Regulatory Impact Statement: Proposal to expand the immigration levy-payer-base

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Proposal	Amend the Immigration Act 2009 to expand the range of people or entities that can be charged the immigration levy
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	2 September 2024

Problem Definition

Currently there are people and groups who do not contribute to the broader costs of the immigration system (because they do not pay an immigration levy; only visa applicants can be charged a levy under the Immigration Act 2009 (the Act)), but who do receive its benefits or create risks that require mitigation. There is an opportunity to ensure that immigration levy charging settings more fully reflect the system's user base (that is, recipients of levy-funded activities such as migrant attraction initiatives and MBIE's border, risk, identity verification, and compliance functions) by expanding the classes of person who can be charged the immigration levy under the Act.

Executive Summary

There are currently people and groups who benefit from, but do not contribute to the broader costs of the immigration system

Currently, under the Act, only visa applicants can be charged a levy (section 399). However, there are other user groups (such as employers, education providers who enrol international students, and New Zealand Electronic Travel Authority (NZeTA) requestors), who do receive a benefit from the existence of a functioning immigration system (i.e. access to migrant labour or international students) or contribute to risks that need to be managed (i.e. migrant exploitation and other forms of immigration non-compliance).

There is an opportunity to ensure that the levy-payer-base more fully reflects the users of the immigration system

This could be achieved by expanding the immigration levy's payer-base to people and groups other than visa applicants. For example, there are approximately 35,838 accredited employers[1], 113 education providers that enrol international students[2], and 1.5 million visa-waiver nationals who may pay fees for immigration services (under section 393) but no levy.

[1] Between May 2022–28 July 2024 a total of 35,838 employers have been granted accreditation.

[2] As at 2019. These providers were identified as entities that paid the Export Education Levy. Note that each provider will enrol a different number of students (there will be for example a difference between a school with a few students, and a university).

The proposal is that the classes of person who can be charged the immigration levy be broadened to groups that do not currently contribute to meeting the broader costs of immigration, but who do receive a benefit (or create risks to be managed)

This would more accurately reflect the immigration system user base and be consistent with the principle that those who benefit from the service, or create the risk or need for the service, should bear the cost.

The proposal also has the potential to reduce costs to existing payers because levy costs would be spread across a wider cohort.

Four options have been considered, within the parameters set out in the purpose section of the Act, the cost-recovery principles, and the objective of a 'user-pays' system:

a. **Option 1:** Status quo – Visa applicants only continue to pay the immigration levy as per section 399 (not recommended).

b. **Option 2:** Amend the Act to specify groups that are required to pay an immigration levy. This would involve explicitly specifying groups (e.g. "employers", "persons requesting NZeTA") who would be subject to the levy in the Act.

c. **Option 3:** Amend the Act so that it empowers regulations to provide for imposition and collection of an immigration levy from 'anyone'. This means anyone who interacts with the immigration system would be potentially subject to be charged the immigration levy. This would be akin to a tax.

d. **Option 4:** Amend the Act to have a broad empowering provision for levy liability and require criteria (included in the primary legislation) to be satisfied when determining who should be subject to an immigration levy (in the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010 (the Visa Regulations)) ***(preferred)***.

The options have been compared against the criteria of:

- People and groups can be efficiently identified.
- Members of the identified groups can be charged efficiently.
- Unintended consequences can be minimised.

Option 4 is preferred because it would:

- Better ensure that users who create the risks or receive the benefits of migration/ New Zealand's immigration system meet the costs of these activities.
- Ensure that the expansion of the levy to new payers is cost effective and efficient to implement.
- Ensure imposing a levy charge to new groups is reasonable with appropriate checks and balances.

A key risk with the proposal is that new levy-payers Confidential advice to Government may pass levy costs on to existing levy-payers (migrants). We expect that this risk will be mitigated through the future detailed design and subsequent consultation of the levy charges, including identifying individuals or groups who will be liable to pay the levy, and at what rate (ensuring transparency of costs that underpin the charges). We will also test this risk (and how it could be minimised) with key stakeholders (particularly those who are Confidential advice to Government) during targeted consultation on the exposure draft of the Bill later in 2024.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Bill and subsequent amendments to the Visa Regulations will be in place before the end of 2025. These timeframes mean that external stakeholder consultation before Cabinet decisions are made has been limited to informing key stakeholders through one-on-one meetings and receiving their initial feedback on the proposals. We have not undertaken significant engagement (such as through discussion documents seeking detailed comments). Engagement on an Exposure Draft of the Bill will occur later in 2024 ahead of Cabinet Legislative Committee decisions.

We informed the following stakeholders of the proposals between 29 July and 9 August 2024:

i. BusinessNZ
ii. the Employers and Manufacturers Association
iii. the New Zealand Council of Trade Unions
iv. the New Zealand Law Society
v. Immigration New Zealand's (INZ) Immigration Focus Group.

The risks of not undertaking a more fulsome consultation ahead of Cabinet decisions are mitigated, however, by the fact that the proposal is enabling only. The design of who will be charged, and by how much, will be determined as part of an upcoming fee and levy review. This does limit MBIE's ability to fully analyse the costs and benefits, as the actual financial decisions are yet to be made. Another factor mitigating the risk of limited pre-Cabinet consultation is that the proposals have taken into account feedback provided in the 2024 Immigration Fee and Levy Review, which indicated some support for broadening the levy-payer-base to include employers.

Responsible Manager(s) (completed by relevant manager)

Stacey O'Dowd

Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE

2 September 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	An independent panel has assessed this RIS and determined that it meets the quality expectations for regulatory impact analysis. The proposal is to establish a regulatory power to levy a wider group of participants in the immigration system. It will be important that the development of those regulations makes a clear case for levying each additional specified group, and assesses the financial impacts for existing and new levy-payers. It would also be useful to that future analysis to assess the net revenue impacts for the Crown.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

How New Zealand's immigration system is funded

1. The immigration system is comprised of:

    - core immigration services, including:
        i. visa assessment and processing services
        ii. settlement services for migrants and refugees
        iii. services to attract and inform migrants
        iv. maintaining the integrity and security of the immigration system.
    - wider immigration services, including:
        i. policy advice and research
        ii. regulation of immigration advisers
        iii. additional services to attract and support investor migrants (provided by New Zealand Trade and Enterprise (NZTE).

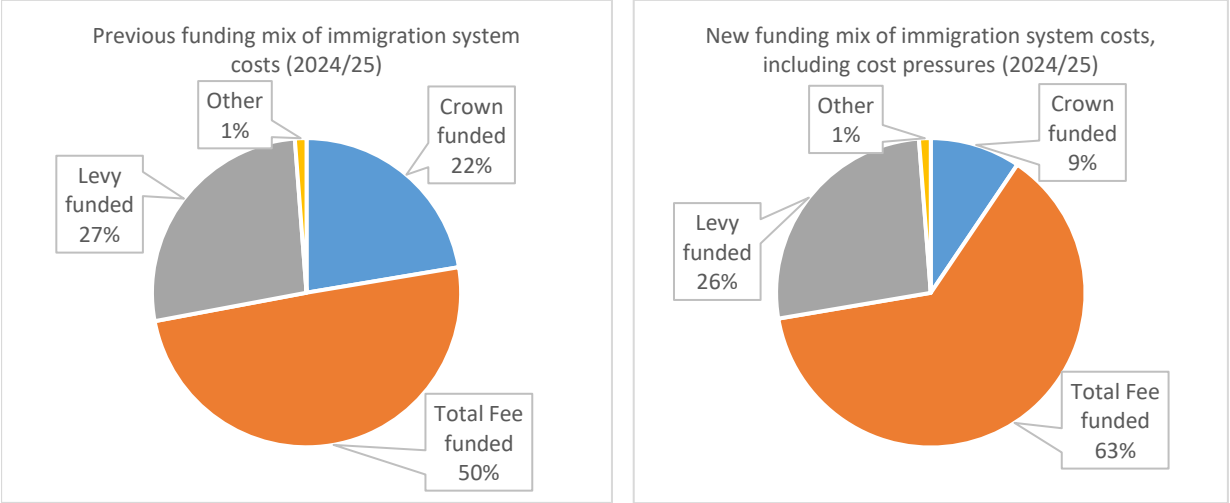
2. These services are paid for, in large part, by fees and levies recovered from visa applicants. These charges recognise the benefits they receive, in the first instance from decisions that enable them to travel to and be here (mostly visa processing) but also from compliance, border functions, and settlement support.

3. Historically, third-party revenue has funded more than two-thirds of these costs, with fees contributing the largest share.

4. The recently completed Immigration Fee and Levy Review[3] has significantly reduced the amount of Crown funding for the immigration system. The Crown now funds nine per cent, with levies (paid only by applicants for visas) funding 26 per cent and fees 63 per cent, as set out in Figure 1 below. The combination ensures users of the immigration system more fully meet the cost of the services they receive, while ensuring Crown funding remains for services that have a public benefit – such as ministerial and refugee services.

[3] Hon Erica Stanford, 9 August 2024. Press release: *Creating a sustainable immigration system*. www.beehive.govt.nz/release/creating-sustainable-immigration-system.

Figure 1: Recent changes in funding composition for the immigration system



Legislative settings

5. The Act establishes at section 400(f) that regulations may be made for the purpose of "prescribing fees and charges in respect of any matters under this Act, and providing for exemptions from or refunds of any fees and charges". Fees and charges have been prescribed, and exemptions provided for, in the Visa Regulations. In particular, the amounts payable for particular matters are set in Schedules 4 and 6 of the Visa Regulations.

6. Sections 393 and 394 of the Act outline who may be made liable to pay immigration fees and what fees can be charged for.[4] In line with Treasury's Guidelines[5] and the Public Finance Act 1989, fees can only recover costs that are attributable to the payers, and should recover, but not over-recover, the cost of the service provided.

7. Levies generally may be set in relation to recovering the costs of a given government activity or service from specific individuals or groups that benefit from it, where it is possible both to identify those individuals or groups, and to efficiently charge them. Section 399 of the Act establishes:

    a. that the immigration levy can be charged, but only to applicants for visas (which means at present it cannot be charged, for example, [redacted] Confidential advice to Government [redacted] and

    b. the wider immigration system purposes that the immigration levy can be spent on (which include, among other things, settlement services, research, marketing, identity management, compliance activities, and the activities of the Immigration Advisers Authority).

[4] Note: this does not limit the broad power of s 400, however anything outside of these parameters could (by implication) be more questionable and subject to change.

[5] The Treasury (New Zealand). (2017). *Guidelines for Setting Charges in the Public Sector: April 2017.* www.treasury.govt.nz/publications/guide/guidelines-setting-charges-public-sector.

8. For completeness, section 399A establishes the international visitor conservation and tourism levy (the IVL), which is charged to certain applicants for temporary visas and people requesting an NZeTA, to provide funding for conservation and tourism infrastructure and initiatives. It is not the subject of further discussion in this RIS.

How fees and levies are set

9. Immigration fee and levy rates are set to more fully recover costs, consistent with the best practice cost-recovery principles outlined in guidelines for the setting of fees and charges in the public sector provided by the Treasury.[6] **Annex One** sets out the cost-recovery principles and shows how they apply to immigration charges.

10. MBIE monitors the balance of fee and levy revenue and offsetting expenditure in memorandum accounts for the immigration system.[7] These are a cost-recovery tool to support managing surpluses and deficits in revenue over time, so that over the medium-term fees and levies are neither over-recovering or under-recovering costs. Regular fee and levy reviews ensure that fee or levy rates can be adjusted up or down as required to trend revenue balances back to zero. The most recent review was completed in mid-2024 with adjusted rates scheduled to take effect from October 2024.

11. The 2024 Immigration Fee and Levy Review resulted in significant changes to how the immigration system is funded (within current legislative parameters), based on the principle that those that receive the benefit or create the risk should bear the cost. These changes are expected to reduce Crown funding (largely limited to refugee-related activities), and mean users of the immigration system are more fully meeting its costs, through increased fee and levy rates. From 1 October 2024, the direct and indirect costs of the system will be met primarily by applicants for visas, consistent with the Act.

Status quo

12. The costs of the immigration system are now met primarily by visa applicants who pay both a fee and levy. There are, however, other users of the system who are not able to be charged a levy under current legislative settings, which is inconsistent with cost-recovery principles (equity, justifiability) as these parties also benefit from immigration activities and/or create risk for the system. This provides the justification for legislative change.

13. Keeping the status quo also creates a fiscal risk for the Crown as while overheads and system costs are relatively fixed, visa volumes are volatile and dependent on many external factors. This has been partially addressed by the most recent fee and levy review. Changing the policy to include a wider and ‘more permanent payer-base’ could help to manage this, although the impacts would likely be relatively marginal (ie factors that impact on numbers of applications for visas are likely to impact across the wider system of users as well)..

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[6] Ibid.

[7] The levy memorandum account is more technically referred to as a hypothecation account, since the revenue is not held separately by MBIE. Instead, it is held by the government centrally alongside taxation revenues, but tracked by MBIE to be hypothecated for spending under the scope authorised by the Act.

What is the policy problem or opportunity?

14. The Government has committed to getting the government's books back in order and restoring discipline to public spending[8], including by keeping tight control of government spending.

15. The Minister of Immigration's major financial objective is an immigration funding model that is efficient, self-funding and sustainable, and that is supported through more fully recovering the costs of services received from third-party users of the immigration system, based on the principle that those that receive the benefit or create the risk should bear the cost.

Currently only visa applicants are liable to pay the immigration levy

16. The Act limits the charging of an immigration levy to visa applicants only. This means, for example, that visa-waiver visitors who hold NZeTAs (which are not visas) or employers of migrants cannot be charged a levy.

17. The immigration levy can fund a wide range of 'internal' immigration system costs, including those relating to research, the attraction of migrants, and the infrastructure required for the immigration systems (this includes ICT, border functions, and compliance). It can also fund "the provision of programmes intended to assist the successful settlement of migrants or categories of migrants"[9] (settlement-related costs), which may be delivered by entities other than MBIE (as may research and attraction).

There are several other groups and individuals who currently benefit from the immigration system but do not pay an immigration levy

18. There are a broad number of groups and individuals who benefit from the immigration system but do not pay an immigration levy (e.g. employers, education providers, and NZeTA holders). **Annex Two** provides a breakdown of these parties, by:

    a. Groups who benefit from migration and are liable for immigration fees but not levies (e.g. accredited employers).

    b. Groups who benefit from migration and interact with the immigration system, but who are not charged fees or levies (e.g. immigration lawyers).

    c. Groups who benefit from migration and interact with the system, but are not charged fees or levies (e.g. international education providers).

    d. Groups who benefit from migration but do not face any government charges (e.g. employers of migrants with open work rights).

19. The nature of the benefits received and/or risks created varies. For example:

    a. **Employers** derive significant financial benefits from access to migrant labour through the immigration system. They also benefit from migrant attraction activities, settlement supports for migrants, and the operational infrastructure of the system relating to risk and verification. However, poor employers also create risks for the system that create the need for MBIE's compliance

[8] The Treasury (2024) Budget Policy Statement 2024 www.treasury.govt.nz/publications/budget-policy-statement/budget-policy-statement-2024.

[9] Immigration Act 2009, Section 399.

activities, including migrant exploitation responses and the compliance work undertaken by the Labour Inspectorate.

b. **Education providers that enrol international students** also derive significant financial benefits from access to foreign students and benefit from the ICT, border, and settlement activities funded from the levy.

c. **Visa waiver travellers who must hold a valid NZeTA** benefit from a well-functioning immigration system and introduce (moderate) risks that create a need for some identity verification and the management of the risk to the integrity of the immigration system/safety and security of New Zealand.

d. **Ports** (maritime and air) derive large financial benefits from direct access to foreign passengers. As the gateway to New Zealand, ports introduce risk and generate a need for the use of levy-funded risk, verification, and compliance activities.

20. There is an opportunity to ensure that immigration levy settings more fully reflect the user base that benefits from and creates risks for the immigration system, by bringing new groups into the levy-payer-base. This proposal will ensure levy settings better align with cost-recovery principles of equity and fairness. It also has the potential to reduce costs to existing payers by sharing existing levy costs across a wider cohort.

21. **Annex Three** provides a more detailed assessment of key people and groups who could be subject to an immigration levy on the basis that they receive benefits from the activities and services the immigration levy has been legislated to fund. It informs both the policy problem and opportunity by showing there is a case for change. It has been used to inform the development of options that feature later in this advice.

22. A separate proposal is being developed to extend the scope of activities that levy revenue could be collected for and spent on. Implementation of this proposal will be separate to the expansion of the levy-payer-base and will happen at a later date.

It is important to note that there are a range of other ways that migrants contribute to revenue collected by the Crown – outside the immigration system

23. Migrants are subject to other costs, as a means of ensuring cost-recovery for the Crown for other broader services. Broadening the levy-payer-base is specific to immigration system costs.

24. Border related fees and levies include but are not limited to; Customs and Border Processing Levy, Ministry for Primary Industries Biosecurity Services Levy, Civil Aviation Authority International Passenger Security and Levy, Civil Aviation Authority International Passenger Safety Levy, the IVL and the Export Education Levy.

25. Migrants also contribute to a wider range of taxes such as the Goods and Services Tax, Excise Tax and PAYE (if the migrant is working).

What objectives are sought in relation to the policy problem?

26. The primary objective is for the immigration levy-payer-base to more fully reflect the immigration system user base that benefits from and/or creates the need for levy-funded activities.

Policy rationale: Why a user charge? And what type is most appropriate?

Immigration's cost-recovery model

27. The immigration system operates a cost-recovery model for fee-funded and levy-funded activities. This model is informed by the cost-recovery principles as outlined in **Annex One**, and the principle that those that receive the benefit or create the risk should bear the cost. The Act and Schedule 6 of the Visa Regulations provide the legal parameters for a user-charge model.

28. Overall, the immigration system is funded by a combination of Crown (9 per cent), levy (26 per cent), fees (63 per cent) and other revenue (1 per cent) and is consistent with cost-recovery principles. This reflects adjustments made in the 2024 Immigration Fee and Levy Review to increase the share of costs covered by third parties (through immigration fees and levies), especially levy-payers.

29. Expanding the existing immigration levy charge to beneficiaries of the immigration system beyond visa applicants is the appropriate method to address the identified policy problem.

30. Using a fee has been discounted, as a fee must be directly linked to matters or services provided to the payer under the Act. As outlined in s 399(2) of the Act, a levy can already be collected for a broader range of activities, as long as they relate to the broader immigration system or to activities to support the settlement of migrants. It is proposed to establish expanded levy purposes, which will however also clearly link any expenditure to the chargeable groups. Ensuring that the charges are reasonable and justifiable can be achieved by demonstrating the benefits that groups of users receive from levy-funded activities.

31. Final, detailed decisions on who will be liable to the new levy, and at what rate, will be implemented through regulation changes in 2025. A Stage 2 Cost-Recovery Impact Assessment (CRIS) will be completed at that point.

Precedent for charging/international comparisons immigration system costs beyond migrants

32. The United Kingdom (Immigration Skills Charge) and Australia (Skilling Australians Fund) both provide a blueprint for similar jurisdictions that levy employers of migrants.

    a. The United Kingdom's Immigration Skills Charge is attached to an employer when they assign a certificate of sponsorship for someone applying for a Skilled Worker Visa or a Senior or Specialist Worker Visa (some occupations are exempt, presumably due to a skills shortage in the country). The price is set based on the size of the organisation. Small or charitable sponsors pay 364 pounds for the first 12 months, and 182 pounds for each additional month. Medium or large sponsors pay 1000 pounds and 500 pounds respectively. The longest a person can be sponsored for is five years, meaning that the charge per migrant worker is capped.[10]

[10] United Kingdom Visa Sponsorship for Employers, United Kingdom Government www.gov.uk/uk-visa-sponsorship-employers/immigration-skills-charge.

b. The Skilling Australians Fund (SAF) works in a similar way. Employers must pay the levy when sponsoring a migrant worker under a Temporary Skills Shortage Visa, an Employer Nomination Scheme/ Regional Sponsored Migration Scheme, or a Skilled Employer Sponsored Regional Visa. The Department of Home Affairs calculates the required SAF levy amount, which is payable in full at the time of lodging an application and is based on the size of the sponsoring organisation, the type of visa(s), and the proposed duration of stay in Australia.[11]

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

33. The primary objective of having a levy-payer-base that more fully reflects the recipients of levy activities underpins the criteria for determining which groups of people should be subject to the current immigration levy[12] (see options table below). The criteria chosen for analysis score potential groups against whether:

    a. People and groups can be efficiently identified.

    b. Members of the identified groups can be charged efficiently.

    c. Unintended consequences can be minimised.

34. The criteria that people and groups can be both identified, and charged efficiently, means that the option is feasible and cost-effective.

35. The criterion about minimising unintended consequences helps to assess whether the primary objective has been achieved. Ensuing that there is a strong justification for charging the group checks that the option will actually result in a fairer immigration system and that there are sufficient balances in place.

36. As the proposal is for a high-level enabling power, cost/benefit, efficiency, effectiveness and equity considerations do not play out at this point, but will at the point that decisions are made about revenue expenditure.

What scope will options be considered within?

37. Options have been considered within the parameters set out in the purpose section of the Immigration Act, the cost-recovery principles, and the objective of a 'user-pays' system.

    a. **The purpose of the Act** is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

[11] Skilling Australians Fund Levy, Australian Government, Department of Employment and Workplace Relations www.dewr.gov.au/skilling-australians-fund-levy.

[12] Note: a future fee and levy review will determine who, and at what rate the levy will apply.

b. **The cost-recovery principles** are that users and the public should be assured that government agencies are managing their costs efficiently and effectively, and when recovering costs, taking appropriate consideration of principles such as transparency, equity, and accountability (a more detailed breakdown is outlined in **Annex One**). For the immigration levy, these decisions are currently limited to the list of levy-funded activities outlined in section 399 of the Act.

c. **The user-pays model** aims to more fully recovering the costs of services received from third-party users of the immigration system, and is based on the principle that those that receive the benefit or create the risk should bear the cost.

38. There are no non-legislative options for amending who can be liable to pay the immigration levy.

What options are being considered?

39. Four options have been identified:

a. **Option 1:** Status quo – Visa applicants only continue to pay the immigration levy as per section 399 (not recommended).

b. **Option 2:** Amend the Act to specify groups that are required to pay an immigration levy. This would involve explicitly specifying groups (e.g. “employers”, “persons requesting NZeTA”) who would be subject to the levy in the Act.

c. **Option 3:** Amend the Act so that it empowers regulations to provide for imposition and collection of an immigration levy from ‘anyone’. This means anyone who interacts with the immigration system would be potentially subject to be charged the immigration levy. This would be akin to a tax.

d. **Option 4 (*preferred*):** Amend the Act to have a broad empowering provision for levy liability and require criteria (included in the primary legislation) to be satisfied when determining who should be subject to an immigration levy (in the Visa Regulations). We propose the following criteria:

- any group liable to pay is easily identifiable and charging must be operationally feasible. For the primary legislation, they are proposed to be: a person or entity that is already able to be charged in the immigration system (e.g. fee-payers), a port (that receives or plans to receive international travellers), an employer of temporary migrants, or a provider of education to fee-paying international students;
- there is a direct and justifiable link between the benefit or risk this group derives or introduces to the immigration system;
- unintended consequences can be managed; and
- the Minister must consult on any groups who are proposed to be included.

40. The development of these options has been informed by the analysis set out in **Annex Three**. These options are mutually exclusive.

How do the options compare to the status quo/counterfactual?

41. The four options have been compared to the status quo using the criteria specified above. A multicriteria assessment is provided at **Annex Four.**

Option 1: Status quo: Visa applicants only continue to pay the immigration levy as per section 399 (not recommended)

42. This option meets criteria one and two. Visa applicants are easily identifiable through INZ records and have a preexisting touch-point at the time their applications are submitted. However, this option does not meet criteria three; the ultimate unintended consequence of maintaining the status quo is that it has resulted in a system where the levy-payer-base does not fully reflect the user base that creates the risks or receives the benefits of levy-funded activities. Additionally, the status quo leaves the Act inflexible: if the levy-payer-base were to be expanded in the future, another amendment act (and all of the policy/legislative work that sits behind it) would be required.

Option 2: Amend the Act to specify groups that are required to pay an immigration levy

43. This option has the potential to meet criteria one and two (assuming that the groups specified in the Act would be easily identifiable and able to be charged), but not criteria three. This option is likely to result in a number of unintended consequences, such as limiting the flexibility of the legislation. Furthermore, specifying the groups to be charged in primary legislation Confidential advice to Government

Option 3: Amend the Act so that it empowers regulations to provide for imposition and collection of an immigration levy from 'anyone'

44. This option does not meet any of the criteria. Such a broad provision in the primary legislation means that determining the interaction with the immigration system would be operationally difficult, as would building a strong enough justification for charging against section 399 activities. it is also likely not all groups/people added to the list would have pre-existing touch points. Confidential advice to Government Legal professional privilege

45. Confidential advice to Government

Option 4 (preferred): Amend the Act to have a broad empowering provision, but limited by a number of factors/criteria that must be taken into account when determining who should be included in the regulations

46. This option meets all three criteria. Stipulating factors in primary legislation that must be taken into account when setting charges in regulations ensures that groups selected are easily identifiable and collecting the levy is operationally feasible. We have initially identified the following proposed categories for the primary legislation:

    a. a person or entity that is already able to be charged in the immigration system (e.g. fee-payers),

    b. a port (that receives or plans to receive international travellers),

    c. an employer of temporary migrants, or

    d. a provider of education to fee-paying international students.

47. The factors outlined in the option also work to ensure that any unintended consequences are mitigated by requiring them to be considered and minimised before the group is included. Legal professional privilege Confidential advice to Government, Legal professional privilege, or Legal professional privile [redacted] or New Zealand's domestic labour market. Including the requirement for the Minister to consult with relevant groups Confidential advice to Government as it would likely help to identify pricing and options that are fair, justifiable, and proportionate.

48. Additionally, this option would address early feedback provided in the 2024 Immigration Fee and Levy review, ensuring that the costs are more fairly shared between beneficiaries of the immigration system as well as codifying requirements to consider differing risk profiles.

49. This option also addresses concerns raised by Confidential advice to Government [redacted]

What option is likely to best address the problem, meet the objectives and deliver the highest net benefits?

50. As set out directly above, Option 4 best meets the criteria and is the most likely to achieve the objective of the proposal, while maintaining flexibility and Confidential advice to Government [redacted]. It would:

- Ensure that the levy charging more fully reflects the user base ensuring that creates the risks or receives the benefits of migration/New Zealand's immigration system.
- Ensure that the levy is cost-effective and efficient to implement.
- Ensure imposing a levy charge to new groups is reasonable, with appropriate checks and balances.
- Reduce applicants' costs by sharing the levy across a broader payer-base.

What are the marginal costs and benefits of the option?

51. The marginal costs and benefits of the option are set out in **Annex Five**.

What is the level of stakeholder support for this option? Who supports, and who is opposed? Has this option been affected by consultation?

There are a number of stakeholders who have the potential to be impacted by the proposal

52. Given that the proposal will only enable more individuals and groups to be charged the levy, with the detail around which groups are charged and at what rates due to be worked through as part of a fee and levy review and subsequent changes to regulations, the enabling proposal has no direct implications for stakeholders.

53. However, stakeholders will have significant interest in the next stage of work to determine who is liable for the levy and what the charges are. Directly impacted stakeholders will be those proposed to be liable for the levy (i.e. potentially accredited employers, education providers who enrol international students, and NZeTA holders), and those currently liable for the levy who will have an interest in how it is apportioned. There will be other groups/entities that are impacted less directly, but will be involved in the policy development, implementation, and monitoring.

54. Information about key stakeholders and potential distributional impacts for the next stage of work is set out in **Annex Five**.

The magnitude of stakeholder support for this proposal is not yet fully understood...

55. The Minister of Immigration agreed to MBIE informing key external stakeholders of this proposal (via emails, succeeded by one-on-one meetings) in advance of Cabinet decision-making. The external stakeholders advised were: BusinessNZ, the Employers and Manufacturers Association, the New Zealand Council of Trade Unions,and INZ's Focus Group.

56. There was significant stakeholder interest in who would be charged, at what rates, and what for what purposes (noting that these elements will be determined as part of future fee and levy reviews, rather than at the point of the enabling legislation). Stakeholders were concerned about increasing pressures on businesses (including tourism businesses) as a result of cumulative costs arising from wider government fee and levy increases faced by migrants (see paragraphs 23–25). The cumulative impact of border charges will be taken into account as part of the levy-setting process.

57. Wider consultation with the public will be included in the normal select committee process.

58. The risks of not undertaking a more fulsome consultation ahead of Cabinet decisions are somewhat mitigated, however, by the fact that the proposal is enabling only. The design of the specific individuals or groups who will be liable to pay the levy, and at what rate, will be determined as part of an upcoming fee and levy review, and further consultation with stakeholders will be undertaken at that point.

…but we can make some inferences from the 2024 Immigration Fee and Levy Review consultation

59. Although we are yet to consult on this specific proposal, targeted consultation was completed in the 2024 Immigration Fee and Levy Review, which provides some insight as to how this proposal may be received. Key feedback provided is set out below.

Cumulative costs on migrants and users should be considered

60. This is especially relevant for migrants who engage with the system multiple times. Submitters representing international students also noted that overall cost is always a factor for students in determining if they can afford to study overseas, and choosing between countries when other factors are broadly similar. This proposal seeks to reduce costs for migrants.

Proposed changes are inconsistent with Government priorities to revive international education and double export revenue

61. The price increases (in the 2024 Immigration Fee and Levy Review) were substantial and there was a risk that this sent a poor signal to businesses, visitors, students and migrant workers. These concerns are mitigated in this proposal as it looks to reduce costs for migrants.

There are divergent views in relation to charges on employers

62. Some stakeholders expressed concern that a levy is not charged to employers even though they benefit significantly from levy-funded services and/or create risk in the immigration system to be managed. There was explicit feedback seeking changes to enable employers to be charged directly, or for the broader benefits of the system, to reduce the costs on migrants alone.

63. However, stakeholders representing businesses were concerned that a one-size fits all approach would not take account of employers' different risk profiles. They also commented (in the context of an economic downturn) that additional costs would place pressure on businesses, particularly for those who also bear the cost of visa applications. This feedback has informed the initial options analysis in this proposal. Confidential advice to Government

Greater transparency and improved communications about immigration charges is required:

64. Stakeholders commented on the need for improved communication. MBIE's communication approach will include key information on activities funded by fees and the immigration levy and signal changes in advance.

Risks to manage

Risk	Mitigation
Other systems users who become subject to the levy may find ways to pass on new levy impositions to the migrant. This could, at its most extreme, mean that existing levy-payers end up	We expect that this risk will be mitigated through the future detailed design of the levy charge as to what individuals or groups will be liable to pay the levy, and at what rate (taking account of levy-funded costs that underpin the charges). As part of the fee and levy review to determine these charges, we will look to get data on who currently pays for visa applications. (Our initial engagement on the

Risk	Mitigation
paying their levy along with some/all of the new payers' costs.	Bill's proposals with business stakeholders indicated that many businesses currently pay the visa costs of their workers, so we could also face the opposite problem of businesses being doubly-levied). We will also test this risk (and seek ideas for mitigations) with key stakeholders, Confidential advice to Government , during targeted consultation on the exposure draft of the Bill later this year. Once the new charges are in place, a further mitigation will be clear communication to migrants about what charges Confidential advice to Government are expected to pay vs. charges for applicants. We will also explore what ongoing monitoring might be possible in terms of the proportion of charges paid by migrants vs. other system actors, and any behavioural changes resulting from the new charges.
Increased administrative burden associated with the proposed consultation and reporting requirements crowd out other high-priority policy work.	Work programme planning to manage timing and resourcing implications of future charging reviews.
The tight timeframes prescribed may make it difficult to meet the requirements prescribed in the Act and the Confidential advice to Government	Officials will undertake early planning and communication with relevant stakeholders and decision makers to ensure the proposed process is followed. This includes working with the Parliamentary Counsel Office on timeframes and sequencing. Officials will actively monitor timeframes and keep the Minister of Immigration informed.

Section 3: Delivering an option

How will the new arrangements be implemented?

65. The enabling proposal will be implemented (come into existence) through an amendment to the Act, in an amendment Bill planned for introduction in 2025. Policy work will soon commence on how what new groups should be liable to pay the levy, and at what rates.

66. This will involve the following steps:

    a. A fee and levy review undertaken by MBIE to determine exactly who, and at what rate the levy will apply. This would involve a period of policy development and rate modelling, working closely with relevant agencies, and Cabinet agreement to targeted consultation. If the Bill passes and subject to the commencement of amendments, Cabinet's agreement to the proposed regulations and charges consequent on the amended scope of the Act would require regulations to be enacted to bring those changes into force.

    b. Amendments to the levy schedule (Schedule 6) in the Visa Regulations.

c. INZ ICT system changes required to update the amounts charged for different [groups/accreditation/visa applications etc.] and rigorous system testing to ensure the correct levy rates will be applied.

d. Developing and delivering a communications strategy to inform applicants and stakeholders as soon as regulatory changes are confirmed, prior to the changes taking effect.

e. Notification of the regulation amendments in the New Zealand Gazette in line with the 28-day rule.

How will the new arrangements be monitored, evaluated, and reviewed?

67. The intention is for the levy to be integrated into the current immigration system. The proposed approach to monitoring and evaluation is set out below.

Quarterly reporting on visa volumes, revenue and expenditure

68. MBIE reports quarterly to the Ministers of Finance and Immigration on visa volumes, revenue, and expenditure, which provides a mechanism to monitor the impact of increased visa product charges. Changes to the levy and the payer-base could also be monitored within this mechanism. Overall revenue collected by the Crown through the levy and its ability to then offset fees for migrants will be the primary measure of ensuring that the policy proposal is working. This will be measured through INZ data and could be included in this reporting.

A fiscal management plan

69. In addition to quarterly reporting, Cabinet has directed MBIE to develop a fiscal management plan for the immigration system from mid-2024, aiming to improve the scrutiny of proposals with financial implications or changes to baselines to manage any fiscal risk to the Crown. It will also ensure the effective and efficient use of resources and increase stakeholders' confidence that immigration charges are reasonable.

Future fee and levy reviews

70. Immigration fees and levies are regularly reviewed (generally on a three-year basis) to ensure they are appropriately recovering costs. Any changes/corrections to the prices will be made through regular fee and levy reviews. Fee and levy reviews are subject to standard Cost-Recovery Impact Assessment obligations.

Annex One: Cost-recovery principles and application to the immigration system

Cost-recovery principles	Application to the immigration system
Equity	Costs associated with the direct provision of immigration services (private goods) or the maintenance of the immigration system, migrant settlement support and management of risks associated with migration (club goods) are fully recovered from fee and levy-payers. Costs that relate to public goods are met by the Crown (refugee services and Ministerial servicing). Cost-recovery is managed through memorandum (or hypothecation) accounts. Inter-temporal equity is achieved by aiming to reduce sustained deficits or surpluses and for immigration accounts to balance to zero overtime.
Transparency and consultation	Fees and levies for applications are fixed in the Visa Regulations and charged at the point of application (pending who is charged and at what point). MBIE consults on significant changes to immigration charges and provides information how visa fee and levy rates are set.
Efficiency	Fees and levies should reflect the underlying costs of efficiently delivered services. This relies on having good understanding of and information about the costs of the activities that are being charged for and the relationship to cost drivers.
Simplicity	Levy rates are set at broader visa categories (as per Schedule 6 of the Visa Regulations) to reflect that costs are not directly attributable to visa applicants.
Accountability	Immigration fees and revenues are scrutinised as a part of its public sector financial accountability arrangements. MBIE monitors and reports quarterly to the Minister of Finance and the Minister of Immigration on visa volumes, revenue, and expenditure, which provides a regular accounting mechanism.
Effectiveness	Fees and levies should reflect the underlying costs of providing an effective immigration service. This relies on having a good understanding of, and information about, the costs of activities, cost drivers, and operational performance. Fees and levies are not set at a rate that creates a barrier to migration or undermines policy objectives, including to attract skilled migrants and support family migration.

Annex Two: Groups and individuals who benefit from the immigration system but do not pay an immigration levy

1. **Who receives the benefits of migration and is already charged by a fee but is not levied?**
   - Visa waiver travellers who must hold an NZeTA
   - Visa waiver crew who must hold an NZeTA
   - Accredited employers (including employers of fishing crew, entertainment industry)
   - RSE employers
   - New Zealanders seeking endorsement of citizenship in foreign passport
   - Residents seeking confirmation of immigration status
   - People granted a visa after requesting consideration under s 61
   - People requesting special directions
   - Visa holders seeking to transfer label
2. **Who receives the benefits of migration and interacts with the immigration system but is not charged or levied?**
   - New Zealanders sponsoring parents
   - New Zealanders supporting partners or dependent children
   - Carriers (employers of crew)
   - Immigration lawyers
3. **Who receives the benefits of migration and is not charged by an immigration fee but is charged by another agency?**
   - International education providers
   - Immigration Advisers
   - Ports
4. **Who receives the benefits of migration and is not charged by government?**
   - Employers of people with open work rights (that, is people who may be students; partners of New Zealanders or workers/students; working holiday makers, asylum seekers; arguably Australians)
   - Australians (both visitors and people who live here)
   - Tourism operators
   - Employers of overstayers/people without work rights
   - Wider New Zealand economy/population

Annex Three: Assessment of key people and groups who could be subject to an immigration levy on the basis they currently receive benefits from section 399 of the Act[13]

Potential group	Justification for charging (i.e. interaction with immigration system activities/costs as per s 399 (2) of the Immigration Act 2009)	Confidential advice to Government	Summary (factors in feasibility and cost-recovery principles)
Accredited employers (including employers of fishing crew, entertainment industry)	High demand for s 399(2) activities. ✚ High financial benefit of accessing the immigration system. ✚ The accreditation process (employer accreditation application, job checks and migrant application for an Accredited Employer Work Visa (AEWV)) means that, at some point, all of the s 399 activities (settlement programmes, research on issues and impacts of migration, the operational infrastructure of the system including risk/verification/ compliance activities) are engaged. Accredited employers also enjoy the benefits of migrant attraction activities and access to licensed immigration advisors to help with not only their employer accreditation, but also the migrant AEWVs. Accredited employers directly financially benefit from the immigration system by being granted rights to employ migrant workers to fill skills or labour shortages.	Confidential advice to Government	Confidential advice to Government
Education providers that enrol international students	High demand for s 399(2) activities. ✚ High financial benefit of accessing the immigration system. ✚ The student visa application process means that, at some point, all of the s 399 activities (settlement programmes, research on issues and impacts of migration, the operational infrastructure of the system including risk/ verification/compliance activities) are engaged. Education providers that enrol international students also enjoy the benefits of migrant attraction activities and access to licensed immigration advisors to help with 'recruiting' foreign students. Education providers that enrol international students directly financially benefit from the immigration system by tapping into a wider pool of students who are generally charged high fees than domestic students for their education.	Confidential advice to Government	Confidential advice to Government

[13] The groups are ordered based on the strength of relationship between the benefit they derive from the immigration system's existence and the high demand they generate of the s399 (2) activities, and therefore the degree to which they Confidential advice to Government how well they can be efficiently charged, and whether there were identified unintended consequences.

Confidential advice to Government

Potential group	Justification for charging (i.e. interaction with immigration system activities/costs as per s 399 (2) of the Immigration Act 2009)	Confidential advice to Government	Summary (factors in feasibility and cost-recovery principles)
Visa waiver travellers who must hold a valid NZeTA	Medium demand for s399(2) activities. 🟡 Medium financial benefits of accessing the immigration system. 🟡 This cohort introduces risks that create a need for some identity verification and the management of the risk to the integrity of the immigration system/safety and security of New Zealand. While these risks are present, they are minimal given checks are generally undertaken pre-travel and are verified at the border, and the short duration of stay a NZeTA acts as a mitigation of these risks. The group also benefits from activities aimed at attracting migrants to New Zealand and a well-functioning immigration system.	Confidential advice to Government	Confidential advice to Government
Ports	High demand for s399 (2) activities. ➕ High financial benefit from accessing the immigration system. ➕ As the gateways to New Zealand, ports (including maritime and international airports) introduce risk and help to generate the need for use of s 399 (2) activities. Aside from the transport of cargo, ports derive financial profit from the transport of international travellers, which the immigration system facilitates.	Confidential advice to Government	Confidential advice to Government

Use of/reliance on s399 activities	Financial benefits received by the group from access to the immigration system
➕ High use of the s399 activities	➕ High financial benefit from accessing the immigration system
🟡 Medium use of the s399 activities	🟡 Medium financial benefit from accessing the immigration system
➖ Low use of the s399 activities	➖ Low financial benefit of using the immigration system

Confidential advice to Government

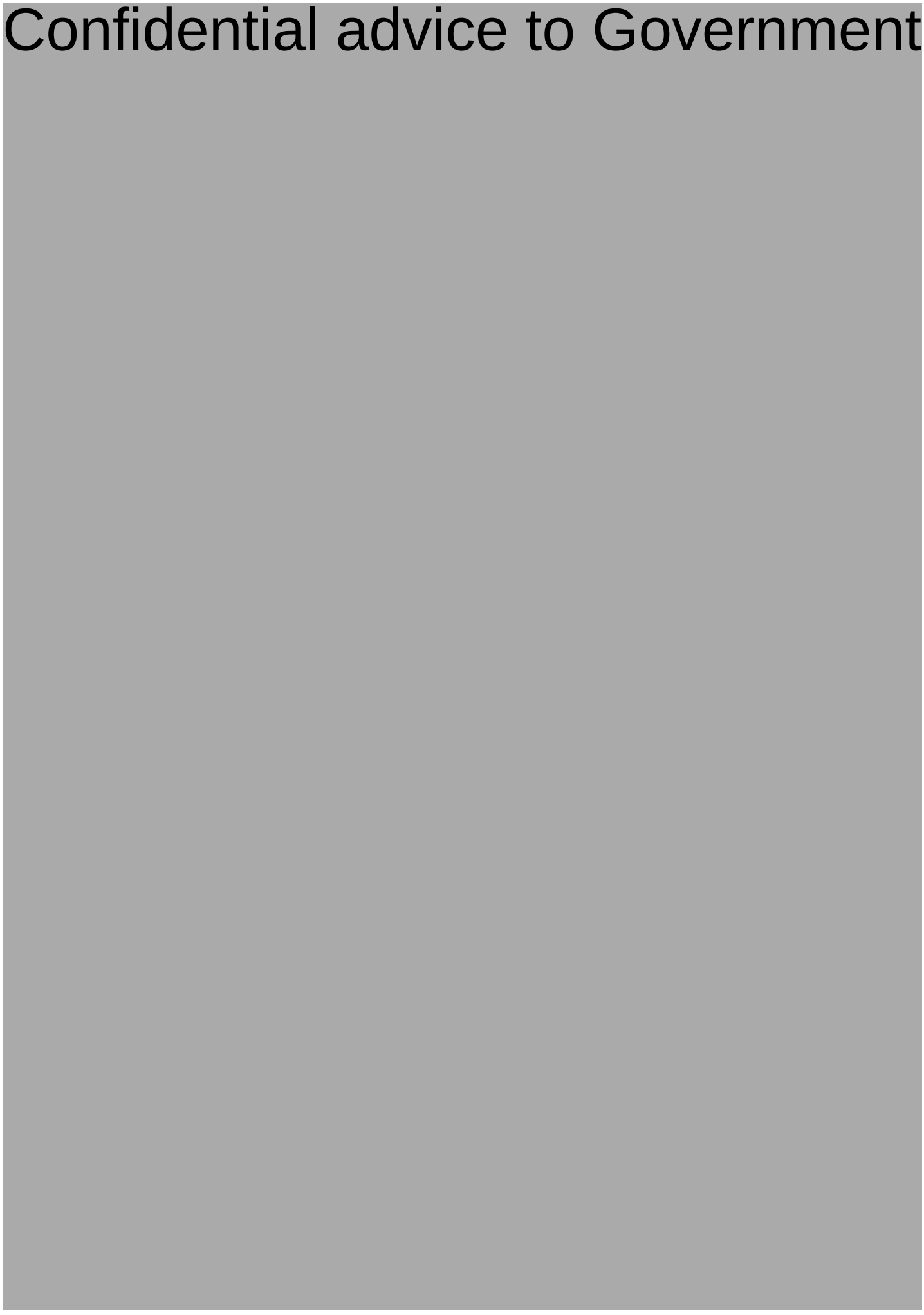
Annex Four: Options analysis for expanding the levy-payer-base

	People and groups can be efficiently identified	Members of the identified groups can be charged efficiently	Unintended consequences can be minimised	Overall assessment
Option 1 – Status quo Maintain current provisions (visa applicants only liable to levy)	3 Visa applicants are identifiable by INZ records and details provided upon application.	3 Touch point exists at time application submitted.	-1 The unintended consequence is that the status quo has resulted in a system where migrants carry most of the costs of migration. A further amendment would be required to change this in the future.	5
Option 2 Act specifies groups that are required to pay an immigration levy	3 Establishing groups in primary legislation will create a prescriptive, clear, and definitive list of who is subject to the levy.	-1 It is unclear at this point whether these groups will have preexisting touch points with the immigration system.	-1 Having a prescriptive list of groups liable to the levy in primary legislation limits how flexible it can be to changes in the future. Confidential advice to Government There is a higher risk that groups added to the list could be Confidential advice to Gov Free and frank opinions	2
Option 3 Act enables collection from 'anyone'	-1 Determining 'interaction with the immigration system' is very broad and it would be operationally difficult to identify who this would apply to.	-1 It is unclear at this point whether these groups will have preexisting touch points with the immigration system.	-1 Confidential advice to Government Legal professional privilege	-3
Option 4 Act enables broad empowering provision for levy liability and requires criteria to be satisfied • Easily identifiable and operationally feasible • Direct and justifiable link • Unintended consequence can be minimised • Minister must consult	3 Although the primary legislative provision would be broad, those who are subject to the levy would be made explicit in the regulations.	2 The criteria that any group that may be included in the levy payer base be considered in light of "easily identifiable and operationally feasible" means that in practise, any group should be able to be charged efficiently, making use of existing touch points.	**3** Legal professional privilege The criteria establish a regime requiring a strong justification for including a group. The criteria explicitly require an assessment of whether including the group is likely to have any unintended consequences, such as impacts on our domestic labour market, Legal professional privilege Including a requirement to consult would also Confidential advice to Government and help to identify a fair, proportionate pricing in any additional fee and levy reviews.	7 **Preferred option**

-1	Negatively impacts criteria
0	Not at all or not applicable
1	Marginal positive impact
2	Partially meets or addresses
3	Meets or addresses well

Annex Five: Marginal costs and benefits of proposal compared to status quo

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Accredited Employers, Education Providers that enrol international students, NZeTA requestors, ports	Nature of cost: financial (new groups to be included in levy-payer-base) Type: ongoing Comment: All will be liable to pay the levy. The price will be set during the next fee and levy review in late 2025.	Medium [depending on price set]	Low. The scale of the financial cost will become more apparent during the next fee and levy review.
	Nature of cost: administration/compliance Type: ongoing Comment: all will need to ensure that they have paid the correct levy amount, at the correct time. This may add a compliance/administration cost.	Low	Medium. One of the objectives and an element that has been considered throughout the design of the proposal is that existing infrastructure and touchpoints be utilised.
Regulators: Border and INZ officials that need to implement the option	Low additional financial costs as the existing fee and levy infrastructure is expected to accommodate the proposed additional levy. A small amount of FTE resource (approximately two-three FTE) from the point of policy decisions is needed for INZ to implement. It is expected that the systems changes (coding, testing etc.) and communications will be the most resource-intensive. Depending on what else is on the work programme at the time of implementation, this would normally be able to be completed from baselines. Nature of cost: ease of travel Type: ongoing Comment: Confidential advice to Government, there is a risk that collection of the levy at the border may introduce some additional processing time which may slow down queues at the border.	Low	Medium. The complexity and therefore cost of implementing the collection infrastructure will depend on policy options that will be considered in the next fee and levy review. Confider
Others: *Government agencies, immigration professionals/business/ investors/migrants*	Low additional costs as the existing fee and levy infrastructure is expected to minimise costs to other wider groups such as government agencies, immigration professionals, and businesses. Including the broader levy-payer-base is intended to reduce costs for migrants.	Low	High.
Total monetised costs	Medium. The scale of the financial cost will become more apparent during the next fee and levy review.		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action			
Migrants	Nature of benefit: financial Type: ongoing Comment: Including the broader levy-payer-base is intended to reduce fee and levy costs for migrants.	Medium [depending on price set]	High.
Regulators: MBIE officials that need to implement the option	Nature of benefit: risk management Type: ongoing Comment: Requiring Confidential advice to Government This could, in turn, reduce the need for risk management activities.	Low	Low. This is based on an assumption and we won't know the impact/difference until the changes are implemented. It is also unclear if this will have a significant impact on Confidential advice to Government
Others: Government agencies, immigration professionals/business/ investors/wider economy	Nature of benefit: financial Type: ongoing Comment: This option will support an immigration funding model that is efficient, self-funding and sustainable by recovering costs from third-party users. This should contribute to a reduction in Crown funding.	Medium	Medium.
Total monetised benefits	Medium		
Non-monetised benefits	Medium		



Confidential advice to Government

We anticipate that there will be distributional impacts

Spreading the levy across a broader payer-base has the potential to reduce levy costs for existing levy-payers. The level of reduction will depend on the number of new levy-payers and the rate the levy is set at for each new group, and will vary depending on visa product.

Confidential advice to Government

Māori

At the implementation phase, to ensure that there are no distributional impacts that will be exacerbated by this proposal on Māori, we will identify the number of accredited employer Māori employers and businesses by matching with the Māori Business Identifier, which is attached to a New Zealand Business Number.

We note that there will be limitations to this, as the Māori Business Number is self-identifying.

Regulatory Impact Statement: Proposal to expand the purposes the immigration levy can be used for

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Proposal	Amend the Immigration Act 2009 to expand the purpose of expenditure of the funding collected by an immigration levy to include contributions to publicly-funded services or infrastructure
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	2 September 2024

Problem Definition

The problem addressed by this proposal is that constraints on what the current immigration levy can fund mean that users of the immigration system cannot contribute via the levy to meeting the costs they impose on certain wider public services or infrastructure. This is a barrier to achieving the government's wider objective of reducing the burden of the immigration system on taxpayers.

A separate proposal will see more users of the immigration system able to be charged an immigration levy, which could enable costs to be more fairly shared, and also could generate more revenue. The opportunity explored in this document is to amend the Act to create a new levy-making power that will enable revenue collected from levy payers to be spent on costs which have a clear link to those payers, but which are outside the direct immigration system.

Executive Summary

The Immigration Act 2009 (the Act) at section 399 (Immigration levy) establishes a levy which can fund a wide range of "internal" immigration system costs, including those relating to research, the attraction of migrants, and the infrastructure required for the immigration systems (this includes ICT, border functions, and compliance). It can also fund "the provision of programmes intended to assist the successful settlement of migrants or categories of migrants" ("settlement-related" costs), which may be delivered outside MBIE (as may research and attraction).

This levy cannot however contribute to activities outside the direct immigration system that do not relate to directly to migrant settlement, even where costs may be generated by migrants, or migrants may benefit from services.

A levy can only be charged currently to applicants for visas, which means, for example, that visa-waiver visitors who hold a New Zealand Electronic Travel Authority (NZeTA), which is not a visa, or employers of migrants, cannot be charged a levy. The Minister of Immigration is separately proposing to make a change which will mean that third-party users of the immigration system can be charged a levy, which will mean that they can contribute to a

wider range of costs, which means that such costs can be more fairly shared across those users.

This proposal looks to capitalise on the fact that more users will be able to be charged, by enabling those expanded revenue sources to fund a greater range of public and social services and infrastructure impacts, where there is a clear connection to migrant use, but which do not fall within the current legislative scope (that is, they are outside the direct immigration system and do not relate to directly to migrant settlement). In order to meet the legal definition of a levy, there will need to be a clear connection between who is charged and what is funded by the resulting revenue, and the eventual charge will need to be approximately proportionate to the likely benefit or cost incurred.

This proposal would acknowledge that beneficiaries of the immigration system (which enables non-New Zealanders to be lawfully in New Zealand, temporarily or permanently) also benefit from well-performing infrastructure/public services, and can impose additional costs or pressures on New Zealand's infrastructure or public services although they have not contributed to the funding of these.

Five options have been considered, within the parameters set out in the purpose section of the Act, the cost-recovery principles, and the objective of a 'user-pays' system.

1. **The purpose of the Act** is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.
2. **The cost-recovery principles** are that users and the public should be assured that government agencies are managing their costs efficiently and effectively and, when recovering costs, taking appropriate consideration of principles such as transparency, equity, and accountability (a more detailed breakdown is outlined in **Annex One**). For the immigration levy, these decisions are currently limited to the list of the activities funded by the levy outlined in section 399 of the Act.
3. **The user-pays model** aims to more fully recover the costs of services received from third-party users of the immigration system (called "groups charged" or "chargeable groups" below), and is based on the principle that those that receive the benefit or create the risk should bear the cost.

The options generated are:

a. **Option 1:** Status quo/counterfactual – immigration levy revenue funds immigration system costs only.

b. **Option 2:** Amend the Act such that levies can fund any services or infrastructure costs. (Note that, as described, this would legally need to be a tax.)

c. **Option 3:** Amend the Act such that levies can fund any services or infrastructure costs, but there must be a link between those costs and the groups charged that levy (that is, the chargeable groups must either cause a demonstrable cost or receive a demonstrable benefit).

d. **Option 4:** Amend the Act such that levies can fund any services or infrastructure costs, but (as above) there must be a clear link between those costs and the chargeable groups, and specified consultation and reporting obligations must be met ***(recommended).***

e. **Option 5:** Amend the Act such that levies can fund specified services or infrastructure costs and specified consultation and reporting obligations must be met.

They have been compared against the criteria of:

- Allow a wider range of costs to be met by immigration levy-payers.
- Not unduly constrain future Cabinets (this relates to the level of specificity of what can be funded).
- Confidential advice to Government [redacted]

Overall, there is a trade-off between adding more specificity in legislation Confidential advice to Government [redacted] and would also likely raise fewer concerns during the parliamentary process), and the ability of the government to change priorities for the expenditure of levy revenue in the future.

On this basis, Option 4 is recommended. It would amend the Act such that the levy can fund any services or infrastructure costs, but there must be a clear link between those costs and the chargeable groups, and specified consultation and reporting obligations must be met. Legal professional privilege [redacted] or through assertions of improper purpose or inadequate processes) were the levy funding a wider set of costs.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Bill and initial subsequent amendments to the Immigration (Visa, Entry, Permission, and Related Matters) Regulations 2010 (the Visa Regulations) will be in place before the end of 2025.

These timeframes mean that the time available for policy development has been relatively brief. It also means that while external stakeholder consultation has been undertaken before Cabinet decisions are made, this has been limited to informing key stakeholders through one-on-one meetings and receiving their initial feedback on the proposals. We informed the following stakeholders of the proposals between 29 July and 9 August 2024:

1. BusinessNZ
2. the Employers and Manufacturers Association
3. the New Zealand Council of Trade Unions
4. the New Zealand Law Society
5. Immigration New Zealand's (INZ) Immigration Focus Group.

We have not undertaken significant engagement, such as would be enabled through discussion documents seeking detailed comments.

The risks of not undertaking a more fulsome consultation ahead of Cabinet policy decisions are somewhat mitigated by the fact that the proposal is enabling only, and that consultation will be mandated both before it is initially brought into effect, and for subsequent reviews.

This includes in the first instance engagement with key stakeholders on an Exposure Draft of the Bill later in 2024, ahead of Cabinet Legislative Committee decisions, followed by consideration by Select Committee during 2025.

The expansion of funding purposes will not be implemented in the 2025 Immigration Fee and Levy Review and consequential Visa Regulations changes. Instead, the initial design of what public or social services or infrastructure would be funded by the levy, and at what rate/s, will be determined as part of a subsequent fee and levy review (which may take place in 2026).

However, the fact that the power is enabling only, and that decisions remain to be made about what is funded, who is then charged and by how much, also limits our ability to fully analyse the costs and benefits of the proposal.

This means that the materiality of potential charges cannot be assessed at this point, even with the design of the levy incorporating legislative safeguards that will:

- include applicable constraints to ensure that any charges established are lawful Confide [redacted] through demonstration that all charges are justifiable, as well as being proportionate in terms of what they are funding and of who is charged);
- establish comprehensive consultation obligations for subsequent reviews that set those charges;
- require the amount of levy revenue, how the rates of charging are calculated, and levy disbursement to be reviewed at no less than five-yearly intervals.

Future fee and levy reviews will also be required to meet Cost-Recovery Impact Assessment obligations.

Responsible Manager(s) (completed by relevant manager)

Stacey O'Dowd

Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE

2 September 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	An independent panel has assessed this RIS and determined that it meets the quality expectations for regulatory impact analysis. The proposal is to establish a regulatory power to authorise the use of levy funding to meet a wider range of costs arising from migration to New Zealand. It will be important that the development of those regulations makes a clear and compelling case for using levy funding for specific new uses.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

How New Zealand's immigration system is funded

1. The immigration system is largely self-funded, through fees and levies charged to people who use immigration services. The immigration system comprises:

    - core immigration services, including:
        i. application assessment and processing services
        ii. settlement services for migrants and refugees
        iii. services to attract and inform migrants
        iv. maintaining the integrity and security of the immigration system.
    - wider immigration services, including:
        i. policy advice and research
        ii. the regulation of immigration advisers
        iii. additional services to attract and support investor migrants (provided by New Zealand Trade and Enterprise (NZTE).

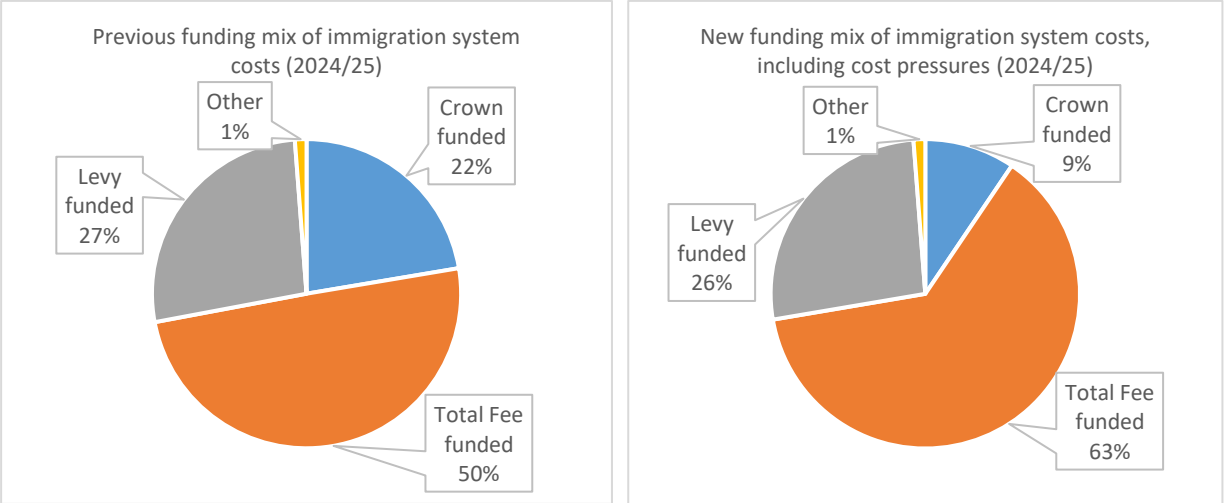
2. These services are largely paid for by fees and levies, recovered mainly from long term and short-term migrants to New Zealand. These charges recognise the benefits they receive, in the first instance from decisions that enable them to travel to and be here (mostly visa processing) but also from compliance, border functions, and settlement support.

3. Historically, third-party revenue has funded more than two-thirds of these costs, with fees contributing the largest share.

4. The recently completed Immigration Fee and Levy Review[1] has significantly reduced the amount of Crown funding for the immigration system. The Crown now funds nine percent of costs, with levies (paid only by applicants for visas) funding 26 per cent and fees 63 per cent, as set out in Figure 1 below. The combination ensures that users of the immigration system more fully meet the cost of the services they receive, while ensuring that Crown funding remains for services that have a public benefit – such as ministerial servicing and refugee services.

[1] Hon Erica Stanford, 9 August 2024. Press release: *Creating a sustainable immigration system*. www.beehive.govt.nz/release/creating-sustainable-immigration-system.

Figure 1: Recent changes in funding composition for the immigration system



Legislative settings

5. The Act establishes at section 400(f) that regulations may be made for the purpose of "prescribing fees and charges in respect of any matters under this Act, and providing for exemptions from or refunds of any fees and charges". Fees and charges have been prescribed, and exemptions provided for, in the Visa Regulations. In particular, the amounts payable for particular matters are set in Schedules 4 and 6 of the Visa Regulations.

6. Sections 393 and 394 of the Act outline who may be made liable to pay immigration fees and what fees can be charged for.[2] In line with Treasury's Guidelines[3] and the Public Finance Act 1989, fees can only recover costs that are attributable to the payers, and should recover, but not over-recover, the cost of the service provided.

7. Levies generally may be set in relation to recovering the costs of a given government activity or service from specific individuals or groups that benefit from it, where it is possible both to identify those individuals or groups, and to efficiently charge them. Section 399 of the Act establishes:

    a. that the immigration levy can be charged, but only to applicants for visas (which means at present it cannot be charged, for example, to visa waiver visitors requesting NZeTAs or employers seeking accreditation); and

    b. the wider immigration system purposes that the immigration levy can be spent on (which include, among other things, settlement services, research, marketing, identity management, compliance activities, the ICT systems that underpin delivery, and the activities of the Immigration Advisers Authority).

[2] Note: this does not limit the broad power of s 400, however anything outside these parameters could (by implication) be more questionable and subject to change.

[3] The Treasury (New Zealand). (2017). *Guidelines for Setting Charges in the Public Sector: April 2017.* www.treasury.govt.nz/publications/guide/guidelines-setting-charges-public-sector.

8. As the levy can fund "the provision of programmes intended to assist the successful settlement of migrants or categories of migrants", (that is, "settlement-related" costs), which may be delivered outside MBIE, the levy and its predecessors have contributed to the cost of English for Speakers of Other Languages (ESOL) in the compulsory school sector since the mid-1990s. That is because foreign-born children, and children who are the children of migrants, benefit from this service. However the immigration levy cannot currently contribute to activities outside the direct immigration system that do not relate to directly to migrant settlement.

How fees and levies are set

9. Immigration fee and levy rates are set to more fully recover costs, consistent with the best practice cost-recovery principles outlined in guidelines for the setting of fees and charges in the public sector provided by the Treasury.[4] **Annex One** sets out the standard cost-recovery principles and shows how they apply to immigration charges.

10. MBIE monitors the balance of fee and levy revenue and offsetting expenditure in memorandum accounts for the immigration system.[5] These are a cost-recovery tool to support managing surpluses and deficits in revenue over time, so that over the medium-term fees and levies neither over-recover nor under-recover costs. Regular fee and levy reviews ensure that rates can be adjusted up or down as required to trend revenue balances back to zero. The most recent review was completed in mid-2024 with adjusted rates scheduled to take effect from October 2024.

11. The 2024 Immigration Fee and Levy Review resulted in significant changes to how the immigration system is funded (within current legislative parameters), based on the principle that those that receive the benefit or create the risk should bear the cost. These changes are expected to reduce Crown funding (largely limited to refugee-related activities), and mean users of the immigration system are more fully meeting its costs, through increased fee and levy rates. From 1 October 2024, the direct and indirect costs of the system will be met primarily by applicants for visas, consistent with the Act.

Status quo

12. The costs of the immigration system are met primarily by visa applicants who pay both a fee and levy. There are, however, other users of the system who are not able to be charged a levy under current legislative settings, which is inconsistent with cost-recovery principles (equity, justifiability), as these parties benefit from immigration activities and/or create risk for the system. This provides the justification for government intervention to change the legislation to expand the levy payer base.

13. Keeping the status quo also creates a fiscal risk for the Crown, as while overheads and system costs are relatively fixed, visa volumes are volatile and dependent on many external factors. This has been partially addressed by the most recent fee and levy review. Changing the policy to include a wider and more 'permanent payer-base' could help to address this, although the impacts would likely be relatively marginal (ie factors that impact on numbers of applications for visas are likely to impact across the wider system of users as well).

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[4] Ibid

[5] The levy memorandum account is more technically referred to as a hypothecation account, since the revenue is not held separately by MBIE. Instead, it is held by the government centrally, alongside taxation revenues, but tracked by MBIE to be hypothecated for spending under the scope authorised by the Act.

What is the policy problem or opportunity?

14. The Government has committed to getting the government's books back in order and restoring discipline to public spending[6], including by keeping tight control of government spending.

15. The Minister of Immigration's major financial objective is an immigration funding model that is efficient, self-funding and sustainable and that is supported through more fully recovering the costs of services received from third-party users of the immigration system, based on the principle that those that receive the benefit or create the risk should bear the cost.

There are several groups and individuals who currently benefit from the immigration system but do not pay an immigration levy

16. There is an opportunity to use expanded revenue sources to fund a greater range of public or social services, or infrastructure, where migrants impose costs (or gain benefits). This would be possible as long as those costs have a clear linkage to the chargeable groups and where the costs cannot currently be funded by those groups (as the costs are outside the direct immigration system and do not relate to migrant settlement).

17. New Zealand's absorptive capacity depends on many things, including the extent to which our housing and urban systems are already under pressure and the government and construction sector's capability and willingness to invest in building additional capacity to support higher levels of demand. New Zealand currently has a large infrastructure deficit.[7] While addressing this is not the direct responsibility of the immigration system, in some under-pressure areas high levels of net migration have resulted in uneven or additional demands on the system. Where migrants can be directly linked to disproportionate costs or costs or benefits, it may be equitable for them to contribute to addressing those costs.

18. An example of more equitable linking of costs and benefits is the accident compensation system, which covers everyone in New Zealand (including migrants such as visitors and students), but which is funded through either general taxation or levies on specific people / areas.[8] Other examples are parent visa holders (who could be levied to contribute to health sector costs, as older people on average consume more publicly-funded health care than the average), levying employers as a contribution to the costs of training New Zealand workers, or levying migrants who bring children to contribute to the costs of specialist teachers in the school system.

19. Expended revenue sources for the immigration system would acknowledge that beneficiaries of the immigration system not only also benefit from well-performing infrastructure/public services, but in some cases impose additional costs or pressures on New Zealand's infrastructure or public services although they have not contributed to the funding of that infrastructure or those services.

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[6] The Treasury (2024) Budget Policy Statement 2024 www.treasury.govt.nz/publications/budget-policy-statement/budget-policy-statement-2024.

[7] See for example www.rnz.co.nz/news/business/513474/1-trillion-to-bring-nz-infrastructure-up-to-standard-asb and www.rnz.co.nz/news/national/525366/whangarei-hospital-ed-hits-code-black.

[8] These levies relate to who has been injured: for example, levies from workers cover the costs of accidental injuries sustained by people earning at the time of injury, while levies on petrol and motor vehicle license fees address the costs of injuries involving a motor vehicle.

20. Following the recent fee and levy review, it is forecast that approximately 850,000 applicants for visas will contribute $267.9 million in levy revenue in 2025/26. A separate proposal for amendment legislation is looking to expand the range of people or entities that can be charged an immigration levy. The expansion of the range of people and entities that could be levied could add a further 1.7 million payers, albeit likely mostly at lower rates. Some of this funding could spread existing system costs across a wider payer group, but some could be used to contribute to wider pressures.

What objectives are sought in relation to the policy problem?

21. The proposed amendment seeks to achieve one major objective, namely to reduce the burden on taxpayers of the immigration system, through enabling people and entities who receive the benefits of migration or the immigration system to contribute to meeting a wider range of relevant or associated costs in New Zealand which are the result of migration.

22. This aligns with the government's objective to constrain calls on taxpayer funding. It could also respond to the objective of addressing New Zealand's infrastructure deficit, noting that this would be subject to legal constraints governing levy charging, and therefore would need to be carefully designed.

Policy rationale: Why a user charge? And what type is most appropriate?

Immigration's cost-recovery model

23. The immigration system operates a cost-recovery model for fee funded and levy funded activities. This model is informed by the cost-recovery principles outlined in **Annex One**, and the principle that those that receive the benefit or create the risk should bear the cost. The Act and Schedules 4 and 6 of the Visa Regulations provide the legal parameters for a user-charge model.

24. The use of a fee has been discounted, as a fee must be directly linked to matters or services provided to the payer under the Act. As outlined in s 399(2) of the Act, a levy can already be collected for a broader range of activities, as long as they relate to the broader immigration system or to activities to support the settlement of migrants. It is proposed to establish expanded levy purposes, which will however also clearly link any expenditure to the chargeable groups. Ensuring that the charges are reasonable and justifiable can be achieved by demonstrating the benefits that groups of users receive from levy-funded activities.

25. A general tax is not proposed, as it is intended that the new levy purposes be established in the Act. It is unusual for taxes to be established outside dedicated legislation.[9] In addition, primary tax rates are generally set by parliament within the relevant dedicated legislation, while it is intended that these chargeable groups, and the rates charged, would be established in regulations.

26. Final, detailed decisions on exactly what public services and infrastructure should be funded by levy-payers, and at what rate, will be implemented through regulation changes at a later date (from 2026). A Stage 2 Cost-Recovery Impact Assessment (CRIS) will be completed at that point.

[9] Noting it is not completely unheard of: the Auckland Regional Fuel Tax was established by a 2018 amendment to the Land Transport Management Act 2003.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

27. The criteria chosen to assess the options for expanding levy expenditure are that the option:

    a. Addresses the primary objective ("expands the purposes for which revenue collected through the immigration levy can be spent").

    b. Would not unduly constrain future Cabinets (recognising that it is not possible to foresee future opportunities).

    c. Confidential advice to Government

28. As the proposal is for a high-level enabling power, broad cost/benefit, efficiency, and effectiveness considerations do not play out at this point, but will at the point that decisions are made about revenue expenditure. However, it is proposed that the legislative design require equity considerations to be taken into account (as the nexus between payer and cost or benefit is fundamental to lawful levy charging).

What scope will options be considered within?

29. The Minister has commissioned work to expand the range of purposes that immigration levies can address (which is based on interest in expanding how migrants can contribute further, aligning with the government objective to constrain calls on taxpayer funding). As the International Visitor Conservation and Tourism Levy (IVL) already exists, it is not anticipated that tourism or conservation purposes would be addressed through this expansion to immigration levy purposes.

Some possibilities for reducing demand were not considered for option generation

30. Specific considerations that are not within the scope of options being considered include:

    a. using immigration policies to:

        i. reduce demand on services or infrastructure (such as through reducing net migration nationwide, requiring migrants to live in locations where infrastructure is not under population pressure or – in the context of this work – reducing the capacity of migrants to bring family, such as school-age children, with them), or

        ii. ensure that any services consumed can always be paid for, such as requiring all temporary migrants to hold insurance as a condition of their visas; or

b. amending eligibility for non-immigration services (such as publicly-funded health services, or access to national parks) to, for example, require non-resident citizens or recent migrants to pay, or to pay more, for access[10]; or

c. funding either tourism or conservation infrastructure (as noted above, temporary entrants are already levied to do so, via the IVL).[11]

Cost/benefit considerations of options

31. Any options would need to be carefully analysed to ensure that the costs of, or practical challenges to, implementing change, or the effects on New Zealand's relative attractiveness, did not outweigh their potential benefits.

32. For example, sharply reducing the numbers of visas granted might negatively impact on New Zealand's economic activity and productivity, and therefore could cost more than it would save. (In addition, net migration is the result of both in- and outflows, only some of which are controllable through visa policies: the movement of New Zealand citizens (especially trans-Tasman movements, which are largely correlated with economic cycles) and existing residence class visa holders is not controllable.)

33. Previous examination into requiring insurance as a condition of temporary visitor visas has identified considerable practical issues, including who would check or endorse that insurance documentation is valid and sufficient, whether to insist that pre-existing conditions are covered, and feasible responses where an onshore traveller is identified as not holding insurance, for example. Together, these may explain why no country requires tourists to hold insurance, although all generally strongly recommend it.

34. Similarly, there may be wider costs to removing publicly-funded health cover for new residents: it may make New Zealand less attractive to some skilled migrants, may disadvantage, for example, refugees or Pacific nationals (or require complex rules to exclude them from the removal), or conversely it may mean that some costs are still incurred by some acutely unwell people, but turn into unrecovered debts at the hospital level.

35. The options around as eligibility for publicly-funded services, or decisions about charging for non-public services, are not within MBIE's portfolio scope, as they sit with the relevant agencies and Ministers, or with local councils or controlling entities.

The options generated are constrained to lawful or potentially lawful charging under the Immigration Act 2009

36. The options generated have been considered within the parameters set out in the purpose section of the Immigration Act, the cost-recovery principles, and the objective of a 'user-pays' system.

a. **The purpose of the Act** is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

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[10] See for example: www.nationalgeographic.com/travel/article/what-is-tourist-tax; www.rnz.co.nz/news/top/525307/te-papa-to-charge-35-entry-fee-for-international-visitors-from-september; www.gov.uk/guidance/nhs-entitlements-migrant-health-guide; www.gov.uk/guidance/using-the-nhs-when-you-return-to-live-in-the-uk.

[11] Immigration Act 2009 - section 399A International visitor conservation and tourism levy.

b. **The cost-recovery principles** are that users and the public should be assured that government agencies are managing their costs efficiently and effectively, and when recovering costs, taking appropriate consideration of principles such as transparency, equity, and accountability (a more detailed breakdown is outlined in **Annex One**). For the immigration levy, these decisions are currently limited to the list of levy-funded activities outlined in section 399 of the Act.

c. **The user-pays model** aims to more fully recovering the costs of services received from third-party users of the immigration system (called "groups charged" or "chargeable groups" below), and is based on the principle that those that receive the benefit or create the risk should bear the cost.

37. Other jurisdictions charge a variety of fees and levies in relation to immigration, particularly in relation to workers and visitors. For example, Singapore charges employers levies in respect of their foreign workers, as part of a wider set of policies intended to regulate the number of foreigners (higher-skilled workers also attract a lower monthly levy).[12] Australia similarly charges employers the Skilling Australia Levy.[13]

38. The UK also charges employers an (annual) levy for most foreign workers[14], and charges migrants a separate annual surcharge which contributes to the cost of the NHS[15] – unlike New Zealand, temporary migrants have access to publicly-funded healthcare in the UK. A range of countries charge visitors levies (Indonesia charges a tourism tax to visitors to Bali[16] and the US charges a "travel promotion fee" to applicants for ESTAs[17]).

39. There are no non-legislative options for amending the scope of what the immigration levy can be spent on.

What options are being considered?

40. Five options have been identified:

a. **Option 1:** Status quo/counterfactual – the immigration levy funds immigration system costs only.

b. **Option 2:** Amend the Act such that levies can fund any services or infrastructure costs. (Note that, as described, this would legally need to be a tax.)

c. **Option 3:** Amend the Act such that levies can fund any services or infrastructure costs but there must be a link between those costs and the groups charged that levy (that is, the chargeable groups must either cause a demonstrable cost or receive a demonstrable benefit).

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[12] Foreign worker quota and levy. www.mom.gov.sg/passes-and-permits/work-permit-for-foreign-worker/foreign-worker-levy.

[13] Cost of sponsoring. immi.homeaffairs.gov.au/visas/employing-and-sponsoring-someone/sponsoring-workers/learn-about-sponsoring/cost-of-sponsoring.

[14] UK visa sponsorship for employers: Immigration skills charge. www.gov.uk/uk-visa-sponsorship-employers/immigration-skills-charge.

[15] The immigration health surcharge. commonslibrary.parliament.uk/research-briefings/cbp-7274/.

[16] About Us - Love Bali. lovebali.baliprov.go.id/about_us.

[17] Federal Register: Electronic System for Travel Authorization (ESTA) Fee Increase. www.federalregister.gov/documents/2022/05/20/2022-10869/electronic-system-for-travel-authorization-esta-fee-increase.

d. **Option 4:** Amend the Act such that levies can fund any services or infrastructure costs but (as above) there must be a clear link between those costs and the chargeable groups, and specified consultation and reporting obligations must be met ***(recommended)***.

e. **Option 5:** Amend the Act such that levies can fund specified services or infrastructure costs and specified consultation and reporting obligations must be met.

41. Note that all of the options except the status quo assume that the Purpose of the Act is also amended to enable a levy to be charged to fund, or contribute to the funding of, wider costs outside the immigration system. This is because a 2019 amendment explicitly amended the Purpose to include the collection and expenditure of the IVL.

How do the options compare to the status quo/counterfactual?

42. The five options have been compared to the status quo using the criteria specified above.

43. In general, there is a trade-off between adding more specificity in legislation Confidential advice and would likely raise fewer concerns regarding possible future uses of the funding during the parliamentary process) and the ability of the government to change priorities for the expenditure of levy revenue in the future.

44. Some concerns can be addressed through consultation and reporting obligations, noting that these also to a degree place constraints on decision making (at a minimum through requiring more time for processes to be undertaken). All options except for the status quo would benefit New Zealanders to the extent that they would substitute for taxpayer funding (although more funding being provided for settlement-related activities which are currently funded by the Crown would have the same positive impact).

45. The scoring schema runs from 0 (significantly worse than the status quo in terms of addressing the criterion) through 3 (neutral or the same as the status quo in terms of addressing the criterion) to 5 (significantly better than the status quo in terms of addressing the criterion).

46. The table below summarises the analysis at a high level. Further detail is provided in **Annex Two.**

Option	Assessment against criteria 0 = worse than status quo 3 = neutral / similar to status quo 5 = better than status quo			Total score
	A wider range of costs can be met by levy payers	**Would not unduly constrain future Cabinet decisions**	Confidential advice to Government	
1 – Status quo/counterfactual	3	3		**9**
2 – Levy can fund any services or infrastructure costs	5	5		**11**
3 – Levy can fund any services or infrastructure costs but there must be a link to the chargeable groups	5	4		**11**
4 – Levy can fund any services or infrastructure costs but there must be a link to the chargeable groups, and specified consultation and reporting obligations must be met **(recommended)**	5	4		**12**
5 – Levy can fund specified services or infrastructure costs and specified consultation and reporting obligations must be met	5	2		**11**

Option 1: Status quo/counterfactual

47. Under this option, the levy funds immigration system costs (status quo) including, following the change to new rates from October 2024, funding 80 per cent of the forecast cost of ESOL programmes in schools. It has been assessed as "3" or "neutral" on all criteria (as it is the basis against which the other options are measured) but from a zero base it scores relatively high, as it has no implementation costs and a Confidential advice to G

48. However, this option is not recommended as it does not meet the primary objective of the proposal, which is to reduce the future burden on taxpayers by enabling people and entities who receive the benefits of migration or the immigration system to contribute to meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure (it does not offer future Cabinets the ability to meet a "wider range" of costs).

Option 2: Amend the Act such that levies can fund any services or infrastructure costs

49. This option would offer the maximum choice to future Cabinets. Confidential advice to Government . As it would not meet the established definition of a levy (which requires a linkage between the "group that pays" and the "group that either benefits or causes the cost"), in order for this option to work it would need to be established as a tax, and officials do not propose to formally establishing a tax in the Act.

50. The reasons that the establishment of a formal tax is not recommended are:

    a. Firstly, that it would be unusual to do so in an Act such as the Immigration Act 2009 (and could likely not be done within the timeframes available for this amendment legislation).

    b. Secondly, that the establishment of a tax would imply that the rate or rates should also be established in primary legislation (that is, levies are set by Order in Council, but taxes are set by Parliament), and this would not meet the government's aims around flexibility.

51. Establishing a tied tax would constrain future decision-making around making changes to charges, considering the timeframes and resources necessary to amend legislation compared with making changes to regulations. (On the other hand, Confidential advice to Government [redacted])

52. Implementing this option but still calling it a levy runs the risk that it might be subsequently found to either nonetheless constitute a tax (Confidential advice to Government [redacted]), or Legal professional privilege [redacted]

53. New Zealand has signed up to a number of obligations established in a range of tax treaties, with regard to non-discrimination on the basis of nationality[18]. (Noting that New Zealanders would generally be exempt from paying any related charge, except where they were employers of migrants, as New Zealand citizens are not subject to the Immigration Act 2009.) This means that, were a tax to be envisaged in the future, at a minimum it would need to be carefully designed to ensure that citizens, or tax residents of jurisdictions where we had non-discrimination obligations, were carved out.

Option 3: Amend the Act such that levies can fund any services or infrastructure costs but there must be a clear link between those costs and the chargeable groups

54. This scores higher than the status quo (it can reduce future burdens on the taxpayer through meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure that migrants benefit from) and higher than Option 2 (through ensuring that a clear link is made between the charge and the benefit or risk specified groups derive or introduce, Confidential advice to Government [redacted]. It offers more choice to future Cabinets than the status quo.

55. Confidential advice to Government [redacted]

[18] See for example Backpacker tax discriminatory under UK Convention | CA ANZ (charteredaccountantsanz.com), which reports on an Australian tax levied on working holiday-makers, which the Australian High Court found cannot be charged where the individual is both an Australian resident for tax purposes and is from Chile, Finland, Germany, Japan, Norway, Turkey, the United Kingdom, Germany or Israel.

Option 4: Amend the Act such that levies can fund any services or infrastructure costs but there must be a clear link between those costs and the chargeable groups, and specified consultation and reporting obligations must be met [recommended option]

56. This option scores higher overall than the previous options, as it would establish an appropriate process to identify the broader costs to be met, Confidential advice to Government [redacted] While any specific decision made under this option Confidential advice to Government (for example on the basis that the results of consultation had not been taken into account or that decisions about the levy were seen to be subsumed within broader budgetary considerations and so not taken independently and for a proper purpose), the requirements for consultation and reporting would provide some safeguard Confidential advice to Government.

57. Legal professional privilege [redacted]

Option 5: Amend the Act such that levies can fund specified services or infrastructure costs and specified consultation and reporting obligations must be met

58. Confidential advice to Government [redacted], and the inclusion of consultation and reporting obligations would also offer protections. However, it would constrain the government's future ability to amend its priorities for the expenditure of levy revenue, and is scored down on this basis.

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

59. Option 4 best addresses the problem, while maintaining flexibility and Legal professional privilege [redacted] once the levy is funding a wider set of costs.

What are the marginal costs and benefits of the option?

60. As noted above, this is examining the creation of a high-level power and therefore the full marginal costs and benefits are not derivable at this point. An initial analysis has been undertaken and is set out at **Annex Three**. MBIE notes that all of the options except Option 1 potentially benefit New Zealand taxpayers.

What is the level of stakeholder support for this option? Who supports, and who is opposed? Has this option been affected by consultation?

61. The Minister of Immigration agreed to MBIE informing key external stakeholders of the proposal (via emails, succeeded by one-on-one meetings) in advance of Cabinet decision-making. The external stakeholders advised were: BusinessNZ, the Employers and Manufacturers Association, the New Zealand Council of Trade Unions, the New Zealand Law Association, and INZ'S Immigration Focus Group.

62. There was significant stakeholder interest in who would be charged, at what rates, and what for what purposes (noting that these elements will be determined as part of future fee and levy reviews, rather than at the point of the enabling legislation). Stakeholders were concerned about increasing pressures on businesses (including tourism businesses) as a result of the cumulative costs arising from wider government fee and levy increases. The cumulative impact of charges will be taken into account as part of the levy-setting process.

63. Wider consultation with the public will be included in the normal select committee process. The process to determine what public and social services and infrastructure would be funded by the levy and at what rate will be determined as part of future fee and levy reviews (the first one likely in 2026), and further consultation with stakeholders will be undertaken then (noting that the proposal includes adding an ongoing legislated obligation to consult before decisions about rates are made).

64. Engagement on an Exposure Draft of the Bill will occur later in 2024 ahead of Cabinet Legislative Committee decisions.

Risks to manage

Risk	Mitigation
Legal professional privilege [redacted]	We consulted with Inland Revenue and the Ministry of Foreign Affairs and Trade on how best otherwise to manage international risks. Legal professional privilege [redacted] A further mitigation is specifying the process to be used for consultation. There are two choices, along the lines of either: • the Chief Executive must undertake consultation with such parties as they consider appropriate (to avoid risk to the Minister), OR • the Minister must be satisfied that specified criteria have been met. The proposed design requires the Minister to undertake consultation.
The overall costs associated with travel to or study in New Zealand/ employing skilled workers/bringing family members home are so high that they discourage activity that is otherwise considered desirable.	Continuing to improve financial management of the immigration system and better understanding about cost sensitivity and the impacts of charging decisions on foreign relations, New Zealanders overseas, etc. (Note that this is not directly a result of an amendment to the purposes that the levy can be spent on but, as above, relates to the materiality of charges, combined with other costs.)
Increased administrative burden associated with the consultation and reporting requirements crowd out other high-priority policy work.	Work programme planning to manage timing and resourcing implications of future charging reviews.
Confidential advice to Government [redacted]	The timing proposed is that this change is not implemented until at least 2026, to allow sufficient time for policy work and adequate consultation. The proposed legislative safeguards are intended to ensure that funding collected and disbursed meets the lawful definitions that pertain to levies.

Section 3: Delivering an option

How will the new arrangements be implemented?

65. The specific option chosen will be implemented (come into existence) through an amendment to the Act, in an amendment Bill planned for introduction in 2025.

66. Policy work to identify costs that could be funded by the levy would be required to set charges. This would take place following the passing of the Amendment Act, but unlike the expected change to chargeable groups, would not be implemented in the initial review.

67. The review to implement the expansion of what could be funded will involve the following steps:

    a. A review undertaken by MBIE to determine what public or social services or infrastructure should be funded by the levy and at what rate. This would involve a period of policy development and rate modelling, working closely with relevant agencies, and Cabinet agreement to consultation. If Cabinet agrees to the proposed charges, regulations will need to be enacted to bring those changes into force.

    b. Amendments to the levy schedule (Schedules 6) in the Immigration (Visa, Entry Permission and Related Matters) Regulations 2010.

    c. INZ ICT system changes required to update the amounts charged for different [groups/accreditation/visa applications etc.] and rigorous system testing to ensure the correct levy rates have been applied.

    d. Developing and delivering a communications strategy to inform applicants and stakeholders as soon as regulatory changes are confirmed, prior to the changes taking effect.

    e. Notification of the regulation amendments in the New Zealand Gazette in line with the 28-day rule.

How will the new arrangements be monitored, evaluated, and reviewed?

68. Monitoring and reporting on the levy revenue and expenditure would be integrated into current immigration system monitoring and reporting. The proposed approach to this, and to evaluation, is set out below.

New reporting obligations introduced with the proposal

69. The recommended option includes legislated reporting obligations. They will seek to expand on the existing Annual Report provisions established in the Immigration Act 2009 at s 399(5) and 399(6), as follows:

> *(5) Not later than 1 October in each year, the chief executive must provide to the Minister a report setting out, in respect of the financial year ending on the preceding 30 June,—*
>
> *(a) the amount collected through the immigration levy; and*
>
> *(b) how the amount of the immigration levy was applied.*
>
> *(6) The Minister must present the report to the House of Representatives not later than 15 sitting days after its receipt.*

70. The proposed augmentation is an obligation to publish annually a breakdown of the groups levied and the amounts collected.

71. In addition, the recommended option would legislate consultation obligations on the Minister as part of future fee and levy reviews, and would also require no less than five-yearly reviews of the amount of levy revenue, how the rates of charging are calculated, and levy disbursement. It would be expected that information on the proposed application of levy expenditure would be included in the consultation documents.

72. Confidential advice to Government

Quarterly reporting on visa volumes, revenue and expenditure

73. MBIE reports quarterly to the Ministers of Finance and Immigration on visa volumes, revenue, and expenditure, which provides a mechanism to monitor the impact of increased visa product charges. Changes to the levy and the payer-base could also be monitored within this mechanism. Overall revenue collected by the Crown through the levy and then its ability to then offset fees for migrants will be the primary measure of ensuring that the policy proposal is working. This will be measured through INZ data and could be included in this reporting.

A fiscal management plan

74. In addition to quarterly reporting, Cabinet has agreed that MBIE will develop a fiscal management plan for the immigration system from mid-2024, aiming to improve the scrutiny of proposals with financial implications or changes to baselines to manage any fiscal risk to the Crown. It will also ensure the effective and efficient use of resources and increase stakeholders' confidence that immigration charges are reasonable.

Future fee and levy reviews

75. Immigration fees and levies are regularly reviewed (generally on a three-year basis) to ensure they are appropriately recovering costs. Any changes or corrections to prices will be made through regular fee and levy reviews. Fee and levy reviews are subject to standard Cost-Recovery Impact Assessment obligations.

Annex One: Cost-recovery principles and application to the immigration system

Cost-recovery principles	Application to the immigration system
Equity	Costs associated with the direct provision of immigration services (private goods) or the maintenance of the immigration system, migrant settlement support and management of risks associated with migration (club goods) are fully recovered from fee and levy payers. Costs that relate to public goods are met by the Crown (refugee services and Ministerial servicing). Cost-recovery is managed through memorandum (or hypothecation) accounts. Inter-temporal equity is achieved by aiming to reduce sustained deficits or surpluses and for immigration accounts to balance to zero overtime.
Transparency and consultation	Fees and levies for applications are fixed in the Visa Regulations and charged at the point of application (pending who is charged and at what point). MBIE consults on significant changes to immigration charges and provides information how visa fee and levy rates are set.
Efficiency	Fees and levies should reflect the underlying costs of efficiently delivered services. This relies on having good understanding of and information about the costs of the activities that are being charged for and the relationship to cost drivers.
Simplicity	Levy rates are set at broader visa categories (as per Schedule 6 of the Visa Regulations) to reflect that costs are not directly attributable to visa applicants.
Accountability	Immigration fees and revenues are scrutinised as a part of its public sector financial accountability arrangements. MBIE monitors and reports quarterly to the Minister of Finance and the Minister of Immigration on visa volumes, revenue, and expenditure which provides a regular accounting mechanism.
Effectiveness	Fees and levies should reflect the underlying costs of providing an effective immigration service. This relies on having a good understanding of, and information about, the costs of activities, cost drivers, and operational performance. Fees and levies are not set at a rate that creates a barrier to migration or undermines policy objectives, including to attract skilled migrants and support family migration.

Annex Two: Options analysis for expanding the purpose the levy can be used for

	A wider range of costs can be met by immigration levy payers	Would not unduly constrain future Cabinets	[redacted]	Overall assessment
Option 1 Status quo/counterfactual	3 No change – neutral.	3 No change. In itself, constrains Cabinets as does not extend range of expenditure.	Confidential advice to Government	9
Option 2 Amend the Act such that the levy can fund any services or infrastructure costs.	5 Could reduce future burdens on the taxpayer through meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure.	5 Offers maximum choice to future Cabinets.		11
Option 3 Amend the Act such that the levy can fund any services or infrastructure costs but there must be a clear link between those costs and the chargeable groups.	5 Could reduce future burdens on the taxpayer through meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure.	4 Offers more choice to future Cabinets than the status quo.		11
Option 4 Amend the Act such that the levy can fund any services or infrastructure costs but there must be a clear link between those costs and the chargeable groups, and specified consultation and reporting obligations must be met.	5 Could reduce future burdens on the taxpayer through meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure.	4 Offers more choice to future Cabinets than the status quo.		12 **Recommended option**
Option 5 Amend the Act such that the levy can fund specified services or infrastructure costs and specified consultation and reporting obligations must be met.	5 Could reduce future burdens on the taxpayer through meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure.	2 Would constrain the government's future ability to amend its priorities for the expenditure of levy revenue.		11

1	Negatively impacts criteria
2	Not at all or not applicable
3	Marginal positive impact
4	Partially meets or addresses
5	Meets or addresses well

Annex Three: Marginal costs and benefits of proposal compared to status quo

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the recommended option compared to taking no action			
Levy payers	Nature of cost: financial (broadened purposes that the levy revenue can be collected and used for) Type: ongoing Comment: Levy payers will be liable to meet a wider range of costs related to New Zealand's services and infrastructure which are the result of migrant. The costs, and the appropriate level of levy-payer contribution will be set during the next fee and levy review in 2024/2025. Nature of cost: administration/compliance Type: ongoing Comment: Impacted levy payers will need to ensure that they have paid the correct levy amount, at the correct time. This may add a compliance/administration cost.	Medium [depending on price set] Low [depending on whether a new levy is established]	Low. The scale of the financial cost for levy payers will become more apparent during the next Fee and Levy review. Medium. One of the elements that has been considered throughout the design of the proposal is that existing levy paying infrastructure be utilised.
Regulators: Border and INZ officials that need to implement the option	Low additional financial costs as the existing fee and levy infrastructure is expected to accommodate the proposed expansion to the purpose of the levy. A small amount of FTE resource would be needed for INZ to implement. Nature of cost: ease of travel Type: ongoing Comment: n/a	Low	Medium.
Others: *Government agencies, immigration professionals/business/ investors/migrants*	Low additional costs as the existing fee and levy infrastructure is expected to minimise costs to other wider groups such as government agencies, immigration professionals, and businesses. Broadening the purposes the levy can be used for is intended to reduce costs for other government agencies.	Low	High.
Total monetised costs	Medium. The scale of the financial cost will become more apparent during the next fee and levy review.		
Non-monetised costs	Low		
Additional benefits of the recommended option compared to taking no action			
Taxpayers	Nature of benefit: financial Type: ongoing Comment: Broadening the levy purpose to enable people and entities who receive the benefits of migration or the immigration system to contribute to meeting a wider range of relevant or associated costs related to New Zealand's services and infrastructure which are the result of migration is intended to reduce the burden on taxpayers.	Low to medium [depending on price set]	Low. The scale of the additional revenue generated (and therefore the cost reduction for taxpayers) will become more apparent during the next fee and levy review.
Others: Government agencies, immigration professionals/business/ investors/wider economy	Nature of benefit: financial Type: ongoing Comment: This option will support an immigration funding model that is efficient, self-funding and sustainable by recovering costs from third-party users. This should contribute to a reduction in Crown funding.	Medium	Medium. Broadening the purposes the levy can be used for is intended to reduce costs for other government agencies (and ultimately the New Zealand taxpayer).
Total monetised benefits	Medium		
Non-monetised benefits	Medium		

Regulatory Impact Statement: Additional safeguards for people who are liable for arrest and detention in order to strengthen the integrity of the immigration system

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	4 September 2024

Problem Definition

Two independent reviews of the immigration system have identified that there are inadequate safeguards for people who are liable for arrest and deportation under the Immigration Act 2009 (the Act). The lack of protections results in disparate and disproportionate outcomes for liable groups, which is undermining the integrity of the immigration system.

Executive Summary

There are inadequate safeguards for people who are liable for arrest and detention under the Act

The lack of protections have the potential to result in disparate and disproportionate outcomes for liable groups, which could undermine the integrity of the immigration system. These issues were highlighted in two independent reviews by KC Heron (2023) and KC Casey (2022), both of which made a range of recommendations for improvement.

There is an opportunity to strengthen the integrity of the immigration system by…

- Updating requirements for applications for individual warrants of commitment (WOCs) for refugee and protection claimants.
- Enabling judges to vary detention conditions for a person who has claimed asylum (currently an individual is subject to an automatic deportation liability notice if they claim asylum post-detention, when there may be valid reasons for this).
- Limiting compliance activities outside of normal hours to specific situations where judicial warrants have been obtained.

A variety of options have been considered, and tested against a set of criteria to see which will best achieve the objectives

The overarching objective is to maintain and enhance the integrity of the immigration system through ensuring the risk mitigation provisions are balanced, transparent and consistent. Underneath this broad objective, others are:

1. ensure that the human rights of those subject to immigration compliance activity are upheld and appropriately balanced against the national interest as determined by the Crown;
2. ensure that protections for human rights of the individual do not unduly limit MBIE's ability to maintain good regulatory outcomes; and
3. ensure that MBIE's social licence to operate is upheld by addressing recommendations from the Casey and Heron reviews.

Based on our analysis we recommend the following suite of amendments:

- **Proposal A:** Create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for claimants for refugee and protected person status.
- **Proposal B:** Repeal section 317(5)(d) of the Act to give a judge the power to not order detention of an individual who is liable for arrest and detention and has claimed asylum after being served with a deportation liability notice or deportation order or after being arrested and detained under the Act.
- **Proposal C:** Amend section 286 of the Act to limit residential compliance activity conducted out of reasonable hours (out-of-hours-activity) to where judicial warrants have been obtained.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Amendment Bill is in place by October 2025. These timeframes have meant that stakeholder consultation before Cabinet decisions has been limited to informing key stakeholders of the proposals, rather than significant engagement. However, feedback received has been incorporated into the proposals, and we know that they support proposals B and C. Between 29 July and 9 August we met with the below stakeholders to discuss the proposals:

i. BusinessNZ
ii. the Employers and Manufacturers Association
iii. the Council of Trade Unions
iv. the Casey Review Focus Group
v. the New Zealand Law Society
vi. the Office of the Ombudsman
vii. Immigration New Zealand's (INZ) Immigration Focus Group.

The risks of not undertaking a more fulsome consultation ahead of Cabinet decisions are somewhat mitigated, however, by the fact that the proposals have been informed by feedback provided during the select committee process for the Immigration (Mass Arrivals Amendment) Bill, as well as information provided by stakeholders for both the Heron and Casey reviews.

Responsible Manager(s) (completed by relevant manager)	
Stacey O'Dowd *Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE*  4 September 2024	
Quality Assurance (completed by QA panel)	
Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS *Immigration Amendment Bill (System Integrity proposals).* The panel has determined that each RIS provided meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Freedom of movement is a fundamental human right

1. Freedom of movement is enshrined in the Universal Declaration of Human Rights[1], the International Covenant on Civil and Political Rights[2] and the New Zealand Bill of Rights[3]. The United Nations High Commission Detention guidelines note that these rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker, or other status.[4] Article 31 of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly.

2. These rights taken together – to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.[5] This right to freedom and liberty is a fundamental value in New Zealand. Our apparatus of criminal law, procedure, rules of evidence, and the presumption of innocence ensure that in the circumstances where it is determined to be necessary for the public interest or national security, the decision to detain is made by an impartial party, that has accounted for all factors and has the discretion to determine a level of restrictiveness that is proportionate to the risk.

The Act prescribes situations where people liable may be detained

3. The Act establishes a tiered detention and monitoring regime to ensure the integrity of the immigration system by providing for the management of the persons liable for deportation and for the safety and security of New Zealand where people may pose a threat (Part 9).

4. Sections 316 - 324A of the Act deals with warrants of commitment (WOCs) to detain an individual, with sections 317A - 317E specific to groups of multiple individuals.

    i. **Section 316** outlines that an immigration officer may apply to a judge for a WOC if there will not be a craft available for deportation, the person has not supplied identity information, there is a risk to security or the public order, or for any other reason the person is unable to leave New Zealand.

[1] United Nations Universal Declaration of Human Rights, Article 13 (1).

[2] International Covenant on Civil and Political Rights, 1996, Article 12 (1). Noting that this is limited to persons lawfully within the territory of a State.

[3] New Zealand Bill of Rights Act 1990, Section 18 (1). Noting that this is limited to persons lawfully in New Zealand.

[4] United Nations High Commission for Refugees Guidelines on Detention 2012, Guideline 2 (para 12).

[5] Ibid (para 13 and 14).

5. The Immigration (Mass Arrivals) Amendment Bill introduced a new section that sets out a range of considerations immigration officers must take into account when processing mass arrivals and seeking a group WOC:

    i. **Section 317A** outlines that in making a group WOC application, an immigration officer must also provide a statement of why the warrant is necessary, how the proposed detention is the least restrictive and for the least amount of time necessary, and considerations of the government's domestic and international human rights obligations. It also allows a judge to order a variation of the location of a warrant.

Judicial warrants are a tool to ensure equity before the law

6. Judicial warrants are required to provide a practicable and timely period within which any threat or risk to public order/integrity of the system[6] can be properly assessed by an independent party (a judge). This helps to ensure that natural justice procedures are followed, and that the restriction of movement is justified.

7. Judges make their decisions by considering precedent (lower courts are bound by decisions made in higher courts) and the concept that like-cases be treated alike. Requiring a judge to consider an application for a judicial warrant ensures equity, impartiality, and consistency in decision-making about compliance or detention activities.

8. Ensuring judges are presented with the relevant information to inform their decisions is a crucial part of enabling this process to work (and ensure any form of restriction on individual rights are proportionate and justified).

The Casey review into the restriction of movement of asylum-seekers made a number of recommendations for the immigration system

9. In 2021 Victoria Casey KC conducted a review into the restriction of movement of asylum claimants (the Casey review[7]) and into MBIE practices that led to the detention of a number of asylum-seekers on WOCs.[8]

10. The review found that the roughly 100 detained asylum-seekers had generally:

    i. been held for significantly longer than was necessary (with 60% being held for more than three months),

    ii. been held in a location of detention that was not appropriate (generally being the Mount Eden Remand Facility), and

    iii. not been detained as a measure of absolute last resort.

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[6] In an individual sense – i.e. detaining for the purpose of mitigating the risk of absconding. There are special WOC provisions that deal with risk or threats to security (see section 318).

[7] Victoria Casey KC (New Zealand): *Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment on the restriction of movement of asylum claimants*, 2022. www.mbie.govt.nz/dmsdocument/20130-report-to-deputy-chief-executive-immigration-of-the-ministry-of-business-innovation-and-employment-restriction-of-movement-of-asylum-claimants.

[8] The asylum-seekers who were detained were generally detained on the basis that: they may have constituted a threat to security or the public order, their identity could not be adequately established, or that they were at risk of absconding if released.

11. The review also found that judges often did not have the discretion that they would have preferred when dealing with such cases.[9]

12. The review also found that New Zealand's immigration detention regime failed to meet the government's obligations under the United Nations High Commission for Refugees (UNHCR) Detention Guidelines.

    i. The review noted that legislative amendments were required to set up a system that was compliant with these obligations, and that any restrictions on the freedom of asylum-seekers pending resolution of their claim must be affirmatively justified by the state as necessary and proportionate.

    ii. The review went further to note that justification must be relatively easily shown for detaining new arrivals for a short period where there are identity concerns and it is necessary to check biometric data. To avoid the detention becoming arbitrary, the purpose for it needs to be clearly stated and the detention must not extend longer than is necessary to meet that purpose.

13. These UNHCR requirements are now reflected in section 317A of the Act.

14. KC Casey found that legislative amendment was crucial, as the status quo of relying on the INZ operations manual to act as a safeguard for these considerations and provisions was ineffective.

15. The review led to 11 recommendations to change MBIE internal policy, including nine operational recommendations (which have been addressed), and three legislative recommendations. The operational recommendations were implemented almost immediately, demonstrating a commitment to responding to the review. A table in **Annex Two** sets out the current status of all of the recommendations.

16. The legislative recommendations of these proposals are set out in the table below:

Review recommendation	Relation to Act and required action
Recommendation one: Part 9 of the Act should be amended to separate the regime for detention and lesser restrictions on freedom of movement for refugee claimants from the regime for immigration detention for turnarounds and people in the process of being deported.	Amend section 316 and 317A This was partially addressed through the Mass Arrivals Amendment Bill (2024).
Recommendation two: Introduce provisions to allow for electronic monitoring as an alternative to detention.	Amend section 317(5)(d) ** note this proposal is included within the scope of the Amendment Bill but is addressed in a separate Regulatory Impact Statement.

17. The absence of explicit additional safeguards for the detention of asylum-seekers and the restriction of judicial discretion means that there is a risk (albeit low) that a repeat of inappropriate use of detention provisions could occur.

[9] In practice, discretion is limited and the only option, even where a judge does not feel it is appropriate, is to detain a person who is liable for deportation and subsequently claims asylum.

The Act confers powers on immigration officers to assist in locating persons who are or may be liable for deportation (Part 9 of the Act)

18. The current settings for out-of-hours compliance activities are:

    i. Section 286 of the Act outlines that an immigration officer may enter and search at any reasonable time, by day or night, any building which an officer believes to be the location of an individual who is subject to a deportation order.

    ii. The Standard Operating Procedures (SOPs) define 'out-of-hours' as compliance activity between the hours of 1900 and 0800, Monday–Friday, public holidays, and weekends.

19. While the legislation requires out-of-hours activities to be reasonable, there is limited judicial input on this discretion.

20. There are strong practical reasons for undertaking visits at these times:[10]

    i. It may be the only 'realistic' option for contacting a person subject to deportation.

    ii. Often people subject to compliance activities deliberately avoid INZ.

    iii. An individual may be detained for up to 96 hours (before a judge must be involved) and officers are required to put the person on the "first available craft". Detaining someone in the early morning means officers still have the rest of the day to find flights, undertake risk assessments, and carry out a deportation interview.

    iv. In Auckland (and other cities), operating in the early hours of the day is sensible just to avoid traffic and related difficulties. This has been reported by compliance officers as a significant impediment to productivity.

The Heron review into immigration out-of-hours compliance activity made a number of recommendations

21. In 2023, Michael Heron KC conducted a review[11] following an instance of compliance activity taking place outside of reasonable operating hours that gained media attention due to its similarity in practice to the Dawn Raids of the 1970s[12]. The review found that the law relating to out-of-hours compliance activity had been implemented discriminatorily, unfairly, and disproportionately by INZ officials and police officers.

22. The review found that, on balance, though the Dawn Raids apology made in 2021 did not make a specific commitment to restrain the use of out-of-hours compliance activity, the apology nonetheless created a reasonable expectation within the Pasifika

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[10] Michael Heron KC (New Zealand): *A review of processes and procedures around out of hours immigration compliance activity, and to identify and recommend potential changes to the process where required*, 2023: www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023

[11] Ibid.

[12] In 2021 the Government officially apologised to the Pasifika community for the practice of the Dawn Raids in the 1970s, whereby Pasifika communities were subject to police and immigration compliance raids, often in the early hours of the morning[12].For more information regarding the Dawn Raids, New Zealand History online has a number of resources available: The dawn raids: causes, impacts and legacy | NZ History.

community that “dawn” intrusions would cease, or at least would be a very last resort option to achieve compliance.

23. The Heron review provided five recommendations, four operational and one legislative.[13]

24. The legislative recommendation was that the Government should consider amending the Act to specify the criteria for out-of-hours compliance visits and whether those involving residential addresses be stopped entirely or limited to specific situations.

25. If the status quo of conducting out-of-hours compliance activities without impartial scrutiny continues, and without taking a clearly stated position, there is a risk that MBIE could loses the confidence and trust of the public in undertaking compliance activity. Continuing to conduct out-of-hours compliance activity under the current legislative settings poses a risk to the integrity and social licence of the immigration system. This in turn could weaken MBIE’s social licence for immigration compliance activities and jeopardise its ability detain individuals who could pose a genuine risk to security or the public order, resulting in immigration system regulatory failure.

26. We note that although legislative settings have not [yet] been changed, the INZ SOPs have been significantly strengthened following the recommendations from the review.

What is the policy problem or opportunity?

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

27. There are a number of international obligations that New Zealand has signed up to which confer protections on people who claim refugee or protected status, in recognition of their legally (having arrived irregularly) and physically (having fled conflict and persecution) vulnerable position.

28. The introductory comment of the 1951 Convention explains that the instrument is “underpinned by a number of fundamental principles”[14], most notably non-penalisation[15] and non-refoulment[16]. It further extends the protection of the international community assuring the “widest possible exercise … of fundamental rights and freedoms”.

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[13] The recommendations are: amend the Act to specify the criteria for out-of-hours compliance visits; update the SOPs and guidelines for compliance officers to reinforce that out-of-hours compliance visits are a matter of last resort and reasonable alternatives should have been considered beforehand; ensure that any assessment of out-of-hours visits should consider the impact on anyone else who may be present, and relevant cultural factors; ensure any decision to undertake an out-of-hours compliance visit should also include an assessment of reasonableness, proportionality, and public interest; and ensure any out-of-hours compliance activity should be authorised by the relevant compliance manager and the national manager.

[14] Such as: the right not to be expelled, except under certain, strictly-defined circumstances (Article 32), the right not to be punished for illegal entry into the territory of a contracting State (Article 31 of the 1951 Convention), and the right to freedom of movement within the territory (Article 26 of the 1951 Convention).

[15] 1951 Convention on the Status of Refugees (Article 31). This ensures that Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who present themselves without delay to authorities and show good cause for their illegal entry or presence. The Contacting States are also prohibited from restricting the freedom of movement of such people.

[16] 1951 Convention on the Status of Refugees (Article 33). The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian, and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-

29. Restrictions on the rights conferred in the Convention can be placed on people, but only until their status is regularised or where the person is reasonably regarded as a danger to the security of the country or having been convicted of a particularly serious crime and are considered a danger to the community. In practice, this runs against the natural justice presumption of innocence. The burden is shifted to the person seeking protection to establish that their immigration status should be regularised (either through refugee or protected person status) and that they are not a danger to the security of the country.

30. The protections are fleshed out in the UNHCR Detention Guidelines[17] as:

- **1. The right to seek asylum must be respected** – "every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore an unlawful act".
- **3. Detention must be in accordance with and authorised by law** – "although national legislation is the primary consideration for determining the lawfulness of detention, it is not always the decisive element in assessing the justification of deprivation of liberty".
- **4.1. There are three purposes where detention may be necessary in an individual case** – "which are generally in line with international law, namely public order, public health or national security".
- **4.1. Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances** – "detention in the migration context is neither prohibited under international law … nor is the right to liberty absolute. However international law provides substantive safeguards against unlawful and arbitrary detention. 'Arbitrariness' is to be interpreted to broadly include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, and detention needs to be necessary in the individual case, reasonable in all circumstances and proportionate to a legitimate purpose. Further, failure to consider less coercive or intrusive means could also render detention arbitrary.
- **4.1. Asylum-seekers often have justifiable reasons for illegal entry or irregular movement including travelling without identity documentation –** "this means, that the default position should not automatically be detention until identity is established. The inability to produce documentation should not be interpreted as an unwillingness to cooperate or lead to an adverse assessment. Rather what needs to be assessed, is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation, or the possession of false documentation, whether he or she

treatment, or other serious human rights violations. Under international human rights law the prohibition of refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). It should be noted that this protection may not be claimed by refugees.

[17] United Nations High Commission for Refugees (2012), Guidelines on the Applicable Criteria and Standards relation to the Detention of Asylum-Seekers and Alternatives to Detention.

had an intention to mislead authorities, or whether he or she refuses to cooperate with the identity verification process."

- **7. Decisions to detain or to extend detention must be subject to minimum procedural safeguards** – including "to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic and take place within the first 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent to the initial detaining authority, and possess the power to order release or vary conditions of release.

31. There is an opportunity to strengthen protections for asylum claimants by explicitly codifying some of these considerations in the Act.

32. Since the Casey review MBIE has established a panel of senior staff members (the Casey Panel) to consider any impingement on the liberty of refugee or protected person status claimants before a WOC application is submitted to the District Court.

33. Since 2022, Confidential advice to Gove have been recommended to the panel by both border and compliance staff. The panel has not upheld any of the WOC recommendations, and has requested that all claimants be released on conditions pending suitable addresses for their stay while their applications are considered. Although the panel recommended release on conditions, Confidential advice to Government, Maintenance of the law A part of the panel's assessment is to weigh up whether the claimant has a suitable address to be released to, to help mitigate the risk to public order.

34. The above demonstrates an operational safeguard that is operating well to ensure that detention is a measure of last resort. However, it is not entrenched, and is vulnerable to staffing changes (both in Senior Leadership positions at MBIE, or the Casey Panel membership), changes in Government priorities, and funding.

Problem B: Judges' discretion is limited, and the only option is to detain a person who is liable for deportation and claims refugee or protection status

35. Under section 317(5)(d) of the Act, if a person claims asylum following detention or the issuing of a deportation order, then they are subject to an automatic deportation liability notice. There is currently no discretion to allow a judge to refuse a WOC. This blanket provision is problematic as it does not account for individual circumstances; it may be entirely valid to claim asylum at the point of detention or deportation. Casey noted that judges felt they were "hamstrung" in approving warrants for extended periods of time to keep individuals in remand facilities.

36. Binding judicial discretion, particularly in relation to the restriction of movement of individuals, is inconsistent with the spirit and general interpretation of fundamental international documents and principles. The gravity of the consequences of detaining someone and removing their rights to liberty should be met with a proportionate judicial measure. Section 317(1)(b)(ii) affords a judge the authority to discharge decisions to vary the conditions for other people liable to detention in recognition of the gravity of the measure. Maintaining 317(5)(d), as it is, is also inconsistent with the proposals to introduce additional safeguards for asylum-seekers in proposal A, and the principle that detention be a last resort. This change, to repeal section 317(5)(d), is contained within recommendation 1 of the Casey review.

37. Although section 315(5) technically provides a judge with powers to apply discretion for exceptional circumstances, the legal threshold for this in the immigration context is very high. The Supreme Court has stated that "exceptional circumstances must be truly exceptional, and well outside of the normal run of circumstances". By definition, as section 317(5)(d) currently stands, all refugee and asylum-seekers who have submitted a claim for protection after being served with a deportation order or arrested and detained under the Act are the general run of cases subject to the default rule. They would need to meet a high bar, well beyond simply being a claimant, to be considered ton have "exceptional circumstances". In cases where a warrant is applied for, it is default that asylum-seekers will be detained.

Problem C: Immigration out-of-hours compliance activity does not have appropriate safeguards in place which could undermine the social licence of the system

38. The Act does not currently put any limitations on out-of-hours-activity by immigration officers. Per the findings of the Heron review, out-of-hours compliance activities have historically been implemented discriminatorily, unfairly, and disproportionately by INZ officials and police officers with little independent scrutiny. The Heron review found that the Dawn Raids apology of 2021 created an expectation that the out-of-hours activities would either cease, or be used only exceptional circumstances. However, section 286 of the Act explicitly allows an immigration officer to search and enter a property at any time if it relates to deportation. This mis-match in expectations, and lack of transparency, has the potential to undermine the social license of the immigration system.

39. For the financial year ended 30 June 2023, there were 20 after-hours visits and 22 after-hours deportations, compared to 318 in-hours visits. The percentage of people deported as a result of an out-of-hours visit was 3.36 per cent of all deportations that year.[18]

40. New Zealand's current approach appears to be out-of-step with other like-minded or M5 countries – all of whom require a warrant to be issued for the arrest or search of a premise, even if it is suspected that someone in the premises identified is liable for deportation. In addition, other like-minded countries do not have the same history of trauma or injustice in relation to compliance activities like the Dawn Raids in the 1970s.

41. **Annex One** provides further information on how New Zealand's approach to out-of-hours compliance activity and WOCs compares to that of other jurisdictions.

Who are the stakeholders affected? What are their views?

42. Key stakeholders impacted by these problems are migrants who are subject to WOCs and migrants who are unlawfully in New Zealand and subject to out-of-hours compliance activity.

43. We have significant insight into how these problems are perceived by stakeholders through the consultation undertaken as part of the Heron and Casey reviews, and feedback received during Select Committee on the Mass Arrivals Amendment Bill. These viewpoints are summarised in the sections below.

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[18] https://www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023.

The Heron review included consultation with a wide group of stakeholders on out-of-hours compliance activity

44. During the Heron review, a wide range of people were interviewed, including INZ compliance officers, Senior INZ and MBIE officials, leaders and members of Pasifika, Indian, and Chinese communities, members of the Immigration Reference Group, immigration lawyers, and representatives of the Ministry for Pacific Peoples. KC Heron also received approximately 100 responses to the public survey questions commissioned.

45. The main themes were:

Greater cultural consideration is required for immigration compliance activity

The disproportionate effect on the Pasifika community by the Dawn Raids in the 1970s, and the expectation that out-of-hours compliance activities would cease following the government's Dawn Raids apology, informs the need for greater cultural considerations in decision-making with regards to immigration compliance activity. Particular care must be given to activity with respect to Pasifika communities.

Affected communities hold diverse views

The Heron review highlighted that affected communities (primarily Pasifika, Chinese, and Indian communities who make up the majority of deportations) hold a diverse range of views on the status quo for out-of-hours compliance activities. Many view that the government has an obligation to open pathways to residence for the Pasifika community, given the history of the Dawn Raids. Others expressed that compliance activity should continue as it reinforces the regular immigration status of many in these communities (those against whom compliance activity is not taking place), and could be considered to aid the social licence these communities have in their regular immigration statuses.

Presence of minors, the elderly, and other vulnerable individuals during out-of-hours compliance visits ought to be avoided

There are situations where compliance activity may take place in the presence of children or the elderly, or other vulnerable individuals. Daytime compliance activity reduces the likelihood that children will be directly affected as they may be at school or in childcare.

Risk to the wider community should be considered

Heron identified in his report that immigration compliance decision-making is currently focussed on risk to the immigration system when considering conducting out-of-hours compliance activity. He suggests that consideration should be given with regard to risk to the wider community rather than just risk to immigration system.

Government agencies/regulators

There may be some additional paperwork required from immigration officers when applying for a warrant of commitment or an authority to conduct an out-of-hours compliance activity. However, in both instances, this should merely be an articulation of criteria already considered when making such decisions.

Judiciary

Were the proposed changes enacted, the workload for judges may increase. However, it would likely to be a minor change as the cohorts of people subject to these measures are minimal.

The Casey review, and feedback on the Mass Arrival Amendment Act, provides insights into stakeholder views on Warrant of Commitment provisions

46. In forming recommendations, KC Casey met with stakeholders from the UNHCR, the Immigration Protection Tribunal, Amnesty International Aotearoa, the Refugee Council of New Zealand, the Asylum Seekers Support Trust, the New Zealand Association of Immigration Professionals, the New Zealand Law Society and the Auckland District Law Society, the New Zealand Red Cross, MBIE officials, and a representative of Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre), members of the refugee bar, and the Royal Australian and NZ College of Psychiatrists. A theme that arose was concern with the lack of Bill of Rights Act 1990 considerations in the decisions to detain asylum-seekers.

47. During public consultation and the Select Committee process on the Immigration (Mass Arrivals) Amendment Bill, the public and civil society were not satisfied that the recently implemented operational changes were adequate protection against the failures outlined in the Casey review. Key feedback was that operational changes instituted since the review were weak protections, and could be eroded with staff changes, business changes, or loss of institutional memory. The changes were welcomed by civil society and contribute towards New Zealand's international obligations under the UNHCR to align detention practices with criteria in 2012 Guidelines on Detention.

We have consulted with a targeted group of stakeholders on the problems identified

48. In July and August 2024, MBIE informed key stakeholders (listed below) of the problems and proposals in this RIS and to prepare them for the exposure draft of the Bill later this year:

    i. BusinessNZ
    ii. the Employers and Manufacturers Association
    iii. the Council of Trade Unions
    iv. the Casey Review Focus Group
    v. the New Zealand Law Society
    vi. the Office of the Ombudsman
    vii. INZ's Immigration Focus Group.

49. Stakeholders were appreciative of the early engagement, and few significant concerns were raised. The questions raised were generally clarifying in nature, and gave a useful indication of the likely areas of interest or controversy at Select Committee, as well as indicating topics on which to focus our proactive communications.

50. Stakeholders Confidential advice to Government were uniformly supportive of the proposals to create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for a refugee or protected person status claimant and amending the Act to limit residential compliance activity conducted out of reasonable hours to where judicial warrants have been obtained. Stakeholders also acknowledged that the proposals (as a package) represent a movement in a positive direction in the human rights space.

51. Proposal A received the most comment from stakeholders. Free and frank opinions were concerned that the emphasis on the WOC proposals needed to focus more on the rights and liberty of asylum-seekers.

52. Regarding the proposal to provide judges with more discretion when a WOC is applied for, feedback from the Free and frank opinions Its view is that the entire section should be reviewed, and the onus of the section reversed, so that there is a presumption of liberty unless INZ is able to demonstrate that circumstances require detention.

53. Both WOC proposals have been designed to strike a balance between the interests of the Crown in managing risk, while being consistent with the 1951 Convention and the UNHCR Guidelines on Detention.

54. However, tight timeframes mean that substantive consultation (outside of agency consultation) ahead of Cabinet decisions is not possible. Wider consultation with the public will be included in the normal select committee process.

What objectives are sought in relation to the policy problems?

55. The broad objective is to maintain and enhance the integrity and social licence of the immigration system through ensuring the risk mitigation provisions are balanced, transparent, and consistent. Underneath this broad objective, others are:

    i. ensure that the human rights of those subject to immigration compliance activity are upheld and appropriately balanced against the national interest as determined by the Crown;

    ii. ensure that protections for human rights of the individual do not unduly limit MBIE's ability to maintain good regulatory outcomes; and

    iii. ensure that MBIE's social licence to operate is upheld by addressing the remaining legislative change, based on recommendations from the Casey and Heron reviews.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

56. The criteria below were selected to help to achieve the objectives outlined above.

    i. **Addresses gaps in immigration settings:** as indicated above, amendments should regularise best practice and ensure consistency across different pieces of immigration legislation. This should support INZ to better manage risks by clarifying the authorising environment in which they operate.

    ii. **Ease of implementation:** the option should be able to be implemented easily, with limited additional costs, for both government and the sector.

    iii. **Positive impact on social license to operate:** the option should balance the need for risk management with the rights of the individual. A component of this will be ensuring that the proposed option is proportionate to the risk posed.

What scope will options be considered within?

57. This Amendment Bill is not a first principles review of the Act. It is instead to introduce or amend a range of provisions as directed by the Minister of Immigration to address immediate issues with the fiscal sustainability and system integrity of the system. Confidential advice to Government

58. Options have been considered within the parameters set out in the purpose section of the Act, which is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

59. As discussed, operational work has already been undertaken to respond to the reviews that the proposals.[19] We consider that all non-regulatory options have been exhausted and have not been considered any further of these options.

Warrant of commitment provisions

60. The scope for this amendment is limited to the relevant sections of the Immigration Act (section 317A and 316).

61. Other legislative changes were made in the Immigration (Mass Arrivals) Amendment Bill in relation to group WOCs, such as removing MBIE's ability to assign police cells or prisons as locations of detention prior to a warrant being issued. We do not propose to include that change as we consider it a necessary power to retain, given individuals on warrants may be a risk to the public order and the period of warrantless detention is limited to a maximum of 96 hours (as opposed to a maximum of 32 days in the group warrant provisions).

[19] Following the Casey review, and the 11 recommendations it made, the nine operational recommendations have been addressed with the implementation of the internal panel. Similarly, following the Heron review significant changes were made to INZ's SOPs. However, this does not address the key suggestions in the reviews which were that legislative change be considered.

Out-of-hours compliance activity

62. MBIE has recommended, and the Minister of Immigration has agreed, that limiting out-of-hours activity to where a judicial warrant has been obtained is, on balance, the best course of action. The Heron review highlighted key issues with how out-of-hours compliance activity is conducted. It is not apparent that in-hours compliance activity has led to similar regulatory failure. Therefore, we consider the scope to be limited to only requiring judicial warrants for out-of-hours compliance activity (rather than all compliance activity).

What options are being considered?

63. We have identified a range of options to respond to the three problems identified, as set out below.

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

- **Option A.1: Status quo** (not recommended)
- **Option A.2: Amend section 316 of the Act to align requirements for individual WOCs with group warrants**, requiring an outline of considerations made prior to detention, reference to compliance with domestic and international obligations (relating to detention), and expanding judicial discretion on the location of detention.
- **Option A.3: Create a new section to strengthen the required considerations when authorising a WOC for a refugee or protected person status claimant**, requiring that a District Court Judge must be satisfied that the application:
    a. clearly articulates the risk the individual poses[20]
    b. detention is the least restrictive measure necessary to manage the risk articulated in (a), and
    c. in cases where the identity of the person is unknown, or the person's identity has not been established to the satisfaction of the court, there should not be a presumption of detention (unless exceptional circumstances apply) in cases where the identity of the person is unknown or unable to be established due to the actions undertaken by the claimant in travelling to and entering New Zealand.[21]

[20] The risk is intended to refer to national security and risk to public order. This is to reflect the 1951 Convention (non-penalisation clause in Article 31) and UNHCR Guidelines, which are clear that "in the context of detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, which are generally in line with international law, namely public order, public health or national security" (guideline 4.1 para 21). Framing the wording in this way helps to respond to feedback from the Casey Review Focus Group, which was that the presumptions need to be reversed – so that liberty must be the default position, with the burden of proof to sit with the detaining authority to justify why detention is necessary.

[21] It is the intent that the new provision for asylum-seekers be the opposite to that for regular individuals under 317(5)(a) and (b) of the Act. It still leaves detaining a person seeking refugee or protected person status on the grounds of not being able to establish their identity as an option. The intention of the wording used for the provision to operate is to ensure that it is not the default position (as is the case with s317(5)(a) and (b). The purpose of framing this particular provision is to also reflect the Convention and guidelines to recognise that "asylum-seekers often have justifiable reasons for illegal entry or irregular movement, including travelling without identity documentation. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate or lead to an adverse assessment. Rather what needs to be assessed is whether the

Problem B: Limited judicial discretion in relation to detention

- **Option B.1: Status quo judge has no power to refuse detention order** (not recommended)
- **Option B.2: Repeal section 317 (5) (d) to give a judge the power to not order detention** of an individual who is liable for arrest and detention and has claimed asylum after being served with a deportation liability notice or deportation order or after being arrested and detained under the Act (recommended).

Problem C: Lack of safeguards around out of hours immigration compliance activities

- **Option C.1: Maintain status quo** no judicial warrants required (not recommended).
- **Option C.2: Require judicial warrants for residential out-of-hours compliance activity only** (recommended).
- **Option C.3: Require judicial warrants for all compliance activity** (not recommended).

asylum-seeker has a plausible explanation for the absence or destruction of documentation, or the possession of false documentation, whether he or she had an intention to mislead authorities, or whether he or she refuses to cooperate with the identity verification process." (UNHCR Guideline 4.1. paras 20 and 25).

How do the options compare to the status quo/counterfactual?

64. The following table sets out analysis of the options identified compared to the status quo using the criteria. The assessment scheme used is as follows:

-1	Negatively impacts criteria
0	Not at all or not applicable
1	Marginal positive impact
2	Partially meets or addresses
3	Meets or addresses well

	Ease of implementation	Positive impact on social licence to operate	Address identified gap or regulatory failure	Overall assessment
Problem A*: *Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants				
Option A.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Inconsistency in legislation may erode public trust in the system.	**-1** Does not align with new provisions set out in the Mass Arrivals Amendment Bill. Introduces complexity into the system and risks disparate outcomes for groups and individuals subject to a WOC.	**-2**
Option A.2 Align requirements for warrant of commitment applications with those for group warrants for all individuals	**0** This option may involve more work for compliance officers during the application for a WOC process. However, this would be minimal as it should just be an articulation of considerations made anyway. MBIE Legal would work with Compliance Officers regarding warrant application and affidavit requirements to include the additional information required. There is also a low risk that the increased consideration for WOCs may increase judges' workload.	**2** Ensures that the legislation (and decisions) are transparent, equitable and consistent across immigration legislation. The additional safeguards and considerations for group WOCs are more stringent due to the prolonged commitment period (up to six months rather than 28 days for individuals).	**1** This will ensure consistency across legislation. Lifting the requirements from s317 to align with mass arrivals WOC provisions may not always be appropriate or proportionate. The provisions were designed with a group of vulnerable people in mind. 'All individuals' encapsulates a much broader range of people in a different context. For example: - People included in a mass arrival are assumed to be more vulnerable that individuals (likelihood of claiming refugee/protected person status). Not all individuals will have this added layer of vulnerability. - Detention for group is for a longer period of time (up to 6 months rather than 28 days). The shorter commitment period before review already acts as a rights-affirming tool, balancing power.	**4**
Option A.3 Create a new section to strengthen the required considerations when authorising a WOC for refugee/protected person status claimants only	**3** This option would codify international best practice and guidance outlined in the INZ SOPs. Likely to be a very small cohort. It is unlikely to substantially increase the workload of compliance officers or judges. MBIE Legal will work with Compliance Officers regarding warrant application and affidavit requirements to include the additional information required.	**3** Extensive consultation was undertaken during the development of the Mass Arrivals Amendment Bill. This proposal draws on the spirit of provisions included in the Mass Arrivals Amendment Bill. This means introducing changes that have already been scrutinised and would mitigate consultation risks associated with the tight timeframes for this Bill.	**3** Addresses an inconsistency in the treatment of individual refugee/protected person status claimants and groups. The codification of additional safeguards takes the individual's vulnerable position into account and adheres to our international obligations outlined above by recognising that people seeking international protection are entitled to the least restrictive means of detention. Directly responds to concerns raised in the Casey review. Shifts the burden of proof to the state to justify why limitations on an individual's liberty are necessary.	**9** **Preferred option**

	Ease of implementation	Positive impact on social licence to operate	Address identified gap or regulatory failure	Overall assessment
Problem B: Limited judicial discretion in relation to detention				
Option B.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Does not account for individual circumstances; it may be entirely valid to claim asylum at the point of deportation. Judges must detain claimants, meaning there is no discretion available when they feel detention is inappropriate. Inconsistent with international best practice and the spirit of human rights obligations and the findings of the Casey review.	**-1** Does not address the restriction on judges' discretion or provide appropriate safeguards.	**-2**
Option B.2 Repeal section 317(5)(d) to allow a judge to refuse a WOC for an individual who claims asylum following a detention or deportation liability notice	**2** No additional implementation impact following legislative change other than notification of changes. Following this the implementation/application of the legislation and decision-making will rest with judges on a case-by-case basis.	**2** Provides leeway in the case of an individual who has claimed asylum after deportation proceedings have commenced. Improves integrity as it is consistent with the other safeguards that are otherwise being proposed in this Bill. Repealing this section could also demonstrate MBIE's commitment to addressing issues raised in the Casey review and ensure risk mitigation processes are balanced and proportionate. It should be noted that this may result in an increase in unmeritorious claims in attempt to avoid detention/deportation, damaging the perception of the integrity of the system. Only Confidential advice to Government, Maint have been held under WOC, and for short periods of time. Following the Casey review, in other instances where INZ staff have sought a WOC for individuals who have claimed asylum and are either liable for deportation or turnaround at the border, the panel has directed for the person to be released on conditions.	**3** Provides judges with discretion to consider if detention is appropriate in these circumstances. Addresses findings from the Casey review.	**7** **Preferred option**
Problem C: Lack of safeguards around out-of-hours compliance activity				
Option C.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Failing to implement the changes recommended in the Heron review has the potential to appear that the government has acted in bad faith, and undermine MBIE's social licence to operate. Maintaining the status quo will also fail to meet communities' expectations that out-of-hours compliance will cease or be a last resort.	**0** Maintains gap/failure.	**-1**
Option C.2 Require judicial warrants to conduct out-of-hours compliance activity	**2** There is a risk that this may add to judges' workload and add some complexity to the system. This can be mitigated by ensuring that the judiciary is made aware of the proposals ahead of time and are prepared for potential implications. Additionally, this option is 'ring-fenced' to a narrow range of activities in an uncommon period of time. MBIE Legal will work with Compliance Officers on warrant application and affidavit requirements to include the additional out-of-hours information required.	**3** Directly addresses a recommendation raised in the Heron review and would help to meet communities' expectations that out-of-hours compliance activities would be a last resort. The action is proportionate by being time-limited, with sufficient safeguards to protect the rights of individuals.	**3** Strikes a fair balance between directly addressing a recommendation made in the Heron review and the purpose of the Immigration Act, by ensuring that compliance activities remain available for MBIE.	**8** **Preferred option**
Option C.3 Require judicial warrants to conduct any compliance activity	**0** This would unnecessarily add to the judiciary workload, potentially slowing decision making timeframes and access to justice for other matters that require judicial input/decisions. It would also slow down the ability of MBIE to undertake compliance activity where it is genuinely needed.	**1** Would help to meet communities' expectations that compliance activities would be a last resort. Unnecessarily goes beyond the recommendation put forward in the Heron review.	**2** This option does address the gap. However, it risks overstepping the balance between individual rights and the ability of MBIE to conduct compliance activity.	**3**

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

65. MBIE recommends three preferred options based on our scoring against the criteria outlined above.

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

66. **Option A.3** (create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for claimants for refugee and protected person status) is preferred as it scored the highest against the criteria above and is therefore the most likely to achieve the objectives outlined.

67. The amendments would enhance the integrity and social licence of the immigration system and MBIE as a regulator by ensuring consistency across legislative provisions (aligning provisions with those for group WOCs in the Mass Arrivals Amendment Bill) and that the risk mitigation provisions are proportionate, transparent, and consistent. It would give effect to the spirit of the Casey review.

68. The requirement to show consideration of the risk the individual poses, and that detention must be the most appropriate way to manage that risk ensures that detention must be to the least restrictive, and for the shortest amount of time possible. This will aid in the determination as to whether detention is justifiable and proportionate. Ensuring that the default position is not of detention where person is a refugee or protected person claimant but their identify cannot be verified upholds the principle of non-penalisation under Article 31 of the 1951 Convention. Taken together, this package of requirements demonstrate adherence to applicable international guidelines and Conventions (relating to detention) to which New Zealand is a signatory. It also addresses concerns raised in the Casey review that INZ was acting in a manner contrary to the UNHCR guidelines by detaining asylum-seekers for extended periods of time. Incorporating New Zealand's international obligations into a judge's decision-making brings New Zealand in line with international best practice.

69. Including a provision to direct a judge towards considering these requirements further addresses issues raised in the Casey review around the consistency of detention of asylum-seekers in prison and will ensure that the human rights of those liable are upheld and consistent with how others (those who arrive in a group) are treated.

70. There is likely to be increased public trust and confidence that MBIE's compliance powers are used properly. Codifying protections in legislation balances individuals' rights with the national interest. It does this by supporting MBIE to maintain its ability to provide good regulatory outcomes that are fair, consistent, and transparent for each of the cohorts subject to WOCs.

Problem B: Limited judicial discretion in relation to detention

71. **Option B.2** (repeal section 317 (5) (d) power for judge to refuse a warrant of commitment) is preferred as it scored the highest against the criteria above and is therefore the most likely to achieve the overarching objectives.

72. Enabling a judge to genuinely scrutinise such a warrant would demonstrate MBIE's commitment to addressing issues raised in the Casey review and ensure the risk mitigation processes are balanced and proportionate. Repealing section 317(5)(d) would make the provision consistent with the safeguards that are otherwise being proposed in this Bill. It will also ensure that these safeguards are available to asylum-seekers. Additionally, in the rare instances an asylum claimant is subject to an application for a WOC, a judge would not have to grant a warrant where they do not think it is appropriate, and instead look to alternative options, better aligning our legislation with our international obligations and best practice as outlined by the UNHCR on alternatives to detention.

Problem C: Limit out of hours immigration compliance activities

73. **Option C2** (limiting out-of-hours-activity to where judicial warrants have been obtained) is the preferred option. It best meets the criteria outlined above, contributing to the overall objectives. Adding the safeguards of the judicial warrant to a time-limited period means that the implementation 'cost' is limited to a small number of cases that will require judicial consideration.

74. It will provide greater protections by ensuring that compliance powers exercised out-of-hours are justified and will require INZ to have exhausted every other avenue of gaining compliance prior to out-of-hours compliance powers being used, thereby providing people more opportunities to more fulsomely engage with INZ prior to such powers being used.

75. It will also help to build MBIE's social licence by articulating a clearly stated position on when out-of-hours compliance activity should take place, and by MBIE acting in the public interest to use the appropriate compliance powers to gain good regulatory outcomes. Giving effect to the recommendation made in the Heron review demonstrates a genuine intent to address the concerns raised by affected communities. Limiting requiring a judicial warrant to 'out-of-hours only' strikes a fair balance between addressing the regulatory failure, accounting for individual rights, and ensuring that compliance activities remain as available tools for MBIE to maintain the integrity of the immigration system, and uphold the national interest.

What are the marginal costs and benefits of the option?

76. The following table sets out the marginal costs and benefits of all preferred options (A.1, B.2 and C.2).

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of a preferred options compared to taking no action			
Regulated groups *Individuals subject to WOCs or out-of-hours compliance activity*	No additional costs, the proposals are not seeking to restrict freedom or impose costs over and above the status quo.	Low	Medium: the options have been considered in light of New Zealand's international human rights obligations, and have tried where possible align with processes of natural justice. Making the legislation clear and transparent around when a judicial warrant is required should hopefully minimise the need for an extended use of legal representation or appeal.
Regulators *MBIE Immigration Compliance and Investigations*	**WOC costs** Higher costs (in terms of time) to evidence reasons for seeking a WOC for a person seeking refugee or protected person status. This is an existing cost that may increase. Confidential advice to Government [redacted] There is a marginal risk that including additional requirements to be fleshed out in the application for a WOC may increase this cost (due to additional time spent completing the application, review by MBIE Legal, and then a longer period spent in court). However, this is mitigated by the fact that in practice these considerations are already being factored into decision-making surrounding WOCs. It is also only likely to be required for a very small number of cases Confidential advice to Government, Maintenance of the law. **Judicial warrant for out-of-hours compliance costs** Higher costs for a judicial warrant for out-of-hours compliance action. This will be a new cost as judicial warrants are not currently required for out-of-hours compliance activity. It is estimated that at a Confidential advice to Government [redacted] As above, this cost is likely to be low, given that there will be very few circumstances where out-of-hours activity is necessary (there have been no out-of-hours compliance activities undertaken since the Heron review), and the application for a judicial warrant is likely to be an articulation of factors and processes already considered as a part of the out-of-hours compliance activity decision-making.	Low–Medium	Medium: Throughout the design of both proposals an element that has been considered is that the preferred option be easily-implemented and a part of this consideration is ensuring the option is cost effective. Medium: For WOCs the figures provided are for standard rates and the average time spent on a case by a compliance officer. These will naturally vary depending on complexity. Low–Medium: For judicial warrants for out-of-hours compliance activity. This will be a new cost, and so estimates have been based off data provided for WOCs.
Others (e.g., wider government, consumers, etc.) *Wider government*	Higher costs for the Courts to consider WOCs for out of hours compliance activity.	Medium	Medium: One of the criteria and an element that has been considered throughout the design of the proposal is that the preferred option be easily implemented.
Total monetised costs	Based on an estimate of three WOCs per year: - WOC costs (this is an existing cost that may increase in line with the number of WOCs required): Confidential advice to Government [redacted] Judicial Warrant costs (this will be a new cost which will also depend on the complexity of the case and number of warrants required): Confidential advice to Government [redacted]	N/A	
Non-monetised costs		Medium	

Confidential advice to Government [redacted]

Affected groups	Comment	Impact	Evidence Certainty
Additional benefits of the preferred option compared to taking no action			
Regulated groups *Individuals subject to WOCs or out-of-hours compliance activity*	Recipients of additional safeguard of requiring judicial warrants (ensuring they are justified in general and specifically for out-of-hours compliance activity).	High	High: Casey review findings The Casey review found that INZ officials and New Zealand Police implemented the laws relating to out-of-hours compliance activity unfairly, unreasonably, and discriminatorily. Requiring an independent decision (via the WOC) that accounts for a variety of factors, including proportionality and reasonableness, adds a layer of transparency and accountability, and ensures that the decision to undertake the action is required 'as a last resort'.
Regulators *MBIE Immigration Compliance and Investigations*	Supports the integrity of the immigration system and social licence for undertaking compliance and investigation activity, including detaining individuals and undertaking out-of-hours compliance action.	High	High: Casey review findings The Casey review found that there has been "no clearly stated position from the government about out-of-hours compliance activity, which is emblematic of a wider problem – that the former Minister and MBIE management shared the view that this kind of activity should not occur other than in specific circumstances. But that this has not been passed on to compliance officers, who understand they are still expected to conduct these activities as and when required within their lawful bounds."
Others (e.g., wider govt, consumers, etc.) *Wider government*	Efficient management of immigration non-compliance with appropriate discretion.	High	High: Casey review findings The Casey review found that if the government intended (through the apology) that out-of-hours compliance activity be discontinued or only occur in circumstances, that it should change the law to do so. In lieu of these changes, there is a loss of social licence.
Wider public	Stronger safeguards in respect of the exercise of compliance powers that support the management of immigration risk.	High	High: Casey review findings The Casey review found that there are mixed opinions on the continuation of these compliance activities. Migrants who are lawfully in New Zealand felt it was important that those who are not are still subject to compliance activity.
Total monetised benefits			
Non-monetised benefits		High	

Section 3: Delivering an option

How will the new arrangements be implemented?

77. Te Whakatairanga Service Delivery within MBIE is primarily responsible for the application for warrants to either detain a migrant or to conduct out-of-hours compliance activity.

Changes to judicial warrants of commitment

78. Given the limited nature of the changes regarding the Casey review we do not consider significant implementation timelines, as the changes can be implemented immediately (once the legislation is passed) without changes to visa regulations or immigration forms.

Limiting out-of-hours compliance activities

79. Following the significant operational changes made to INZ's SOPs, we also do not consider implementation of judicial warrants for out-of-hours compliance activity will be substantial. Regulatory change will be required to create a new form that immigration officers will need to submit to the court to apply for a warrant. Many of the operational changes already made will contribute to the requirements of a warrant application, which also reduces the significance of implementation.

80. The Bill is expected to be passed in 2025 and these proposals will come into effect immediately. A communications plan will be developed to ensure that stakeholders are well aware of the changes before they come into effect.

How will the new arrangements be monitored, evaluated, and reviewed?

81. There are two key prongs for oversight of out-of-hours compliance activity and applications for warrant of commitment included in the Standard Operating Procedures[25]. They are the:

82. **Decision-making panel on restriction of freedom of movement of asylum claimants**. This provides oversight of asylum claimants who are detained as a part of the deportation process. The panel was established following the Casey review and ensures that decisions to restrict the freedom of movement of asylum claimants are consistent with the 2012 UNHCR Guidelines on Detention. INZ produces a quarterly report which is sent to the Office of the Ombudsman (in relation to the Optional Protocol to the Convention Against Torture) and this details, among other things, the number of days any person has been detained for and the outcome (deportation or release with reporting conditions).

83. **Approval panel for out-of-hours compliance activity**. The SOPs include a quality check by a technical specialist before any out-of-hours visit is considered by the panel. The panel's role is to confirm that the visit is in fact a last resort and then the National Manager for compliance makes the final decision.

84. We will explore ways of ensuring there is appropriate reporting and monitoring, including updates to the Minister of Immigration.

[25] SOPs (March 2024), page 80 and page 304.

Annex One: Comparison of New Zealand's settings with other jurisdictions

Comparison of out-of-hours compliance activity settings

Country	Are there time limits on out-of-hours compliance activities?
New Zealand (individuals)	Immigration officers may enter premises and search at any reasonable time by day or night any premises in which the officer believes on reasonable grounds that the person named in a deportation order is present.
USA	Immigration officers must obtain a warrant for either arrest, or search and seizure – one warrant does not apply to the other action.[26] There is no section in legislation that deals with out-of-hours compliance activity.
Australia	Immigration officers require a warrant to arrest someone they think may be at risk of absconding.[27] There is no section in legislation that deals with out-of-hours compliance activity.
United Kingdom	Immigration officers must obtain a warrant to enter a premise to conduct compliance activities – these warrants can be granted by a justice of the peace.[28] There is no section in legislation that deals with out-of-hours compliance activity
Canada	Immigration officers require a warrant to arrest someone they think may be at risk of absconding.[29] There is no section in legislation that deals with out-of-hours compliance activity.

Comparison of Warrant of Commitment (WOC) settings

Country	Are there time limits on detention?	Judicial review available?
New Zealand (individuals)	(on arrival) 96 hours without a WOC 28 days (renewable) with a WOC	Yes
(members of a mass arrival group)	(on arrival) 7 days without warrant (28 days if a judge cannot make a decision within 7 days) 6-month (renewable) WOC	
Australia	Unlimited	No
United Kingdom	Unlimited	Yes
Canada	(on arrival) 14 days, before initial review by non-judicial board 6 months, renewable upon further review	Yes

While these WOC comparisons offer important international context as to the environment in which New Zealand operates, they are **not comparable** to the New Zealand context, given New Zealand's small population, our geographical distance from origin and transit countries, and the dangerous waters that surround us.[30]

These factors mean that our immigration system, with regard to refugee and protection claimants, is geared towards the orderly management of a limited number of claimants. The countries outlined above operate in significantly different environments to New Zealand, and have faced unique challenges and successes with regards to asylum-seekers.

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[26] Section 1357 of United States Code Law Title 8—Aliens and Nationality.

[27] Section 251 of the Australian Migration Act 1958.

[28] Section 17 of the United Kingdom Immigration Act 1971.

[29] Section 55 of the Canadian Immigration and Refugee Protection Act 2001.

[30] The average population of the countries in this table (excluding the US, which is a significant outlier) is around 36M, more than five times the size of New Zealand. The relative size of these countries, the GDP of the Global North countries, and their experience (generally) with land-based migration, contributes to their having streamlined systems of managing arrivals of groups (sometimes large groups) of people at their border.

Annex Two: Relevant Statistics

Out-of-hours compliance activity statistics FY15/16 to FY22/23[31]

	Total deportations	After-hours (visits)	After-hours (deportations)	In-hours	Visa-required arrivals	Visa-waiver arrivals
2015/16	1,891	7	6		902,815	1,521,550
2016/17	2,162	30	22		967,878	1,758,618
2017/18	2,938	10	11		1,084,185	1,813,637
2018/19	1,142	7	5		1,117,874	1,861,983
2019/20	1,507	6	8	65[18]	769,703	1,428,516
2020/21	904	9	15	272	28,567	28,701
2021/22	517	6	12	185	79,664	85,535
2022/23 (4 May 2023)	654	20	22	318	621,309	1,093,090

Combined deportation numbers for 2015-2023

Deportation	3,841	29%
Self deportation	4,878	36%
Voluntary departure	4,756	35%
Total	13,475	

Notes on statistics

- A proportion of Chinese nationals have come to New Zealand to work in construction or hospitality These jobs, by their very nature, begin early in the morning and often, at least in the case of hospitality, end very late in the evening. It would not be possible to meet these people at their homes during INZ's normal operating hours, but their jobs would make it difficult and potentially dangerous for officers to visit them at their places of work.
- In FY20/21, INZ was granted additional budget to focus on construction as a priority sector and a large proportion of non-compliant Chinese nationals were identified through this activity.
- Following COVID-19, and even now, the Kingdom of Tonga has refused to accept deportees other than in small numbers. During the phase of acute response to COVID-19, it was not possible to deport people to certain countries (in particular in the Pacific).

[31] www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023.

Regulatory Impact Statement: Providing a more flexible response to managing individuals under the Immigration Act 2009

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Advising agencies:	Ministry of Business, Innovation and Employment
Proposing Ministers:	Minister of Immigration
Date finalised:	20 February 2023

Problem Definition

The immigration system regulates the flow of people into New Zealand. The purpose of the Immigration Act 2009 (the Act) is to "manage immigration in a way that balances the national interest".

Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act. The current approach in the Act to manage these risks is to refuse visas or deport people. Detention is currently possible where deportation is being pursued and where a claim for asylum (also known as a refugee and protection claim) has been lodged and the individual poses a risk.

There are limitations in the current settings when it comes to possible deportation of those who pose a risk where they have (or are likely to have) protected person status (discussed further below). In addition, aspects of this approach, particularly the detention of asylum claimants have garnered criticism as they may not be fully compliant with our international obligations and may have impacts on the wellbeing of non-citizens who are/were detained in corrections facilities.

This Regulatory Impact Statement (RIS) analyses two proposals to provide a more flexible responsible to managing individuals under the Act:

- ***Proposal A****- Cancellation of residence class visa status (to facilitate eventual deportation)*
- ***Proposal B*** *- A community management framework for asylum seekers and others liable to detention under the Immigration Act 2009*

Why Government intervention is required

Proposal A: Cancellation of residence class visa status

Recent cases have identified potential gaps within the immigration system to manage individuals subject to the Act who present a national security risk to New Zealand. In

particular, there are limited tools to manage the risk of individuals who are protected persons as they are at risk of torture or ill treatment if deported.

Confidential advice to Government will be considered as part of the Ministry of Justice review of the Terrorism Suppression (Control Orders) Act 2019 (the Control Orders review). However, a new "cancellation of residence class visa status power" could **facilitate the future deportation of an individual subject to the Act who poses a threat or risk to security** (for example if there is a change in circumstances which means they are no longer deemed to be a protected person).

Proposal B: A community management framework

Immigration New Zealand (INZ) commissioned an independent review into the processes and procedures relating to restriction of the liberty of claimants for refugee and protection status (asylum claimants). Victoria Casey (KC) produced a report (the Casey Report[1]) which was highly critical of the practice of detaining asylum claimants who are considered a risk in remand at Mount Eden Corrections Facility. She recommended community-based options are established and used as quickly as possible to **avoid ongoing human rights breaches**.

In addition, the national security work on options to expand avenues to detain or deport persons of national security concerns (discussed in this RIS in relation to Proposal A) highlighted the **need for more robust community management measures in the immigration system, as an alternative and more proportionate response to managing those who are currently liable for detention** under the Act.

Executive Summary

Diagnosing the policy problem

The proposals in this RIS have arisen from two pieces of work:

Proposal A: Cancellation of residence class visa status

Following recent terror attacks, Ministers commissioned work on **legislative options to expand the avenues within the immigration system for the detention and/or deportation of persons for whom national security concerns have been identified** (the national security work).

This work has highlighted:

- the difficulties with managing individuals who are not citizens and are a known risk to public safety, who would otherwise be deported but cannot be due to their status as a protected person
- there are additional challenges to the deportation of individuals subject to the Act who present a security risk where they have residency status in New Zealand, due to greater rights and protections provided by that visa.

Proposal B: A community management framework

INZ commissioned an independent **review into the processes and procedures relating to restriction on the liberty of claimants for refugee and protection status**. The subsequent Casey Report was highly critical of the practice of detaining asylum claimants

1 The report can be found at: Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment – Restriction of movement of asylum claimants (mbie.govt.nz)

who are considered a risk in remand at Mount Eden Corrections Facility and recommended community-based options are established and used as quickly as possible to avoid ongoing human rights breaches.

This work has highlighted:

- a need to have a broader suite of options to support the management of a range of individuals under the Act proportionate to the risk they pose in order to prevent harm while meeting our international and domestic human rights obligations.

Deciding upon an option to address the policy problem

Proposal A: Cancellation of residence class visa status

Through the course of the national security work outlined above, a number of options for change were considered that have now been discounted. Specifically, these related to deportation with assurances, long-term detention and management options (in either a corrections or purpose-built INZ facility) and procedural options such as automatic name suppression. These options focused specifically on the issue of managing individuals who pose a risk or threat to security but cannot be deported due to (likely) protected person status. The options that were strongly opposed by external experts consulted and that raised significant New Zealand Bill of Rights Act 1990 issues (i.e. detention options) are not being progressed at this time.

Confidential advice to Government will be considered as part of the Ministry of Justice Control Orders Review which is scheduled to begin this year.

There is however, one bespoke immigration option being considered in the RIS - Cancellation of residence class visa status (to facilitate eventual deportation). This option would apply to those who were certified to be a threat or risk to security but could not yet be deported, for example protected persons and those who could not return home due to border closures or a lack of available flights.

Proposal B – A community management framework

The option outlined in this RIS responds directly to recommendations made in the Casey Report but also provides an alternative option for the management of individuals who may otherwise have been detained.

These proposals were both assessed against the status quo under the following criteria:

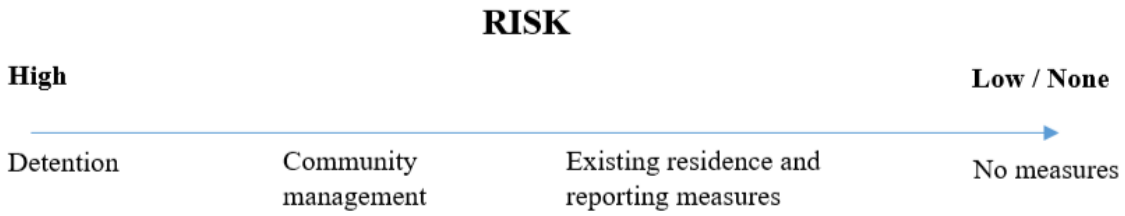
- effectiveness at preventing harm
- consistency with domestic and international law, including human rights; and
- operational feasibility and cost.

Summary – Proposal A

- On balance, *Proposal A: Cancellation of residence class visa status* has been identified as the preferred option to increase the potential pathways available to facilitate timely future deportation.
- While this option restricts some rights associated with residence status such as being able to own a home and vote, it is only likely to apply to a small number of individuals (1-2 individuals every five years). It is consistent with existing policy settings regarding residence status for those who pose a risk and our international obligations.
- This option could facilitate timely future deportation of individuals who pose a threat or risk to security and signals that those who pose a risk or threat to security in New Zealand will not be allowed residence, which in turn could add an additional disincentive to such behaviours.

Summary – Proposal B

- *Proposal B: A community management framework* has been identified as the preferred option to improve management of asylum seekers and other individuals subject to detention under the Act in a manner consistent with the New Zealand Bill of Rights Act 1990.
- A community management framework adds to the existing management options available under the Act (as demonstrated below) to ensure restrictions placed on individuals are proportionate to the risk posed (as deemed by the Courts), it also offers a more rights compliant option to manage asylum claimants who pose a risk, compared to detention.



Delivering an option

These proposals would both require legislative changes to implement, Confidential advice to Government

A minimum of 6-12 months will be required for INZ to put into effect a new community management function (Proposal B) and to undertake procurement for services. This could not take place until appropriate funding had been approved. This may result in a delay

between when the legislation is passed, when implementation may commence, and when the proposals may come into effect. There is also a risk that any new powers provided through legislation would not be able to be used if additional funding is not secured.

Limitations and Constraints on Analysis

The scope of this analysis has been narrowed by previous Cabinet and Ministerial decisions

Following recent terror attacks, Ministers commissioned work on legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of non-New Zealand citizens for whom national security concerns have been identified. Following targeted consultation on options, a range of options for change were considered Confidential advice to Government specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and raised New Zealand Bill of Rights Act 1990 (NZBORA) issues[2]. Ministers have agreed not to progress these options at this time.

Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

This RIS focuses instead on two targeted immigration options which arose from the work detailed above and from the ongoing response to the Victoria Casey report on the detention of asylum claimants.

The scope of Proposal B is limited to a community management option which in part responds to the Victoria Casey report but does not include other recommendations made

In early 2021 Amnesty International released a report about asylum claimants' treatment in prison. In June 2021, INZ commissioned an independent review to assess its operational practices relating to the potential detention of asylum seekers.

The final report from Victoria Casey KC was issued on 23 March 2022. It highlighted areas of concern and made 11 recommendations to address those, both at an operational and policy level. Three of the recommendations require legislative change.

A community management framework would address some of the concerns raised in the Casey Report. In particular, it would go some way towards implementing the recommendation to allow for electronic monitoring as a more proportionate option where the Court considers it necessary to address well-founded and serious risks of absconding, or to public safety or national security but does not consider detention to be warranted. It would also partly implement recommendations relating to ensuring alternatives to detention are available and that INZ takes responsibility for claimants subject to restrictions on their freedom.

The Casey Report's broader legislative recommendations, particularly around amending the detention regime for asylum seekers as a whole, will not be addressed by the proposed changes. Addressing these recommendations involves a broader piece of policy

2 Detention which was no longer linked to deportation was highlighted as likely to be considered as discrimination based on nationality as the detention would not relate to an immigration purpose, and therefore it was hard to justify why the threshold for detention would be lower for a non-citizen than a citizen. Similarly, detention options had been highlighted as unlikely to be justifiable under NZBORA as they may or would be likely to constitute arbitrary detention.

work that would require expert consultation. The Minister of Immigration instructed officials to progress work on a community management framework first so that legislation could be introduced this Parliamentary term. The work on broader legislative changes can be done as part of a wider Immigration Act review scheduled to begin in late 2023.

The scope of Proposal B does not encompass new support services at this time

For the purpose of this RIS, Proposal B extends only to the establishment of a community management framework and not the additional provision of new wraparound support services which could support more positive outcomes for those managed.

It has been recommended that if Proposal B is progressed Cabinet agree to INZ working with community representatives in the design of any wraparound services available under the community management measures.

In the interim, the proposal will rely on existing services and support (e.g.. Mental health support through NGOs such as Refugees as Survivors New Zealand (RASNZ)).

External consultation has been limited to subject matter experts and was mostly focused on other options which have now been discounted

For the national security work, the Minister of Immigration agreed to officials undertaking confidential targeted consultation with external experts and stakeholders. As this work related to the national security system it was sensitive and therefore consultation was limited rather than undergoing a full public consultation process. This consultation took place between February and May 2022.

We note that the proposals at the time of consultation related solely to the issue of managing individuals who pose a security risk or threat but cannot be deported due to protected person status. *Proposal A: cancellation of residence class visa status* was consulted on at a high level. *Proposal B: A community management framework* was consulted on as a longer-term (ongoing) regime for the management of individuals who pose a security risk or threat, rather than for asylum seekers and other individuals liable for detention under the Act.

Proposals that were strongly opposed by experts, in particular relating to deportation with assurances and ongoing detention and management are not being progressed at this time.

We also note that consultation with subject matter experts focussed on those groups likely to experience a direct or indirect impact of these proposals. Public consultation through the Parliamentary process will invite a broader range of perspectives, including focus on preventing harm to New Zealand communities.

There are wider limitations on available data for the estimated size of the problem

There are limitations in intelligence and surveillance information to accurately quantify the number of individuals who may be directly impacted by the proposed options.

The number of people who pose security risks and who cannot be deported is difficult to quantify, as it will be so rare and well below any meaningful sample size – approximately 1-2 people every five years.

It is difficult to estimate the number of individuals who would be managed under Proposal B. This is because of the challenges of predicting how many individuals currently in detention or managed by existing mechanisms would be better suited to management under the proposed orders. In addition, the length of time an individual can require detention or management can vary greatly. For example, periods of detention for the majority of individuals have historically been less than 30 days, whereas periods of management under

existing Residence and Reporting Agreements for the majority of individuals have been less than one year.

Detailed costings of proposed options are limited at this time

Officials have estimated the annual cost of Proposal B based on a range of assumptions on both the costs of and need for different services (e.g. electronic monitoring), and the number of people that could be subject to the orders and the length of time any individual would be subject to them.

These estimates are largely based on the current experience of Ara Poutama (Corrections) in managing individuals in the community and providing services through contracted providers. This has limitations due to the existing expertise and economies of scale in Corrections settings (which INZ would not have in standing up a new function, and in managing a very small cohort of people).

There may also be costs to other agencies depending on the responsibilities of each agency which are yet to be determined.

Responsible Manager(s) (completed by relevant manager)
Sam Foley *Manager* *Immigration (International and Humanitarian) Policy* *Ministry of Business, Innovation and Employment*  20/02/2023* *Cost estimates for Proposal B were updated in September 2024[3]

Quality Assurance (completed by QA panel)	
Reviewing Agency:	Ministry of Business, Innovation and Employment
Panel Assessment & Comment:	MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact Statement **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

3 Cost estimates are set out in Section 2 from paragraph 81.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The purpose of the immigration system

1. The immigration system regulates the flow of people into New Zealand. The purpose of the Immigration Act 2009 (the Act) is to "manage immigration in a way that balances the national interest".

2. Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act. The current approach in the Act to manage these risks is to refuse visas or deport people. Detention is currently possible where deportation is being pursued.

Previous Cabinet decisions

3. In response to recent terror activities in New Zealand, specifically the New Lynn terror attack on 3 September 2021 (referred to as the *Samsudeen* case), the Prime Minister and the Minister of Immigration sought advice from officials regarding policy and legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of persons for whom national security[4] concerns have been identified.

4. International relations, Confidential information entrusted to the Government

5. Officials provided advice to Cabinet in December 2021 Confidential advice to Government and were directed to provide further developed policy options following targeted consultation with external experts[5].

4 Security as defined under section 4 of the Immigration Act 2009.

5 Stakeholders included: Kāpuia, NZ Human Rights Commission, Amnesty International, Refugee Council of New Zealand, NZ Red Cross, Immigration Reference Group, and the Refugee and Protection Status Determination Cross-sector Joint Working Group.

6. Following targeted consultation, a range of options for change were considered Confidential advice specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and detention options raised NZBORA issues, specifically discrimination based on nationality (where detention was no longer linked to an immigration purpose) and arbitrary detention. Ministers have agreed not to progress these options at this time.

7. Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

8. This RIS focuses instead on two targeted immigration options which arose from the work detailed above and from the ongoing response to the Victoria Casey report on the detention of asylum claimants.

9. The status quo from which the options considered in this RIS would build on is outlined below.

Status quo

Proposal A: Cancellation of residence class visa status

10. Deportation is the ultimate tool available to the New Zealand government under the Act, providing the ability to deport people who pose a security risk. Where an individual under the Act poses a threat or risk to security, deportation is the best option for removing the risk from our shores.

Deportation of refugees/protected persons

11. The Act provides for the deportation of those who pose a security risk to New Zealand. However, those mechanisms are constrained if the individual is, or is likely to be, considered a protected person. Currently:

    - refugees may only be subject to deportation where Article 32.1 or 33 of the Refugee Convention allows deportation of a refugee (essentially for national security or public order grounds); and
    - an individual cannot be deported if they are a protected person – that is, there are substantial grounds for believing that the person would be in danger of torture or ill-treatment in the receiving country.

Residence class visa status

12. A holder of a resident visa is entitled to stay in New Zealand indefinitely, unless they breach their visa conditions (for example, if they commit a crime, or they obtained their resident visa through fraud with false or fraudulent information). By comparison, the holder of a temporary visa is entitled to work or study in New Zealand for a specific period of time and will need to depart New Zealand upon the expiration of that visa (or if it is not renewed).

13. The Act currently enables a person claiming asylum who is of sufficiently bad character not to be granted residence in the first instance, but instead to be placed on long-term work visas. Protected person status gives access to employment, and income support if necessary, but long-term work visas (as opposed to a residence-class visa) mean that the individual cannot become a citizen.

14. There is currently no power for residence status to be revoked once it has been granted for those who pose a risk or threat to security (i.e. those whose risk was not identified until after a residence visa was granted).

Proposal B: A community management framework

Detention provisions

15. The Act currently provides powers for detention and monitoring as a tool to enable deportation. These powers can only be used pending the making of a deportation order, or if the individual is already subject to a deportation order. They may also be used where an individual has lodged a claim for asylum and poses some kind of risk.

16. Section 309 sets out specifically who can be liable to arrest and detention under the Act including:

    - persons who are liable for turnaround:
    - persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4))[6]:
    - persons who are suspected by an immigration officer or a constable to be liable for deportation or turnaround and who fail to supply satisfactory evidence of their identity when requested under section 280:
    - persons who are, on reasonable grounds, suspected by an immigration officer or a constable of constituting a threat or risk to security.

17. Detention in a corrections facility is subject to the decision of a District Court judge to grant a Warrant of Commitment (WoC). Section 317 of the Act outlines the decisions and considerations a Judge must make on application for a WoC. Section 318 outlines the decisions to be made where the WoC applies to someone who is a threat or risk to security. Notably that, unless the release of the person would not be contrary to the public interest, the Judge must issue a WoC authorising the person's detention for a period of up to 28 days.

18. Outside of custodial detention arrangements (and if a WoC is not granted), Section 315 of the Act provides for a person[7] to reside in the community with reporting requirements (Residence and Reporting Requirements Agreement (RRRA)) if agreed by the person liable for detention and an immigration officer. While a breach of RRRA conditions is not an offence, an individual could be detained under a WoC if they did not meet the requirements. Section 320 also allows the Court to release a person on conditions and specifies which conditions can be imposed should the Judge see fit, including that they must reside at a specified place and report to a specified place at a specified time among others.

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6 This section outlines that:

- A refugee or a claimant for recognition as a refugee may be deported but only if Article 32.1 or 33 of the Refugee Convention allows the deportation of the person.
- A protected person may be deported to any place other than a place in respect of which there are substantial grounds for believing that the person would be in danger of being subjected to torture or arbitrary deprivation of life or cruel treatment.

7 Persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4)) of the Act).

19. Detention and monitoring can be warranted in certain circumstances. The United Nations High Commissioner for Refugees (UNHCR) Guidelines outline the obligations of parties to the Convention[8] in relation to the detention of asylum seekers. The Convention does not categorically prohibit detention, and it is generally accepted that there are circumstances where detention may be justified, particularly for short periods of time. Under existing New Zealand law, any detention must be linked to future deportation. International best practice[9] also maintains that migrants should not be detained with the general prison population.

Review into the detention and treatment of asylum seekers

20. In early 2021 Amnesty International released a report about asylum claimants' treatment in prison. In June 2021, INZ commissioned an independent review to assess its operational practices relating to the potential detention of asylum seekers.

21. The final report from Victoria Casey KC was issued on 23 March 2022. The report was highly critical of the practice of detaining asylum claimants who are considered a risk in remand at Mount Eden Corrections Facility. The report outlined that the vast majority of asylum claimants do not end up in detention: of the approximately 2,500 people who made claims between 2015 – 2020, only around 100 were detained.

22. However, the report noted that:

"For the small number who are declined visas at the border or who are facing imminent deportation at the time of their claim... Detention in a Corrections facility is in practice essentially the default position, and can extend for a long time: over the 2015 – 2020 period 60% were detained in prison for more than 3 months, and 12% for over a year. One person was held for over three years."

23. The report, among other things recommended community-based options be established and used as quickly as possible to avoid ongoing human rights breaches. We note that operational changes since the Casey Report have meant that there are currently no asylum claimants in detention.

Wider Government tools for community management/detention

24. There are wider detention and management tools across government to manage risk. The relevant law includes:

- Crimes Act 1961 offences and attempts to commit those offences;
- the Control Orders regime (if convicted previously of a terrorism related offence);
- offences in the Terrorism Suppression Act 2002, including the offence of planning and preparing to commit a terrorist act; and
- objectionable publication offences (Films, Videos and Publications Classifications Act 1993).

25. The status quo also includes operational Police tools and activities, for example the 24/7 surveillance and monitoring in the *Samsudeen* case.

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8 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

9 For example, the UN International Organisation for Migration: *Global Compact for Safe, Orderly and Regular Migration* (Link: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195)

What is the policy problem or opportunity?

26. There is an opportunity to increase the tools available to support the management of and facilitate the eventual deportation of individuals subject to the Act who pose a risk.

Proposal A: Cancellation of residence class visa status

27. New Zealand has experienced two terror events in the last few years where the perpetrator has not been a New Zealand citizen. These cases, and the *Samsudeen* case in particular, have highlighted the difficulties with managing individuals who are not citizens and are a known risk to public safety, who would otherwise be deported but cannot be due to their status as a protected person. As outlined above, there are legal limitations on our ability to deport an individual who has or is assumed to have protected person status.

28. There are also challenges on our ability to deport individuals who present a security risk where they have residency status in New Zealand, due to greater rights and protections provided by that visa. Although residents can be deported where they pose a security risk, meeting the threshold for Ministerial certification and the subsequent Order in Council making the individual liable for deportation under section 163 of the Act may be difficult and/or time consuming. Conversely, those on temporary entry class visas can be deported more easily, e.g. under section 157 where the Minister is able to determine there is sufficient reason to deport a temporary entry class visa holder, including matters relating to character.

29. In some circumstances, it may be appropriate to cancel a person's resident visa, and replace it with a temporary visa, for the purpose of facilitating future deportation.

Proposal B: A community management framework

30. As outlined above, the Act currently allows for detention and reporting requirements for individuals in certain circumstances.

31. An independent review into the detention of asylum seekers found that this practice was being essentially used as a default because no alternate options were available, and this raised "serious issues of non-compliance with New Zealand's international and domestic human rights obligations". The United Nations Human Rights Committee and the Working Group on Arbitrary Detention have also expressed concern about the use of Corrections and Police facilities, and that asylum-seekers are not separated from the rest of the detained population[10].

32. Alternative options to detention could be either, to have individuals in the community with no management in place or rely on existing RRRA provisions. There are however issues with these options. No management at all could lead to individuals absconding and INZ not being able to locate them and facilitate deportation (where possible). Conditions provided by the RRRA, however, are reasonably limited (such as residing at a specified place) and are not enforceable. The individual would have to agree to the reporting requirements. If they did not, this would leave no alternative ability to monitor the individuals. Electronic monitoring is also not an available measure under RRRA's and is not a restriction that would be appropriate to impose without a court order (so could not be built into the existing RRRA framework).

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10 https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FHRBodies%2FHRC%2FRegularSessions%2FSession30%2FDocuments%2FA_HRC_30_36_Add_2_ENG.DOCX&wdOrigin=BROWSELINK

33. A community management framework would build on existing detention and reporting requirements in the Act to ensure the management of the individuals as outlined below could be proportionate to the risk posed and reduce human rights breaches currently found in the detention of asylum seekers.

34. A community management framework as analysed in this RIS would, where appropriate, cover:

- Asylum seekers who would otherwise be liable for deportation or turnaround, that is people who claim to be recognised as refugees either at the border (including in a mass arrivals case), or where they are already in New Zealand and then make a claim.
- Individuals who are unable to be immediately deported or turned around due to non-cooperation with attempts to secure travel documents, or due to external factors such as lack of flights, transit and border restrictions, or natural disasters in the deportee's country of origin.
- Individuals who are certified to be a security risk or threat and are pending deportation (although depending on the level of risk, detention may continue to be the appropriate mechanism).

The size of the problem

35. A limitation of this analysis is that the size of problem cannot be accurately known. The proposals themselves will only directly affect those who:

- *Proposal A:* constitute a security risk or threat and cannot be deported, for example, protected persons or those unable to be deported due to border closures or lack of available flights.

  Officials have estimated this is likely to be 1-2 individuals every five years.

- *Proposal B:* meet the existing thresholds for detention under the Act:

  From 2015 to 2022 there have been 1,176 individuals who have been in immigration detention[11] (including those detained and then later released on existing Residence and Reporting Agreements or on court-imposed conditions). This is an average[12] of 147 individuals who have been in immigration detention each year.

  In addition, there are 849 individuals who have been manged by INZ on existing Residence and Reporting Agreements and court-imposed conditions in the same period[13]. This is an average of 106 individuals managed on existing and Residence and Reporting Agreements each year. It is difficult to predict how many of those individuals who have previously been detained or managed under the Act would be better suited to management under Proposal B.

11 For the purposes of this data, "detained" refers to clients managed by INZ since 2015 under section 316 of the Immigration Act. It does not include clients managed by four-hour section 312 detentions.

12 Note this is a straight-line average.

13 Under sections 315 or 320 of the Immigration Act.

The length of time an individual can require detention or management can also vary greatly. The average time an individual is in detention or management is likely to be less than 12 months. Most (81.5%) of clients in detention were detained for less than 30 days, just over 90% within three months and just over 96% within six months. Residence and Reporting Agreements entail longer periods of time for compliance to manage. For example, almost 81% of RRRAs are managed within a year.

Key stakeholders and population impacts

36. Experts MBIE consulted advised that clearly identifiable groups and communities will likely experience secondary or indirect impacts due the mere fact that these changes are being proposed in the immigration sector, regardless of whether they would ever be subject to the changes themselves.

37. Refugees and protected persons are already vulnerable groups in New Zealand. Many have faced war, persecution and oppression in their home country, and face unique challenges integrating into New Zealand society from previous trauma[14]. These proposals may have the following secondary or indirect impacts for migrants, refugees and minority ethnic communities in New Zealand:

- increased religion-, race- or immigration-based negative commentary and actions, potentially leading to an increase in hate-based crime;
- increased anxiety amongst minority ethnic, refugee and migrant communities as to whether they are welcome in New Zealand as members of the community; and
- increased uncertainty and anxiety as to their ongoing immigration status.

MBIE engagement

38. As part of this work, MBIE consulted with representatives from disproportionality impacted population groups during consultation with external experts. In particular, we consulted with Kāpuia, the NZ Human Rights Commission, Amnesty International, the Refugee Council of New Zealand, NZ Red Cross, and the Refugee and Protection Status Determination Cross-sector Joint Working Group to hear their views on potential policy options.

39. Consultation with the subject matter experts above was very constructive and informed the refinement of the options considered as part of this work, proposals that were strongly opposed by experts, in particular relating to deportation with assurances and ongoing detention are not being progressed at this time.

40. A summary of feedback received through this consultation is attached as **Appendix One,** although we note this largely focuses on options no longer being progressed.

41. We note that consultation with subject matter experts focussed on those groups likely to experience direct and indirect impact from these proposals. Public consultation through the Parliamentary process would invite a broader range of perspectives, including focus on preventing harm to New Zealand communities.

14 NZ Red Cross, Migration Scoping Report (May 2021)

Engagement to inform the Casey Report recommendations (only relevant for Proposal B)

42. As part of the independent review into the detention of asylum seekers, Victoria Casey was asked to meet with identified civil society stakeholders, including representatives of:

- The United Nations High Commission for Refugees (Canberra),
- The Immigration and Protection Tribunal
- Amnesty International Aotearoa
- The Refugee Council of New Zealand
- The Asylum Seekers Support Trust
- The New Zealand Association of Immigration Professionals
- The New Zealand Law Society
- The Auckland District Law Society

43. She also spoke with:

- New Zealand Red Cross
- Other MBIE officials (including a member of the legal team that conducts the warrant of commitment court processes for INZ, and the current refugee claimant welfare advisor);
- A representative of Te Āhuru Mōwai o Aotearoa, the Māngere Refugee Resettlement Centre.

What objectives are sought in relation to the policy problem?

44. The overall objective of these changes is to prevent harm to New Zealand communities by ensuring that the immigration system has the appropriate tools available to deport or manage individuals under the Act while ensuring that any measures are consistent with domestic law and New Zealand's international obligations, specifically human rights.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

45. When the Minister of Immigration and Cabinet considered initial advice on the national security work, the following criteria were applied:

- effectiveness at preventing harm to the New Zealand public;
- compatibility with domestic and international law;
- reputational risk, and impacts on bilateral relationships and foreign policy objectives; and
- operational feasibility and cost [ERS-21-MIN-0054 refers].

46. As the options have subsequently been narrowed significantly and no longer involve proposals that raise questions involving reputational risk, the options in this RIS have been assessed against three of the four above criteria, only excluding reputational risk, and impacts on bilateral relationships and foreign policy objectives.

What scope will options be considered within?

The options have been narrowed over the course of Ministerial and Cabinet discussions

47. Following recent terror attacks, Ministers commissioned work on legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of non-New Zealand citizens for whom national security concerns have been identified. Following targeted consultation, a range of options for change were considered Confidential advice to Government], specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and raised NZBORA issues. Ministers have agreed not to progress these options at this time. Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

48. Separately, an independent review was commissioned in June 2021 to assess INZ's operational practices relating to the detention of asylum seekers. The final report from Victoria Casey KC highlighted areas of concern and made 11 recommendations to address those, both at an operational and policy level. Three of the recommendations require legislative change. *Proposal B* in this RIS responds in part to a recommendation made in the Casey report. Following Ministerial direction, wider work on responding to the Casey recommendations is to progress separately.

Non-regulatory options have recently been implemented relating to Proposal B

49. Following the findings from the Casey report, INZ established the *Decision-making Panel on Restriction of Freedom of Movement of Asylum Claimants* which makes decisions consistent with the UN 2012 Detention Guidelines. The Panel was established to ensure integrity of the regulatory system, the welfare of asylum claimants and mitigation of risks to New Zealand when determining whether an asylum claimant should be detained.

50. When determining whether the freedom of movement of an individual liable for deportation should be restricted through detention or a Residence and Reporting Requirements, Agreement (RRRA) the following are considered:

- Which option will produce the most good, and do the least harm?
- Which option treats people fairly and without bias?
- An assessment of all the circumstances of the case, including humanitarian factors.
- Whether all appeal periods have expired (refer to s175A – when a deportation order may be served)
- Are they in some way a risk e.g. safety, health?
- Are they a flight risk (i.e. likelihood of them disappearing)?
- Whether previous contact with the individual has resulted in non-compliance.
- What the likelihood is that the individual will depart by themselves.
- Whether the individual can be relied upon to meet the reporting requirements of a RRRA.
- Whether custody is necessary and appropriate in all the circumstances.
- Whether non-custodial deportation and issue of a RRRA is more suitable.

51. As outlined below, while this has prevented claimants from being detained (particularly as a default) this does not provide an intermediary step (between RRRAs and detention) to manage risk and in particular does not provide for electronic monitoring. For the purpose of consideration of Proposal B, the process and risk management levers outlined above should be considered as the status quo.

We have identified an additional non-regulatory option which would supplement both proposals

52. These proposals focus on what to do after someone becomes a risk. There is also an opportunity to do more to prevent individuals reaching that state in the first place. Specifically, there is the ability to provide more support and services for refugees and refugee claimants to assist them with integration into the community, having a positive effect on preventing radicalisation due to isolation and stigmatisation.

53. This could be considered through the Refugee Resettlement Strategy Refresh (RRSR) and Migrant Settlement Strategy (MSS) Refresh. The RRSR is already considering how quota refugees are supported when they arrive in New Zealand and beyond. A cross-agency operational policy workstream may then be set up to deliver any programmes of work needed to achieve those outcomes, including any necessary future Budget bids.

54. Changes in this area will not in themselves solve the problem of extremism and risk to New Zealand from security threats, but it would complement current workstreams being delivered by other agencies also addressing these issues. These include the social cohesion work being progressed by the Ministry of Social Development and the multiple workstreams delivering the changes based on the recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain.

55. This non-regulatory option would not solve the problem of managing individuals under the Act who present a risk or threat to security now. However, over time it may have a positive impact in reducing the number of people who present with these risk factors in the future. MBIE is leading a cross-agency refresh of the strategies to progress this option further.

What options are being considered?

Proposal A: Cancellation of residence status

56. As discussed above, following Ministerial discussions cancellation of residence status is now the only option being considered against the status quo for Proposal A.

How cancellation of residence status would work in practice to facilitate deportation

57. It is proposed that this option would apply to individuals who had been certified by the Minister of Immigration as constituting a threat or risk to security (in line with the existing mechanism in section 163 of the Act) who cannot at that stage be deported because they have or are assumed to have protected person status or there is another barrier to their deportation such as a lack of access to flights or border closures.

58. “Security” is broadly defined in the Act to include the defence of New Zealand, protection from acts such as espionage, the prevention of any terrorist act (not defined in the Act) and the prevention of organised crime.

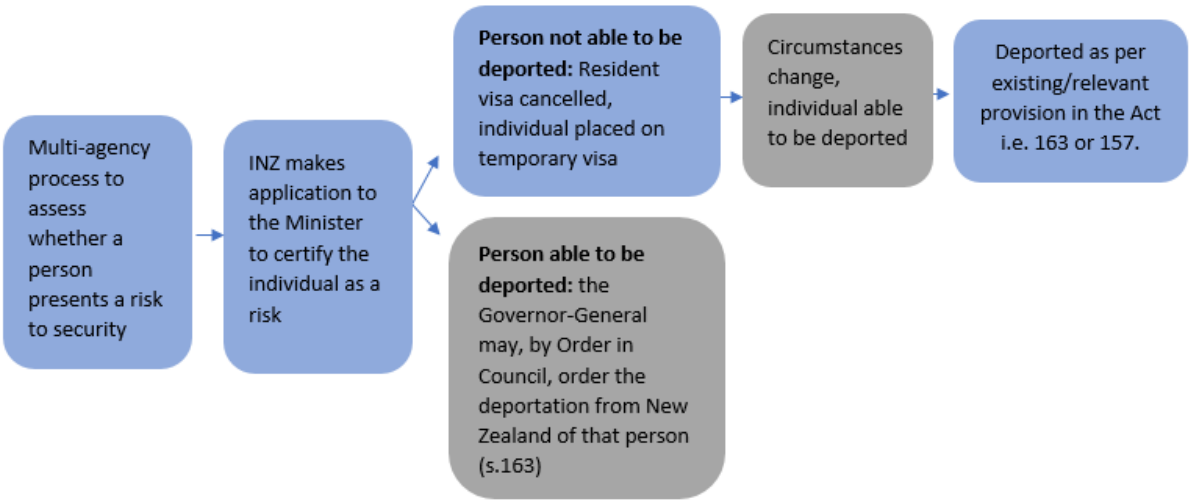
59. INZ, in coordination with partner agencies, would make an assessment of whether a person constituted a threat or risk to security. This multi-agency process would draw on relevant information relating to a person's security risk. Information that may be considered as part of an assessment may include:

- National security or defence
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

60. INZ would then recommend that the Minister of Immigration certify that the individual is a threat or risk to the security of New Zealand. The factors that may be considered in this assessment would not be prescribed in legislation as they may vary depending on the nature of the case.

61. This Ministerial certification would trigger the cancellation of the individuals resident visa.

62. An overview of how this process would work is illustrated below:



63. This option would mean that rather than waiting for someone to be able to be deported to begin the process of certification for the purpose of deportation (as under the status quo s.163), it could begin as soon as the threat had been identified. This would:

    a. facilitate timely deportation once the circumstances meaning the individual could not be deported had changed, specifically as deportation could be facilitated under a different section of the Act which would have a lower threshold:

        > Currently under section 163 of the Act, following the Ministers certification, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person. Whereas should the Minister have already certified that the person was a threat or risk to security and residence status had been revoked, the individual could be deported under a different section of the Act e.g. section 157 which allows for the deportation of a temporary class visa holder if the Minister determines that there is sufficient reason[15], but would not require an Order in Council.

    b. mean that the threshold for certification would only need to be met once and the time involved in doing this could be front-loaded into the process, ultimately reducing the length of time a risk may be in the community.

A) Effectiveness at preventing harm

<u>Preventing harm to the community</u>

64. This option would better enable future deportation in certain circumstances. For example, it could ensure that if the individual is no longer a protected person, perhaps due to regime change in the receiving State, they can be deported from New Zealand more easily i.e. under section 157 of the Act as opposed to section 163 as noted above .

65. This would also increase the timeliness of deportation, ultimately reducing the length of time that a risk is in the community. This could confer significant benefits if time saved could have otherwise enabled the individual to commit an attack of some sort.

66. Confidential advice to Government – which will be considered further as part of the upcoming Control Orders Review and also addressed in part by Proposal B. Confidential advice to Government

67. Maintenance of the law

15 Sufficient reason includes, but is not limited to concerns around character and criminal offending.

Preventing harm to the individual

68. Refugees and protected persons who have their residence status cancelled and replaced with a temporary work visa would be able to access employment, benefits and income support if necessary while they remained in New Zealand. However, they would not have access to other rights associated with being a resident, such as the right to vote; the right to travel to, enter and remain in New Zealand at any time; and to sponsor any family member for a visa.

69. We note that while refugees and protected persons would continue to have access to social welfare, those whose deportation is prevented by other means i.e. border closures or the lack of access to flights, who did not hold refugee or protected persons status may not be eligible for welfare from the Ministry of Social Development as this relies on either residence status and/or refugee/protected person status (or those who have claimed who are also lawfully in New Zealand).

70. Agencies and subject matter experts we consulted raised fewer concerns with this option, though multiple subject matter experts as well as the Ministry of Justice have noted that the use of a temporary work visa over a long period of time could have a negative impact on social cohesion if individuals do not feel secure about their immigration status. Maintenance of the law

B) Consistency with domestic and international law

71. Free and frank opinions but, as those claimants would continue to be protected in New Zealand (and have access to the same services and supports), it would be compliant with our international human rights obligations.

72. This option is consistent with current policy settings reflected in the Act that enable a person who is recognised as a refugee or protected person seeking asylum or protection who is of sufficiently bad character not to be granted residence in the first instance, but instead to be placed on long term work visas.

C) Operational feasibility and cost

73. This option would be more complex and slightly more costly to administer than the status quo, as INZ would need to continually grant temporary visas. However, no additional funding would be required.

Table One: Proposal A – Summary of analysis against criteria

Criteria	*Status quo*	Proposal A: Cancellation of residence status
Effectiveness at preventing harm	0	+ • May be effective in facilitating timely future deportation if circumstances preventing deportation change. This would reduce the length of time a security risk is in the community and therefore the potential time where they could commit an attack. • Reinforces the message that security threats will not have access to the rights and privileges of residence which could have a deterrent effect. • Maintenance of the law [redacted] • Cancellation of residence status will also reduce the rights of individuals, including in certain circumstances the ability to access welfare support which could be harmful to the individual.
Consistency with domestic and international law	0	0 • Free and frank opinions [redacted] • Would not impact protected person status.
Feasibility and cost	0	0 • Relatively easy to implement.
Overall assessment	0	+

Summary – Proposal A

- On balance, *Proposal A: Cancellation of residence class visa status* has been identified as the preferred option to increase the potential pathways available to facilitate timely future deportation.
- While this option restricts some rights associated with residence status such as being able to own a home and vote, it is only likely to apply to a small number of individuals (1-2 individuals every five years), it is consistent with existing policy settings regarding residence status for those who pose a risk and our international obligations.
- This option could facilitate timely future deportation of individuals who pose a threat or risk to security and signals that those who pose a risk to threat or security in New Zealand will not be allowed residence, which in turn could add an additional disincentive to such behaviours.

Proposal B: A community management framework

74. As outlined above, the option being considered in Proposal B is limited to establishing a community management framework available for individuals currently liable to detention under the Act.

How the community management framework would work in practice

75. The design features (outlined in the table below) of the community management framework as proposed have been designed to mirror the existing detention provisions in the Act.

Design feature	Description of proposal
Triggering mechanism	Same trigger as in section 316 of the Immigration Act, which allows INZ to apply to the District Court for a warrant for detention for an individual who cannot be deported or turned around within a reasonable timeframe (i.e. because there are no available flights, the person's identity is unknown, a decision as to security risk or threat is pending, or for any other reason (including that an asylum claim has been lodged preventing deportation).
Range of available management measures	A non-exhaustive list of measures, with some standard/minimum conditions. A District Court judge can apply any additional conditions as they see fit. Minimum/standard conditions: • A person must report to a specified place at a specified time. • If the person is a claimant, they must attend any required interview with a refugee and protection officer or hearing with the Tribunal. Additional/special conditions can include, but are not limited to: • A person must provide a guarantor responsible for ensuring compliance with conditions/reporting and any failure to comply with conditions.

Design feature	Description of proposal
	• A person must reside at a specified place. “Reside” should be defined in the Immigration Act and cannot amount to imposing a curfew of more than 12 hours per day. • Non-association requirements. • Electronic monitoring. • Any other conditions that are relevant to the management of the individual, for example, requirement to attend rehabilitation programmes.
Responsibility for determining measures imposed	District Court on application from an INZ officer (as per existing section 316).
Discretion to refuse an order	As per existing section 318, where the person has been certified a risk or threat to security, or where an INZ officer suspects the person may be a risk or threat to security, the District Court must grant an order for management (except where the application is for the wrong person, or where not granting an order would be contrary to the public interest). For all other individuals, as per section 317, the District Court may refuse to grant an order as it sees fit.
Term and review of orders	Orders have a maximum term of up to three months where they relate to imposing the special conditions of the proposed community management framework, namely the requirements of non-association and electronic monitoring. Orders imposing other conditions may be reviewed at any time on the application of INZ or the individual.
Appeal rights	There are no appeal rights proposed. Judicial review will be available, and orders can be reviewed regularly.
Consequences of non-compliance	Where an individual fails to comply with the terms of an order, INZ would be able to apply to the District Court for the imposition of further management measures, or where necessary, detention as per the existing mechanisms in the Immigration Act.

A) Effectiveness at preventing harm

76. This option would be more effective in preventing harm than the status quo in response to lower levels of risk where more restrictive measures may not be warranted. It would effectively expand and enhance the existing RRRA regime limitations by making a wider range of management tools available to the immigration officer (such as curfews and electronic monitoring). However, we note that this option may not be effective at managing high risk, and in those cases detention may still be warranted.

77. Community management may be more likely than imprisonment to reduce an individual’s risk long-term (both to themselves and others), particularly if wraparound support services are provided by appropriate government agencies. This would be particularly relevant for asylum claimants who are eventually granted refugee or protected person status (and therefore would no longer be liable to detention or management under the Act).

B) Consistency with domestic and international law, including human rights

78. This framework has been designed to respond to human rights concerns raised in the Casey Report. Because the proposals will only apply to asylum seekers while their claim for asylum is being considered, and other individuals while the process of deportation is underway, discrimination is likely to be justified. This would change when an individual no longer has an active asylum claim i.e. it has been approved or the person is no longer actively in the process of being deported. At this point an order for community management would no longer be available.

79. A community management framework will also impact on rights to freedom of association, movement and expression. The right to be free from arbitrary detention may also be engaged as the concept of detention is based only on the freedom to leave and can be fleeting. The ability to impose residence restrictions will limit any curfew imposed to less than 12 hours per day in order to reduce the likelihood of measures constituting detention.

80. A key safeguard that will help ensure infringement on the above rights is justifiable will be that the legislation requires that any management measures imposed on an individual must be proportionate to the level of risk that individual poses, and that these measures are imposed by the District Court. The availability of support services that may provide a pathway out of management and the fact that the need for and reasonableness of community management measures will be regularly reviewed (through a maximum three-month term for orders imposing the more invasive restrictions) are also important.

C) Operational feasibility and cost

81. Currently the Department of Corrections (Corrections) is the only government agency delivering electronic monitoring, and as such there would be potential efficiencies in Corrections delivering parts of this function in the future for MBIE. Confidential advice to Government

82. Confidential advice to Government

83. Confidential advice to Government

84. The annual cost estimate is based on the following assumptions:

    a. Electronic monitoring would be required for an estimated 135 individuals per year (of which up to 5 could be asylum claimants). [16]

    b. Approximately 20 individuals would be monitored at any one time.

    c. The small number of asylum claimants, may, in addition to electronic monitoring, require support comparable to the type provided in Ara Poutama Aotearoa supported accommodation.[17] For example, this could include providing furnished accommodation, depending on the particular risk of the individual.

    d. Most individuals would be subject to monitoring for 30 days or less. [18]

85. This option would impose a new function for INZ and would require approximately 6-12 months to establish (including potentially recruitment, procurement for services, staff training etc.). INZ staff who would be responsible for managing individuals in the community would require specific training as the scope of their role would change in light of having greater powers under the Act.

86. An internal implementation workstream will need to be established, with a working group comprising MBIE and INZ representatives being tasked with developing terms of reference and key milestones. Further information on that work programme will be provided in the Cabinet Legislation paper prior to the introduction of the Bill.

87. Issues relating to suitable accommodation and support are likely to arise when electronic monitoring is imposed. These are difficult to predict and will depend on the individual case. For example, there may be issues relating to finding an appropriate address for an individual subject to monitoring to reside. This may lead to a need for further support services in the future.

88. There are unlikely to be significant savings from individuals no longer in detention. This is because a large proportion of Ara Poutama costs are fixed costs that are unaffected by a reducing prison population.

89. There is also a piece of work required to determine the responsibilities of and costs to New Zealand Police.

90. Should Cabinet agree to Proposal B, more accurate costings will be available as officials work through implementation and the legislation is developed.

16 Based on the numbers of individuals detained in prison under the Immigration Act since 2015 (average of 147 each year). However, data has been updated to reflect the fact that due to operational changes since the Victoria Casey Report, there are likely to be fewer asylum claimants in detention going forward (officials estimate 0-5 per year, previously 16 per year).

17 Ara Poutama Aotearoa supported accommodation provides housing and other support for offenders with complex needs to help ease their transition back into the community.

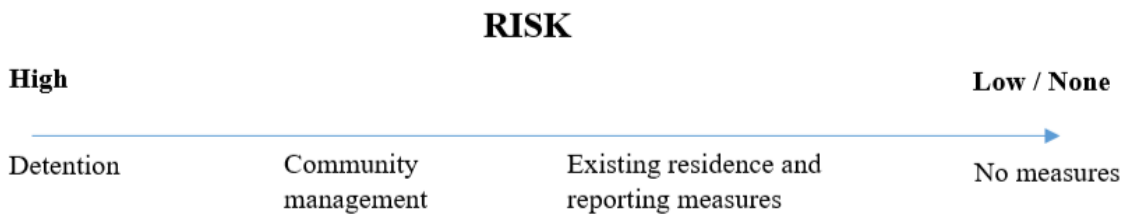
18 Since 2015, 81% of individuals were detained for up to 30 days, just over 90% for less than three months and just over 96% for less than six months . Asylum claimants are typically detained for much longer periods.

Table Two: Proposal B – Summary of analysis against criteria

Criteria	*Status quo*	Proposal B: Community management
Effectiveness at preventing harm	0	+ Likely effective (lower risk) • May not be effective at managing substantial or extreme risk (but existing detention mechanisms would be available for these cases). Would rely on tools such as electronic monitoring and curfews and existing provisions. • Could reduce an individual's risk long-term if there is access to services and support, providing a potential pathway out of management. • May create a safety risk for INZ staff or contractors in cases where they are dealing with higher risk individuals.
Consistency with domestic and international law, including human rights	0	+ Moderate • Restrictions could be designed to be proportionate to the level of risk presented. Courts would tailor restrictions to ensure proportionality. • Designed to respond to some of the human rights concerns raised in the Victoria Casey Report. Because the proposals will only apply to asylum seekers while their claim for asylum is being considered, and other individuals while the process of deportation is underway, any discrimination is likely to be justified.
Operational feasibility and cost	0	- Moderate • Confidential advice to Government • INZ staff do not have expertise – would need to build or buy the expertise. • Would require information sharing between agencies.
Overall assessment	0	+

Summary – Proposal B

- MBIE has identified *Proposal B: A community management framework* as the preferred option as it is likely to improve the status quo under the desired policy objective of preventing harm while being considered justifiable under the New Zealand Bill of Rights Act 1990.
- A community management framework adds to the existing management tools available under the Act (as demonstrated below) to ensure restrictions placed on individuals are proportionate to the risk posed (as deemed by the Courts), it also offers a more rights compliant option to manage asylum claimants who pose a risk, compared to detention options.



What are the marginal costs and benefits of the option?

Proposal A: Cancellation of residence class visa status

Affected groups	Comment.	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Immigration NZ	Additional administration costs. INZ would need to continually grant temporary visas. However, anticipated costs would be low and would not require additional funding.	Low	Medium
Wider government	N/A	N/A	N/A
Refugee and migrant communities in NZ	Could negatively impact on social cohesion.	Low	Medium
New Zealand communities	N/A	N/A	N/A
Individuals who have their residence cancelled	Impacts their rights and privileges in New Zealand including the right to vote and own a home. Those who are not protected persons, refugees or asylum claimants will	Medium - high for a small number of individuals	N/A

Affected groups	Comment.	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
	also become ineligible for welfare support.		
Total monetised costs	Additional administrative costs for INZ. Cannot be quantified at this time but are anticipated to be low.	Low	Medium
Non-monetised costs	Low	Low -Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Immigration NZ	Additional tool available to deport people more swiftly in certain circumstances.	Low-Medium	Medium
Wider government	N/A	N/A	N/A
Refugee, migrant and minority ethnic communities	N/A	N/A	N/A
New Zealand communities	May be effective in preventing harm to communities in the event that deportation may be facilitated. Could be significant benefit should timeliness prevent an attack taking place.	Low-Medium	Medium
Individuals who have their residence cancelled	N/A	N/A	N/A
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	May achieve benefits in reducing harm to New Zealand communities.	Low-Medium	Medium

Proposal B: Community management

Affected groups	Comment.	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Immigration NZ	Significant costs for organisational change to establish new function. Confidential advice to Government .	High	High
Wider government	May be wider costs to other agencies such Police support and investigation, prosecution costs, and Corrections in the event conditions are breached.	Medium	High

Affected groups	Comment.	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Refugee and migrant communities in NZ	May experience heightened uncertainties, including decline in social cohesion.	Medium	Medium
Wider NZ community	N/A	N/A	N/A
Individuals subject to community management	Restricts the freedom and liberty of those affected but less so than detention in a corrections facility.	Medium	N/A
Total monetised costs	Significant costs for organisational change to establish new function. Confidential advice to Government	High	High
Non-monetised costs	Medium	Medium	Medium
Additional benefits of the preferred option compared to taking no action			
Immigration NZ	Additional tool available to INZ to effectively manage individuals in the community. Provides a more rights compliant option for the management of asylum seekers who pose a risk.	Medium	High
Wider government	N/A	N/A	N/A
Refugee and migrant communities in NZ	N/A	N/A	N/A
Wider NZ community	May result in reduced harm to communities as risk is more effectively managed.	Medium	Medium
Individuals subject to community management	Provides greater liberties and freedoms than being detained in a corrections facility, however more restrictions on liberty and freedoms that a RRRA.	N/A	N/A
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits	May achieve benefits in reducing harm to New Zealand communities.	Medium	Medium-High

Section 3: Delivering an option

How will the new arrangements be implemented?

Legislative Implications

91. The proposed options which depart from the status quo would require legislative change to implement. Confidential advice to Government

Implementation

Proposal B: A community management framework

92. A minimum of 6-12months will be required for INZ to put in place a new community management function and to undertake procurement for services. An internal implementation workstream will need to be established, with a working group comprising MBIE and INZ representatives being tasked with developing terms of reference and key milestones. Further information on that work programme will be provided in the Cabinet Legislation paper prior to the introduction of the Bill.

93. There is also a piece of work required to determine the responsibilities of and costs to Corrections and the New Zealand Police.

94. It has been recommended that if Proposal B is progressed Cabinet agree to INZ working with community representatives in the design of any wraparound services available under the community management measures.

Implementation risks

95. Proposal B would create a new function for INZ under the Act that would be a change in business-as-usual activities. INZ does not currently have expertise in the management of individuals in the community (in relation to the provision of accommodation, mental and other health services and pastoral support). These services (for example, the administration of an electronic monitoring regime) would likely need to be contracted out.

96. There is a risk that there is not a suitable market available to procure these services, or suppliers may not be available at the desired implementation date. This risk may be mitigated by INZ/MBIE conducting an early procurement process to identify potential providers, including early engagement with providers who currently provide similar services in the community (such as supported accommodation providers in Corrections settings). Overall, we consider that there is an available market to deliver services of this nature, as shown through existing contracted providers that deliver similar services in Corrections settings, as well as global companies that are active in Australia.

97. In addition to the capability risks above, there is a broader risk that implementation of the community management option would not be possible if additional funding is not secured (even if legislation is passed). This may result in a delay between when the legislation is passed, when implementation may commence, and when the proposals may come into effect. There is also a risk that the any new powers provided through legislation would not be able to be used if additional funding is not secured.

Communications

98. MBIE recommends that no public announcements on the proposed changes are made until the enabling legislation is approved for Introduction.

99. MBIE has also recommended that before an announcement is made, officials are empowered to work with selected stakeholders that provide support services and information to affected communities. This engagement will take the form of confidential discussions regarding the content of those announcements, and providing collateral for the organisations to use such as fact sheets and Questions and Answers sheets. This will set the groups up to support their communities if negative impacts are felt, and be a

source of accurate information explaining what is happening and how they can be involved – countering the spread of harmful misinformation early.

100. Many of these groups are already aware of this work at a high level as representatives of their organisations are members of Kāpuia, the Immigration Reference Group, or other stakeholders and subject matter experts that have already been consulted on this workstream. With Cabinet's approval, MBIE officials will provide the Minister of Immigration with an Action Plan setting out how this proactive engagement will take place and with whom, to be activated when an announcement is forthcoming.

How will the new arrangements be monitored, evaluated, and reviewed?

101. Any review or monitoring mechanisms will aim to ensure that the appropriate processes have been implemented and that the desired policy objectives are being achieved. We propose that monitoring and review arrangements would take place in two parts:

- **Part One:** MBIE would undertake an initial implementation review 18 months after new arrangements have gone live. This would assess the appropriateness and effectiveness of new structures and processes and identify any areas for improvement (such as agency roles and responsibilities). A report would be provided to the Minister of Immigration with any recommendations identified through the review.
- **Part Two:** a comprehensive review to assess whether the new arrangements are achieving the desired policy objectives 5 years after new arrangements have gone live. It may be appropriate for this review to be completed by a third party for independence and transparency, similar to the recent Victoria Casey KC review into the detention of asylum seekers. A report would be provided to the Minister of Immigration with any recommendations identified through the review.

102. We note that the extent of this review will be subject to funding decisions taken alongside funding decisions for Proposal B, and that should funding not be secured this could limit the ability for successful evaluation of the proposals.

Key measures that could be assessed (subject to what options are progressed)

103. INZ/MBIE will work with partner agencies to monitor and evaluate the impact of proposed options. Potential key performance measures are outlined in the table below:

Proposal A: Cancellation of residence status
• Number of applications to the Minister of Immigration to certify an individual as a threat or risk to security (including those that result in an Order in Council). • The length and number of temporary visas granted in place of a resident visa.
Proposal B: Community management
• Number of individuals subject to community management or detention measures (compared against international jurisdictions per capita). • The average length of time that individuals are subject to community management measures (compared against international jurisdictions per capita). • Number of breaches of conditions (and nature of breaches), including response time to any breaches. • Number of individuals who demonstrate a de-escalation in risk (i.e. they are no longer considered a risk and in need of management).

Appendix One – Summary of feedback received through consultation with subject matter experts

Consulted groups were provided with a discussion document summarising the three categories where changes might be proposed (deportation, detention and procedural improvements). Hui were then held across March and April 2022 to discuss their comments and written submissions received. The following table summarises the key points made. In most cases, these points were made by more than one group.

Subject area	Summary of main points in feedback received
Problem definition	• The risk to NZ does not just come from those subject to the Immigration Act. The focus needs to be on addressing the risk all New Zealanders pose, including citizens. • Targeting refugees and other groups without citizenship would be discriminatory in nature and will in fact stigmatise those groups. • Quota refugees get support, but convention (asylum) refugees do not. It comes down to funding, and the money would be more effective if it was spent on services than detention/deportation and the subsequent legal battles. • A key failing for migrant communities is a lack of understanding of their rights, what support is available and where to access it etc. There's a lack of awareness and cultural understanding in the professionals and govt departments working in this space, a lack of availability of legal professionals, and therefore they see their needs and support as being unimportant and forgotten about. This exacerbates all pre-existing issues/conditions that lead to problems. • The failings in the *Samsudeen* case were not ones arising from the immigration legislation/landscape, they were failings in the criminal justice system and mental health system more widely. The *Samsudeen* case, from Amnesty International's perspective, actually showed the immigration legislation worked, not that it failed. • We need to be looking at proactive work being done in the white nationalist terrorism space. The policy problem definition needs to address the acknowledged danger there.
Consultation process	• Stakeholders want more time to consult with deep discussions with all communities concerned. • Need to engage with communities who deliver the support services and take a whānau ora approach.

MBIE's stewardship role in the immigration system	• That there is a need for more support for migrants and refugees in particular, to address the trauma they have suffered and support integration into New Zealand communities, to prevent radicalisation and the escalation in risk. Those consulted would welcome MBIE efforts to provide more of a stewardship role in this area.
	• Response to question of MBIE stewardship roles and where the gaps are (workshop undertaken with multiple stakeholders presented):
	  ○ We have a skills shortage in the de-radicalisation workforce, with regard to capability, capacity and development. We have to get resources from Australia because they don't exist here. They don't exist in Corrections.
	  ○ Need seed funding to community groups to provide mosques and libraries – places people go to learn how to interact in life as a Muslim, not as an outcast.
	  ○ Example of RAS funding sport for kids for many years as a really positive and pro-social way to provide integration and cohesion.
	  ○ Link to MSD social cohesion work.
	  ○ Refugee family reunification policy could use some work. The whole point to allow family members to come to NZ is to provide the support needed for integration and rebuilding a life. But there's a low number for how many people can come in, it takes so long for that to happen and they struggle in the meantime.
	  ○ Need funding for lawyers and professional advice for the sponsor. Practitioners are finding assessors are putting people through the wringer as a sponsor (including by needing to provide assurance of housing for a long time period), when they don't know their rights or what information/support is available.
	  ○ Need Corrections care model to be developed and implemented.

Impact on affected communities	• Any time you make changes to address risks posed by migrants, you feed the fire of racism against ethnic minority communities. • Great care needs to be taken in how this is messaged, and how support services for those communities are prepared to be able to address the backlash that will inevitably arise against our Muslim and migrant communities.
Deportation	• Any changes to residence status or potential for deportation will have a destabilising effect on refugee and migrant communities. This destabilising effect will have the opposite outcome from what you're intending as it will harm mental health and inhibit integration and a sense of belonging, which fuels isolation and radicalisation. • Deportation with assurances is contrary to human rights, including those enshrined in international law and NZBORA. The practice of deportation with assurances essentially waters down the global prohibition against torture and commitment to international laws and rules to prevent torture. • Any monitoring is ineffective as it always relies on any diplomatic assurances and relationships with the country. Even cases of monitoring being delivered by the Red Cross have failed as torture has happened to the detainee. This is even less effective if the individual is at large in the community and not in detention (as for extradition). • With diplomatic assurances there's a logic problem. If you're found to be a refugee or a protected person then that decision necessarily acknowledges that the state has failed to provide protection to you and cannot provide protection to you. How could you trust assurances from a failed state?

Subject area	Summary of main points in feedback received
	• Assurances are not binding (they're diplomatic), and they fail. For example, International relations • Assurances have been used for deportation and extradition internationally without success – including cases of torture being used. There was a case where an individual was deported with assurances and then months later was interviewed in the home of an Al Qaeda stronghold – so actually became far more of a security risk after deportation than before. • International relations • Amnesty International has indicated they would fund a public campaign against this measure, were it to be progressed. • International relations • International relations • The same body should be able to deal with cancellation of refugee status, cancellation of residency, and cancellation of citizenship. The citizenship question shouldn't go to DIA. • There is an anomaly in the Act of issues of bad faith. If someone puts themselves in harm's way in order to force the need for protected person status (i.e. making a public disclosure of Tamil tiger status) the issue is not a protected person one in effect – it's an immigration one as they're doing it for an immigration purpose. If it's in the Act that the RSU can make a determination that someone is acting in bad faith, then why isn't it open to the IPT? • Need to consider ring-fencing the deportation liability. If someone is in NZ from 3 years of age, doesn't apply for citizenship, then gets radicalised at 33. Should they be sent overseas?
Management / detention	• Options to better provide for the security and monitoring of refugee claimants (colloquially known as asylum seekers) in the community who would instead (under the status quo) be held in remand cells under a Warrant of Commitment is preferable, particularly if wrap around support services are included. • There is scope to look at some improvements in this space, particularly in the community management end. More community-based responses and management would be welcomed by migrant communities. Culturally appropriate faith based mental health activities should be part of the wrap around support. • Detention of refugees is contrary to human rights, including those enshrined in international law and NZBORA. • In the two years prior to COVID NZ detained 54 of the 500/600 people who claimed refugee status, mostly because they couldn't establish their identity. 48 were held in prison, rather than the Mangere camp. • Detention could be an available option for particular cases where a risk of harm to the public is established. There's no breach of rights there if due process is respected as your right to liberty doesn't trump other people's rights to safety. If they need to be detained forever, that's a political call as to whether that's palatable. • With *Samsudeen*, there were detention options that weren't covered off by the Crown. More stringent sentencing options/conditions were available in his High Court case that weren't imposed. There also wasn't a mental health referral. • Any decision around detention or any other option on the basis of responding to failures from *Samsudeen* is premature until the IPCA/Inspector General/Corrections Inspectorate review is published and then the coronial inquiry after that. • Zaoui case raised concerns over detention being used in a civil system when it better belongs in the criminal system. What does national security concern in this case mean? When we look at Zaoui, the Crown used quite a wide definition that didn't actually pose a physical risk to New Zealanders. Do we want to capture Zaoui and a Russian oligarch with this? If not, ring-fence to violent outcome only. • Judicial orders requiring people to attend programmes, be tagged, reside at an address etc are still not required by citizens but are required by migrants. So again, this could well be considered discriminatory. At the high end, people are subjected to orders in the basis of suspicion when their counterparts are not. And it will look like people of colour are being targeted. In many countries these measures are used on people of colour from a Muslim minority placed on different conditions than the people around them which becomes extraordinarily stigmatising and therefore counter-productive. All restrictions on human rights needs to be necessary and proportionate. And what is necessary and proportionate for a migrant may be different to those on a non-migrant. For example, work restrictions. But it's hard to see how any of those measures that we're considering that are necessary and proportionate when they're not necessary in the citizenship space.
Procedural improvements	• Procedural changes work when they're based on evidence and research, not legislative requirements. • Rights of appeal and procedural fairness must be maintained, but if they are then improvements to the timeliness of cases would be welcomed by all parties. • *Samsudeen* timeline of IPT hearings is available on their website (case reference 900008). There were 12 teleconferences and the IPT was prioritising it because of the risk. • Expedited hearings is possible – would make sense to allow any party to apply for an expedited hearing on the grounds of the safety of themselves or another individual. • Legal aid is holding things up – won't give a timely answer as to whether they are covered or not. Could consider a requirement for legal aid consideration prioritisation too.

Subject area	Summary of main points in feedback received

	• The hold up in procedural timeliness is not the IPT. They see through a case in 6 months.4 months of that is lawyer prep time.
	• To get to the SC takes 6 hearings due to the need to seek leave and be substantively heard if leave is granted. Consider this scenario:
	  ○ Decision is made.
	  ○ Application for leave to appeal to the HC is heard (declined). This is an interlocutory proceeding.
	  ○ Leave is sought to appeal that decision not to give leave to appeal (appealing an interlocutory matter).
	  ○ There's a hearing for application to seek leave, if it's allowed this time then it will progress on appeal with an additional two hearings in between. If it's declined, then that's an additional two hearings that weren't necessary.
	• There used to be a bar on interlocutory appeals, which the Court of Appeal changed a few years back. Could reinstate that.
	• No cross-over between special advocates for the use of National Security Information and immigration specialists. Need to have an immigration specialist appointed PLUS a special advocate.

Regulatory Impact Statement: Strengthening migrant exploitation offences

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Proposal	To make it an offence for a New Zealand-based employer, their agent, or any person involved in the recruitment process or dealing with the intending migrant, to charge a premium for employment irrespective of whether an employee/worker has commenced active employment and if the payment is made offshore, to address migrant exploitation
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	4 September 2024

Problem Definition

The migrant exploitation offence provisions in the Immigration Act 2009 (the Act) do not currently capture a situation where a premium is required before employment commences, if the payment is made offshore, and situations where the premium is requested by a person engaged on behalf of the employer.

Executive Summary

The charging of premiums for employment is an increasing form of migrant exploitation. From financial year (FY) 2021/2022 to August FY 2024/2025, there have been over 640 allegations of premiums paid, Free and frank opinions

Under section 351(1)(a)(iii) of the Act, an offence is be committed if an employer, while allowing a temporary worker to work in their service, is responsible for a serious contravention of the Wages Protection Act 1983 (WPA) in respect of the employee or worker.

As it currently stands, section 351(1)(a)(iii) does not capture situations where a premium is required before employment commences, where the premium is paid offshore, or when it is requested by a person engaged on behalf of the employer. These gaps significantly limit the available methods within the immigration system to address migrant exploitation and hold exploitative employers to account.

This Regulatory Impact Statement (RIS) outlines the proposal to make it an offence for a New Zealand-based employer, their agent, or any person involved in the recruitment process or dealing with the intending migrant, to charge a premium for employment,

irrespective of whether an employee/worker has commenced active employment and if the payment is made offshore.

The overarching objective of this suite of proposals is to enhance the integrity of the immigration system. The sub-objectives for this particular proposal are to:

- improve MBIE's ability to address migrant exploitation,
- close a gap in our migrant exploitation offences.

To achieve this, we have considered two options:

- to either remain within the status quo, or
- to amend the Act to make it an offence for a premium to be paid before employment (and if offshore) ***(preferred)***. As section 351 only relates to an *employer* committing the offence, this could be achieved by inserting a new section to cover all parties (e.g. a New Zealand-based employer, their New Zealand agent, or any person involved in the recruitment process or dealing with the intending migrant).

While there are other options for recourse (i.e. civil) for this form of exploitation, there are no non-legislative options that will provide a criminal remedy for the identified gap.

The two options have been compared against the following criteria:

- addresses a gap in the immigration regulatory system;
- effective risk management;
- protection of workers; and
- ease of implementation.

This preferred option will help address cases of migrant exploitation, strengthen the integrity of the immigration regulatory system, enable the better management of immigration risk, and demonstrate that New Zealand is upholding its international obligations, specifically with regard to the 2000 United Nations Convention against Transnational Organized Crime, and its protocols focused on combatting people-smuggling and trafficking in persons. It also supports the New Zealand National Party and New Zealand First Coalition Agreement undertaking to "commit to enforcement and action to ensure those found responsible for the abuse of migrant workers face appropriate consequences".

Confidential advice to Government

However, there will be a case for prosecution if it can be proven that some/all of the premium has been passed on to the New Zealand employer or recruiter.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Amendment Bill will be in place before the end of 2025. These timeframes mean that external stakeholder consultation before Cabinet decisions has been limited to informing key stakeholders through one-on-one meetings and receiving their initial feedback on the proposals. Engagement on an

Exposure Draft of the Bill will occur later in 2024 ahead of Cabinet Legislative Committee decisions.

MBIE informed the following stakeholders of the proposals between 29 July and 9 August 2024:

- BusinessNZ
- the Employers and Manufacturers Association
- the Council of Trade Unions
- The Casey Review Focus Group
- the New Zealand Law Society
- the Office of the Ombudsman
- Immigration New Zealand's (INZ) Immigration Focus Group.

While we have not had time to undertake significant external engagement, we have received detailed comments from agencies and key immigration and employment exploitation regulators, and feedback has been incorporated into this RIS.

Responsible Manager(s) (completed by relevant manager)
Stacey O'Dowd *Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE*  4 September 2024* *Information was updated in November 2024[1]

Quality Assurance (completed by QA panel)	
Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS *Immigration Amendment Bill (System Integrity proposals).* The panel has determined that each RIS provided meets the quality assurance criteria.

[1] Updated information is set out in paragraph 11 and 12, and Annex One: *Costs and benefits of preferred option*.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The purpose of the immigration system

1. The immigration system regulates the flow of people into New Zealand. The purpose of the Act is to "manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals".

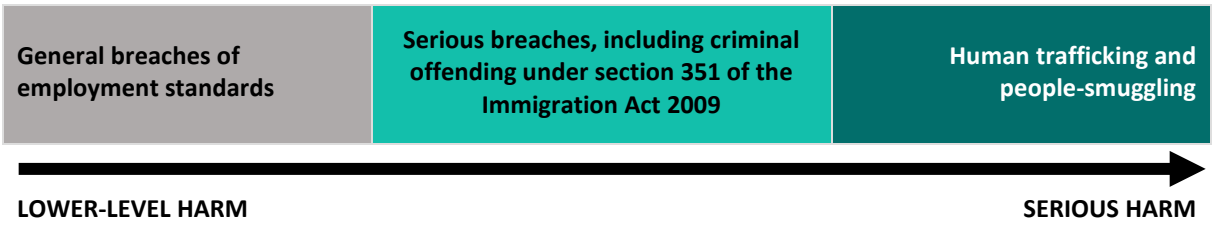
2. Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act.

Charging premiums for employment is an increasing form of migrant exploitation

3. Temporary migrant worker exploitation is a serious problem in New Zealand, with agencies receiving increasingly complex cases of exploitation to investigate and address. Exploitation is understood to mean the breach of employment standards which are the standard requirements for all workers in employment law (regardless of immigration status) prescribed in the Holidays Act 2003, the Minimum Wage Act 1983 (the MWA) and the WPA.

4. Employment standards prevent employers from underpaying wages, or not paying wages; unlawfully deducting wages; and charging premiums to work. Breaches of employment standards vary, as shown in the figure below.

Figure 1: Spectrum of employment standard breaches



5. Under the Act, section 351 contains offence provisions for employers and defines exploitation of unlawful employees and temporary workers as, while allowing such employees to work in the employer's service, being responsible for serious breaches of the Holidays Act 2003, the MWA, and the WPA in respect of that employee.

6. Compliance with the Act is important to manage immigration and security risks and enhance New Zealand's reputation as a safe working migration destination. Employers have legal responsibility to ensure that their employees are legally entitled to work for them. INZ is in regular contact with employers to ensure they understand their employment and immigration obligations.

7. Recently, steps have been taken to strengthen tools and enforcement measures to address instances of migrant exploitation. In July 2021, the Migrant Exploitation Protection Work Visa (MEPV) and new reporting tools were launched. These initiatives help to address migrant exploitation by encouraging people to report instances of exploitation and provide migrants with a pathway to quickly leave exploitative situations.

8. Between the MEPV's inception and the end of July 2024, MBIE granted over 2,600 MEPVs. Most (2,067 or 86 per cent) were granted in the financial year (FY) to 30 June 2024 (FY 2023/24), and MBIE received over 3,925 complaints of migrant exploitation during FY 2023/24.

The Act imposes penalties for migrant exploitation…

9. The exploitation of temporary migrants or those working unlawfully is a criminal offence under section 351 of the Act and carries penalties under section 357(3) and 357(4). Such convictions may result in the employer becoming liable for deportation from New Zealand if certain criteria are met.[2]

10. Any person convicted of an offence against:

    10.1. section 351(1)(a) is liable to imprisonment for a term not exceeding seven years, a fine not exceeding $100,000, or both (under section 357(3)).

    10.2. section 351(1)(b) is liable to imprisonment for a term not exceeding five years, a fine not exceeding $100,000, or both (under section 357(4)).

11. The following matters may be taken into account in deciding whether a failure, default, or contravention is serious (referred to in section 351(1)(a)): the amount of money involved; whether it comprises a single instance or a series of instances; if it comprises a series of instances, the number of instances and the period over which they occurred; whether or not it was intentional; whether the employer concerned has complied with record-keeping obligations imposed by the Act concerned; and any other relevant matter.[3]

12. The following are examples of actions of the kind referred to in section 351(1)(b): taking or retaining possession or control of a person's passport, any other travel or identity document, or travel tickets; preventing or hindering a person (from having access to a telephone; using a telephone; using a telephone privately; leaving premises; or leaving premises unaccompanied); or preventing or hindering a labour inspector (within the meaning of the Employment Relations Act 2000) from entering or having access to any place or premises to which he or she is entitled to have access under any enactment.

[2] If the exploiter is a residence class visa holder at the time of conviction (that is, has not gained citizenship), and the offence is committed not later than ten years after they first held a residence class visa, they are automatically liable for deportation under section 161(1)(d) of the Act.

[3] Section 351(3)) of the Act.

…but the current wording of section 351(1)(a)(iii) of the Act does not capture all situations where exploitation occurs

13. Under section 351(1)(a)(iii) of the Act, an offence will be committed if an employer, while allowing a temporary worker to work in their service, is responsible for a serious contravention of the WPA in respect of the employee or worker.[4]

14. Section 12A of the WPA notes it is unlawful for employers or a person engaged on behalf of the employer to charge an employee, or prospective employee, a premium (fee) for employment. This includes charging an employee money in exchange for giving them a job. The wording in section 12A prohibits not just the receipt of a premium but also the seeking of a premium.

15. Section 351(1)(a)(iii), as currently worded, does not capture a situation where a premium is required ***before*** employment commences, and where a premium is required by someone other than an employer. The current wording, when combined with the definitions of 'employer', 'employee', and 'work' in the Act, only captures situations where an unlawful or temporary worker is working in the employer's service ***at the time*** the premium is required.

16. No criminal offence is technically committed if New Zealand-based employers, or their agents, or other people dealing with an intending migrant, demand a premium (including if paid offshore) before employment actively commences.

There is nothing to indicate that the policy was intended to be limited in this way

17. The creation of section 351(1)(a)(iii) was a consequence of New Zealand's decision to sign up to the United Nations (UN) Convention against Transnational Organised Crime (TOC).

18. In December 2000, New Zealand signed up to both the TOC and the UN's Protocols on the Smuggling of Migrants and Trafficking of Persons. The TOC Bill 2002 followed, containing amendments to the Immigration Act 1987 and provisions that were needed in New Zealand law to meet its obligations under the Convention.[5] The Bill's 'General policy statement' notes that "amendments are made to the Immigration Act 1987 to expand the range of offences available under that Act to deal with the exploitation of migrant workers".

19. Part 3 of the Bill (clause 21) refers to the insertion of section 39A into the Immigration Act 1987, covering exploitation of people not legally entitled to work.[6] On 18 June 2002, section 39A(1)(a)(iii) was introduced into the Immigration Act 1987 through section 5 of the Immigration Amendment Act 2002.[7] When the Immigration Act 2009 was enacted, section 39A(1)(a)(iii) became section 351(1)(a)(iii).

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[4] Under section 12A(1) of the WPA, "no employer … shall seek or receive any premium in respect of the employment of any person…". www.legislation.govt.nz/act/public/1983/0143/latest/DLM74853.html.

[5] New Zealand Historical Bills. *Transnational Organised Crime Bill* (2002). Transnational Organised Crime Bill 2002 (201-1) (austlii.edu.au).

[6] Page 9, Clause 21. New Zealand Historical Bills. *Transnational Organised Crime Bill (*2002). Transnational Organised Crime Bill 2002 (201-1) (austlii.edu.au).

[7] Immigration Amendment Act 2002 No 22. Immigration Amendment Act 2002 No 22 (as at 29 November 2010), Public Act – New Zealand Legislation.

20. There is no indication that the policy intent behind section 351(1)(a)(iii) was to limit its application to situations where workers are actively working for their employer at the time they are required to pay a premium.

If the status quo continues immigration regulators will continue to be unable to prosecute for premiums charged prior to the commencement of employment

21. This gap significantly limits the available methods within the immigration system to address migrant exploitation and hold exploitative employers, or their agents, or other people dealing with an intending migrant, to account.

22. From FY 2021/22 to August FY 2024/25, there have been 640 allegations of premiums paid (frequently in conjunction with other immigration and employment offences). Often, premiums are paid offshore by migrants before the migrant has arrived in New Zealand and commenced employment. These instances include several scenarios that are not captured under current wording in the Act:

    22.1. Prospective employee/migrant is offshore and pays a premium to secure employment;

    22.2. Prospective employee/migrant is offshore with an employment agreement and hasn't commenced active employment and pays a premium;

    22.3. Prospective employee/migrant is onshore and pays a premium before commencing active employment;

    22.4. A premium is required (including in the situations above) by an employer's agent, or any other person involved in the recruitment process or dealing with the intending migrant.

23. The inability to prosecute these forms of exploitation has the potential to damage New Zealand's international reputation as a safe place to work and our ability to attract and retain the migrant workers New Zealand wants and needs.

24. Currently, there is no criminal recourse for this specific offending. There may be a civil remedy in the future – Free and frank opinions

What is the policy problem or opportunity?

Charging premiums before and during employment is a common form of exploitation, and the number of allegations of premiums being charged has significantly increased

25. From FY 2021/22 to August FY 2024/25, there have been 640 allegations of premiums paid. A further breakdown each year is depicted in **Table One** below.

Table One: *Migrant exploitation complaint cases with allegations of premiums paid*

Financial Year (FY)	Number of complaints received
2021/2022	105
2022/2023	120
2023/2024	376
2024/2025 *(as at 29 August 2024)*	39
Total	**640**

26. Both employment and immigration regulators are also seeing increasing cases of recruitment agents/agencies charging premiums for jobs, in addition to employers.[8]

27. Free and frank opinions

Case Study

28. Maintenance of the law

Section 351(1)(a)(iii) does not capture a situation where a premium is required before employment commences and if the payment is made offshore

29. The current wording of section 351(1)(a)(iii) Act does not capture situations where a premium is required before employment actively commences, if the payment is made offshore, and if the payment is required by someone other than an employer. This limits the available prosecution methods for addressing migrant exploitation.

30. Work has been undertaken to combat the paying of premiums in other aspects of the system:

    30.1. The AEWV application forms/declarations make it clear that charging a premium is not acceptable – this also includes that paying/charging a premium may result in revocation of accreditation and mean that a person is not eligible for an MEPV.

    30.2. INZ has the ability within immigration instructions to create more stringent criteria in order for someone to obtain a visa. Confidential advice to Government

    30.3. The LI can take enforcement action under civil jurisdiction, including penalties against the employer (either at the Employment Relations Authority or Employment Court). This would lead to the offender being on INZ's stand-down list. Depending on the case, and if the breach was serious enough, the LI could seek declaration of breach, pecuniary penalties[10], compensation order, and/or a banning order[11].

[8] Case summary: *Unlawful premiums on employment.* 2017. Unlawful premiums on employment: Case Summary - Copeland Ashcroft.

Confidential advice to Government

[10] These penalties include up to $50,000 for an individual or the greater of $100,000 or 3x the financial gain for a corporate person.

[11] Prevents a person (individual or corporate) from operating as an employer. INZ is also able to seek a banning order in certain circumstances.

31. The Employment Court found that the demand for, and receipt of, a premium for employment **offshore** is not fully an impediment to New Zealand employment legislation (for the purposes of the WPA). The Employment Court has recently commented that it might already be possible for the WPA to cover premiums paid offshore, but the law is unclear in this area. Confidential advice to Government

32. There is an opportunity to strengthen the integrity of the immigration system by broadening the offence provisions in the Act to clarify that it is an offence to charge/require a premium for employment irrespective of whether an employee/worker has commenced active employment, if the payment is made offshore, and/or if the payment is required by someone other than an employer.

In addition, there is also the opportunity to consider increasing the maximum liability under the penalty provisions in the Act

33. As set out in paragraph 9, migrant exploitation or those working unlawfully is criminalised under section 351 of the Act and punishable with up to five or seven years imprisonment, a fine of up to $100,000, or both.[12] Such convictions may result in the employer becoming liable for deportation from New Zealand if certain criteria are met.

34. Given the scale of premiums being charged, Confidential advice to Government

Stakeholders impacted by the problems

36. We have identified the following affected groups and the nature of their interest:

    36.1. **Regulated group:**

    - Migrant workers impacted by migrant exploitation and who have been subject to providing premiums upon commencing employment or as a requirement for securing employment.
    - Employers (including their agent(s) or any person involved in the recruitment process (onshore or offshore)) of migrant workers who commit these offences.

    36.2. **Regulators:**

    - MBIE's ICI team, which undertakes investigations and compliance activities for instances of non-compliance with the Act.
    - MBIE's LI, which is responsible for upholding employment standards and works closely with ICI.
    - MBIE Legal, which advises on prosecution cases and investigations.

[12] Section 357(3) and 357(4) of the Act.

- MOJ, which has a regulatory oversight function and advises on infringement regimes/penalties. The majority of criminal cases go through the District Court, with very serious crimes to the High Court.
- The correctional system, designed to keep society, at large, safe by separating them from individuals who have committed crimes.

36.3. **The public:** Confidence that instances of migrant exploitation can be enforced.

37. MBIE has consulted with regulators on the policy problem. Regulators were supportive of the proposal due to its aim to address serious instances of migrant exploitation.

38. The population group mostly impacted are migrants who are victims of exploitation. The other group is New Zealand-based employers of migrant workers who are committing these offences but have not yet been prosecuted.

39. We consulted with Ministry for Ethnic Communities, which had no concerns with the proposal. We also held initial discussions with key stakeholders (BusinessNZ, the Employers and Manufacturers Association, the Casey Review Focus Group, the New Zealand Law Society, the Immigration Focus Group, and the Office of the Ombudsman) on the proposals. All stakeholders were supportive of addressing the problem identified. MBIE will undertake more substantive engagement with stakeholders on an exposure draft following Cabinet policy decisions.

What objectives are sought in relation to the policy problem?

40. The overarching objective across the suite of proposals is to enhance the integrity of the immigration system. The sub-objectives for this particular proposal are to:

40.1. To address a gap in the offences (Part 10) of the Act[13] - specifically where New Zealand-based employers or their agents demand a premium (including if paid offshore) before employment actively commences can be addressed.

40.2. To improve MBIE's ability to address instances of migrant exploitation, manage risk to the integrity of the immigration regulatory system and uphold New Zealand's international obligations, specifically the UN TOC.

41. These objectives align with the:

41.1. Government's commitment (as expressed in the New Zealand National Party and New Zealand First Coalition Agreement) to greater protections against migrant worker exploitation through "enforcement and action to ensure that those found responsible for the abuse of migrant workers face appropriate consequences".

41.2. Government's migrant exploitation action plan, which sets out New Zealand's approach to addressing exploitation through internationally-recognised pillars of prevention, protection, and enforcement.[14] Partnership is fundamental to successfully achieving the aims of this plan and includes government, unions, businesses, civil society organisations, and international partners.

41.3. Government's commitment to ensure that regulatory systems remain fit-for-purpose and work well.

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[13] Part 10 of the Act covers offences, penalties, and proceedings.

[14] Combatting Modern Forms of Slavery. MBIE. Plan of Action against forced labour, people trafficking and slavery 2020-2025.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

42. The following criteria, which support the objectives identified for this proposal (identified above in paragraph 41), have been developed to guide the analysis:

    42.1 **Addresses a gap in the immigration regulatory system:** Option strengthens the integrity of the immigration system and enables MBIE to identify, prosecute, and penalise employers and related actors for charging premiums, irrespective of whether the prospective employee has commenced employment.

    42.2 **Effective risk management:** Option strengthens the responsiveness of the immigration system by managing the risk, and addressing instances, of migrant exploitation. This includes the prevention of further risk of undermining international commitments and obligations, and ensures those engaging with the immigration system adhere to compliance requirements.

    42.3 **Protection of workers:** Option provides safeguards for workers from instances of migrant exploitation and improves social outcomes.

    42.4 **Ease of implementation:** Option supports a seamless implementation process and is feasible operationally, with limited additional costs for government.

What scope will options be considered within?

43. As part of the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill, the Minister of Immigration has agreed to address a gap in the offence provisions part of the Act specific to premiums charged for employment offshore and prior to commencing employment) to address migrant exploitation.

44. Options have been considered within the parameters set out in the purpose section of the Act.

45. There are no non-regulatory options being considered as the problem identified is due to a regulatory failure identified with current legislation.

What options are being considered?

46. Two options are being considered:

    46.1 **Option One:** Status quo – Continue with current offence provisions. This means MBIE ICI would continue to be unable to prosecute employers who require a premium to be paid for employment prior to work commencing ***(not recommended)***.

    46.2 **Option Two:** Amend the Act to make it an offence for a premium to be paid offshore and prior to employment commencing, including those paid to an employer's agent or someone else involved in the recruitment process ***(recommended)***. As section 351 only relates to an *employer* committing the offence, this could be achieved by inserting a new section to cover all parties (e.g. a New Zealand-based employer, their New Zealand agent, or any person involved in the recruitment process or dealing with the intending migrant).

47. Confidential advice to Government However, there are no non-legislative options that could provide a criminal remedy for the identified gap.

How do the options compare to the status quo/counterfactual?

48. **Table Two** sets out analysis of the two options against the criteria established under paragraph 42.

Table Two: *Analysis of options against key criteria*

	Addresses identified gaps in the immigration regulatory system	Effective risk management	Protection of workers	Ease of implementation	Overall assessment
Option One: Status Quo – Continue with current provisions	**-1** Option One will not address the gap in the immigration regulatory system. MBIE ICI is unable to prosecute premiums charged prior to active employment and while the employee is offshore. This option also limits migrant workers from seeking criminal recourse for this specific offending. Confidential advice to Government [redacted]	**-1** Option One will not support effective risk management. Remaining within current offence provisions will not safeguard migrant workers and prevent them from financial exploitation. This option will not strengthen the responsiveness of the immigration system, rather, it has the potential to increase the risk of non-compliance and undermine New Zealand's international commitments and obligations.	**1** Option One supports the current level of offence provisions depicted in section 351(1)(a)(iii) and only positively impacts migrants at a marginal level. The current wording does not capture all situations where a premium is required. This option limits migrant workers from seeking criminal recourse for this specific offending. Confidential advice to Gover [redacted] .	**1** Option One is the status quo and therefore will require no additional implementation effort. However, continuing the status quo does not support a seamless process for compliance measures as immigration and employment regulators are unable to identify, prosecute, and penalise illicit actors of this form of exploitation.	**0**

	Addresses identified gaps in the immigration regulatory system	Effective risk management	Protection of workers	Ease of implementation	Overall assessment
Option Two: **Amend the Act to make it an offence for a premium to be paid offshore and prior to employment commencing**	**3** Option Two will address the identified gap to the extent possible within the application of New Zealand law. This option will strengthen the integrity of the immigration system and enable MBIE to identify, prosecute, and penalise employers/their New Zealand agent(s) for charging premiums irrespective of whether the prospective employee has commenced active employment. This option will Confidential advice to Government [redacted] However, a case will be able to be made if it can be proven that some/all of the premium has gone to the New Zealand employer.	**3** Option Two will support effective risk management over time as immigration regulators will have the offence provisions to prosecute illicit actors/ employers and reduce the risk of migrant exploitation instances of this form. It provides a method to addressing migrant exploitation and ensure compliance is met.	**3** Option Two will support the protection of migrant workers. It will enable MBIE ICI to prosecute and hold offenders to account, which will in turn have a deterrent effect on other employers or parties acting on behalf of employers.	**2** Option Two partially meets this criteria as there are already established systems in place for the justice system and the cost to implementation is minimal. However, Confidential advice to Government [redacted] but still possible with the cooperation of complainants. Overseas agents/recruiters sit outside of New Zealand law and therefore will not be able to be prosecuted (but the New Zealand employer or recruiter may be able to be charged if it can be established that they have received some/all of the premium payment).	**11**

Scoring scheme against criteria									
-1	Negatively impacts criteria	0	Not at all or not applicable	1	Marginal positive impact	2	Partially meets or addresses	3	Meets or addresses well

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

49. MBIE recommends Option Two as it best meets (partially or well) the criteria. It also supports the Minister of Immigration's agreed scope of the Bill to address a gap in the offence provisions in the Act (specific to premiums charged for employment offshore and prior to commencing employment) to address migrant exploitation.

50. Option Two would:

    50.1. Address a gap in the immigration regulatory system. MBIE would be able to prosecute the charging of premiums by New Zealand employers and agents, irrespective of whether the migrant has commenced active employment or if the premium has been paid offshore. This would strengthen the integrity of the immigration system.

    50.2. Enable more effective risk management over time, as regulators will have the right tools to address migrant exploitation cases of this form. Amending the Act to capture these instances of financial exploitation will also ensure compliance is met and uphold New Zealand's international obligations, specifically the UN TOC.

    50.3. Safeguard vulnerable migrant workers from exploitation. Workers vulnerable to this form of exploitation will be able to seek criminal recourse and justice. MBIE ICI will be able to prosecute and hold offenders to account, which will in turn also have a deterrent effect on other employers, their agent(s), or any person involved in recruitment processes. This option provides the public confidence in judicial systems in New Zealand.

51. Confidential advice to Government but still possible with the cooperation of complainants.

52. Confidential advice to Government However, there will be a case for prosecution if it can be proven that some/all of the premium has been passed on to the New Zealand employer or onshore agent.

What are the marginal costs and benefits of the option?

53. This section focuses on the costs and benefits of the preferred option (Option Two).

54. Given that most of the costs and benefits associated with Option Two relate to intangible factors such as improved worker wellbeing and enhanced enforcement measures, MBIE has not attempted to accurately describe the non-monetised costs and benefits of this option.

55. We have identified the following affected groups:

    55.1. **Regulated groups:**

    - Migrant workers impacted by migrant exploitation and who have been subject to providing premiums upon commencing employment or as a requirement for securing employment.

- Employers (including their agent(s) or any person involved in the recruitment process (onshore or offshore)) of migrant workers who are facing these charges but have not yet been prosecuted.

55.2. **Regulators:**

- MBIE's ICI team, which undertakes investigations into non-compliance and would be responsible for enforcing the Act.
- MBIE's LI, which is responsible for upholding employment standards and works closely with ICI.
- MBIE Legal, which advises on prosecution cases and investigations.
- MOJ, which has a regulatory oversight function and advises on infringement regimes/penalties. The majority of criminal cases go through the District Court, with very serious crimes to the High Court.
- The correctional system, designed to keep society at large safe by separating them from individuals who have committed crimes.

55.3. **The public:** Confidence that instances of migrant exploitation can be enforced.

56. **Annex One** sets out the non-monetised costs and benefits of the preferred option: amending the Act to make employers requiring a premium for employment an offence irrespective of commencing employment and if offshore, in comparison to the status quo.

Section 3: Delivering an option

How will the new arrangements be implemented?

57. Implementation arrangements will come into effect when the Bill is passed in late 2025. MBIE's ICI team will be responsible for its implementation and operation. A communications strategy will be developed to ensure employers are informed of the offence.

58. A potential issue related to implementation and timing is that if it becomes known that there is a legislative gap, this may encourage further unacceptable behaviour by bad actors. One way to address this is to make it abundantly clear in communications that this behaviour is unacceptable. As noted in paragraph 30.1, AEWV application forms have recently been amended to require applicants to declare if a premium has been paid. If it is found that they have this may amount to the provision of false and misleading information to an immigration officer (an offence already), and loss of accreditation/deportation.

How will the new arrangements be monitored, evaluated, and reviewed?

59. MBIE ICI will investigate allegations that are made involving offshore payments once the legislative amendment is introduced. Free and frank opinions Cases of payments made back to employers onshore will be easier and more feasible to prove.

60. MBIE's ICI function currently reports internally on the number of prosecutions, and this process will continue once the proposal has been introduced.

61. MBIE intends to conduct an implementation review a year after the proposal takes effect. This would monitor the progress and effectiveness of the proposal, scale of investigations and prosecutions captured, and any issues and unintended consequences associated with its enforcement.

Annex One: Costs and benefits of preferred option (Option Two)

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action (status quo)			
Regulated groups *Migrant workers impacted by migrant exploitation* *Employers (including their agent(s) who breach the Act)*	***Migrant workers*** Nature of cost: Administrative costs associated with making a complaint Type: ongoing Comment: Migrant workers may incur an administrative burden through making a complaint or increased documentation requirements to prove their case.	Low	High. MBIE is aware that there are avenues for reporting exploitation and making a complaint (free of charge). Concerns and reports of exploitation (including premium payments) can be received through: • the Migrant Exploitation reporting line[15] (an online form can be filled out as well[16]), • Crime Stoppers (informants/complainants can choose to be anonymous)[17], • [redacted] Confidential advice to Gov • MBIE's Migrant Exploitation channels (e.g. helpline or contact centre) Confidential advice to Government [redacted] • Confidential advice to Government [redacted], • the victim of migrant exploitation, as well as friends, colleagues, or concerned members of the public. A migrant is also able to apply for a MEPV. An MEPV assessment is started (or is an option) when a migrant reports exploitation to MBIE Employment Services through the Migrant Exploitation reporting line. A migrant will not be able to apply for a MEPV without making a complaint and they can choose to withdraw their complaint after they have received a Report of Exploitation Advice Letter).
	Migrant workers Nature of cost: Financial costs Type: initial stage but some ongoing Comment: Migrant workers may need to seek legal advice or assistance to understand their rights under the new law, incurring additional costs.	Low	Low. MBIE is unable to identify the magnitude for administrative burden.
	Employers (who breach the Act) Nature of cost: Financial cost of penalties Type: one-off Comment: Under section 357 of the Act[19], employers convicted of an offence against section 351(1) are liable to imprisonment not exceeding seven years, or will pay a fine not exceeding $100,000, or be liable for both.	Low	High. MBIE is aware that employers will incur a penalty in compliance with section 357 of the Act. INZ is in regular contact with employers to ensure they understand their employment and immigration obligations.
	Employers (who breach the Act) Nature of cost: Administrative cost Type: ongoing Comment: Employers may incur increased costs for compliance measures. Increased documentation and reporting requirements to meet obligations can lead to higher administrative overhead for employers.	Low	Medium. MBIE is aware that employers have legal responsibility to ensure that their employees are legally entitled to work for them. An amendment to existing offence provisions would mean that employers should already have established administrative measures in place to ensure compliance. INZ is in regular contact with employers to ensure they understand their employment and immigration obligations. This will help manage the additional administrative burden (if any).
Regulators *MBIE ICI & LI* *MBIE Legal* *MoJ*	Nature of cost: Increased ICI workload and implementation costs and difficulties Type: ongoing Comment: • Enforcement will likely require additional resource. The financial cost to implementation is relatively low due to already established enforcement measures to monitor compliance, investigate complaints, and prosecute offenders. It will most likely increase ICI's workload.	Medium	High. The reasons include: • Free and frank opinions [redacted] • MBIE also understands that capturing premiums paid offshore will be a new process to navigate. Confidential advice to Government, Free and frank opinions [redacted]. MBIE's ICI

[15] People are able to report migrant work exploitation by calling 0800 200 088, with interpreters available for over 180 languages. *Employment New Zealand*. Found here: Migrant exploitation | Employment New Zealand.

[16] Request help. *Employment New Zealand*. gethelp.employment.govt.nz/.

[17] People are able to call Crime Stoppers for free on 0800 555 111. How to report a crime. *New Zealand Police*. How to report a crime or incident | New Zealand Police.

[18] Confidential advice to Government [redacted]

[19] Section 357 of the Act, *Penalties*. Immigration Act 2009 No 51 (as at 05 June 2024), Public Act 357 Penalties: employers – New Zealand Legislation.

Affected groups	Comment	Impact	Evidence Certainty
District and High Court *Corrections*	• The only option that would necessitate additional costs or may be difficult to manage would be capturing premiums paid offshore. This is also captured under the proposed amendment and regularised under jurisdiction. • There is also an Confidential advice to Government .		are predominately proactive and will investigate allegations that are made involving offshore payments when/if legislation is amended. Confidential advice to Government • If an offshore agent charges and receives a premium without the employer's knowledge, MBIE knows there is a limitation to charging the offshore agent as this is out of New Zealand's jurisdiction and New Zealand Law cannot be applied in this scenario. There is a case, however, if ICI can prove that some traces of the premium has been made back to the New Zealand employer. An onshore recruitment agent who charges and receives a premium (without the employer's knowledge) could be charged when/if legislation is amended, as the offence would be committed in New Zealand.
	Nature of cost: Increased Legal and litigation costs Type: initial stage but some ongoing Comment: New legislation might lead to an increase in legal cases as workers seek legal redress for past exploitation instances of this form.	Low	High. MBIE knows that the established judicial system will face a low financial cost. The likelihood in an increase in instances to prosecute can be reduced as newly amended AEWV application forms require applicants to declare if a premium has been paid and action can be taken earlier on in the process.
	Nature of cost: Costs to Justice system for increased service delivery Type: ongoing Comment: This could place a financial burden on the Justice system as a whole (e.g. in addition to extra work for judges presiding, more cases in court also means additional work for prosecutors, defence, agencies administering sentences etc. In particular, implementation costs could potentially include: • MoJ Free and frank opinions – There could be an impact on expenditure (this is unlikely depending on volume of cases). Interpreters may also be required for migrants. Higher-value fines can impact the government's debt book (this is unlikely to have an impact). System changes will be dependent on volumes (unlikely to be required). • MoJ Free and frank opinions – There could be an impact on expenditure, but this impact is relatively low.	High	Medium. Given the significance of the problem (640 allegations from FY 2021/22), MBIE understands that broadening offence provisions increases the likelihood of cases to prosecute. While there are established systems, MoJ has advised that an increase in the courts' caseloads will still have a minimal cost. These are all very dependent on volume, which is unknown at this stage.
	Nature of cost: Additional burden and costs to Correction facilities Type: ongoing Comment: This could place a potential housing burden and additional costs to accommodate additional prisoners once prosecuted for imprisonment.	Low	High. Corrections has advised MBIE that the additional housing pressures for imprisonment and financial costs to accommodate is minimal as the scale of offenders prosecuted is relatively low compared to other offences.
Others *Public*	No additional cost as these groups will benefit from the Act being amended as it enhances compliance methods, strengthens provisions for prosecuting illicit actors, and addresses migrant exploitation.	Low	High. MBIE knows that the public will not face costs in relation to the preferred option.
Total monetised costs	N/A		
Non-monetised costs	Medium to Low		
Additional benefits of the preferred option compared to taking no action (status quo)			
Regulated groups *Migrant workers impacted by migrant exploitation* *Employers (including their agent(s) who breach the Act)*	***Migrant workers*** Nature of benefit: Protection of workers Type: ongoing Comment: Migrant workers (who are often more vulnerable due to language barriers, lack of local knowledge, and with limited access to their rights and legal resource) can receive better protection from exploitation and unfair treatment.	High	High. MBIE knows that Option Two will help address and prevent financial exploitation. Amending the Act will make it an offence for employers to charge premiums, irrespective of whether employment has commenced or if the employee is offshore.
	Migrant workers Nature of benefit: Legal Recourse for victims Type: ongoing	High	High. MBIE knows that Option Two will enable MBIE to identify, prosecute, and penalise employers for charging premiums irrespective of whether the prospective employee has commenced active employment. This does not limit migrant workers to seek legal recourse for exploitation of this form.

Affected groups	Comment	Impact	Evidence Certainty
	Comment: Amending the act strengthens the methods for addressing and deterring migrant exploitation, allowing victims of this form of exploitation the ability to seek a justice remedy. Increased awareness that the law protects their rights can empower workers to report abuses and stand up against unfair treatment.		
	Employers (who breach the Act) Nature of benefit: Transparency of the law Type: ongoing Comment: Making the offence clear encourages ethical employment practices. The regulated community has certainty about its legal obligations and rights, the regulator acts in a transparent and predictable way, and there is consistency with other regulatory regimes where appropriate.	Medium	High. MBIE knows that clear legal provisions would incentivise employers to foster more ethical, transparent, and fair labour practices. Employers can maintain their employment obligations and better compliance.
Regulators *MBIE ICI & LI* *MBIE Legal* *MoJ* *District and High Court* *Corrections*	Nature of benefit: Strengthening Legal and Regulatory Frameworks Type: ongoing Comment: Enhanced enforcement and legal provisions will make it easier to identify, prosecute, and penalise violators, leading to better compliance with immigration and employment laws. Amending the Act could mean improved monitoring and reporting on exploitation instances.	Medium	High. MBIE knows that options two will strengthen the integrity and responsiveness of the immigration regulatory system.
	Nature of benefit: Helps addresses exploitation instances of this form Type: ongoing Comment: Making instances of this form of exploitation explicitly illegal irrespective of active employment or if it has occurred offshore serves as a deterrent to potential violators, reducing such practices over time.	Medium	High. MBIE is certain that option two will help address this form of exploitation as the amendments will enable regulators with provisions for prosecution of illicit employers. MoJ Free and frank opinions advised that New Zealand recently underwent its 4th Universal Periodic Review before the UN Human Rights Council and a number of countries made recommendations to New Zealand to improve protections against migrant exploitation. MoJ supports the intent of the proposal.
	Nature of benefit: Minimal implementation costs across regulators Type: ongoing Comment: The proposed amendment to the Act will incur a minimal cost to regulators.	Low	High. Consultation with key operational agencies highlighted the minimal impact this proposal has on implementation resourcing. While this presents an increase in caseloads across ICI and the justice system, the cost to enforcement through the already established systems are quite low.
Others *Public*	Nature of benefit: Upkeeping international standards and reputation Type: ongoing Comment: This amendment can enhance New Zealand's reputation as a safe place to work for migrant workers and support Government's commitment to greater protections against migrant worker exploitation.	Medium	High. MBIE understands that option two will uphold New Zealand's international obligations, specifically the UN TOC.
Total monetised benefits	N/A		
Non-monetised benefits	Medium		

Regulatory Impact Statement: Clarify deportation liability is a consequence of criminal offending

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Proposal	To amend the Immigration Act 2009 (the Act) to clarify that people who have pleaded guilty to, or are found guilty of, a criminal offence are liable for deportation if they would otherwise have met existing thresholds set out in section 161
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	4 September 2024

Problem Definition

Deportation liability is intended to be the purview of the immigration system, with right of appeal through the Immigration and Protection Tribunal (IPT). The Act sets out a graduated framework for deportation liability for residence class visa-holders who receive a criminal conviction.

However, the deportation liability provisions are not triggered if a residence class visa-holder is discharged without conviction, even if a person has been found or plead guilty. Furthermore, a recent Supreme Court judgment means that judges must take into account the likelihood of a conviction triggering deportation liability when considering whether to discharge an offender without conviction.

There is an opportunity to close this legislative gap and clarify the seat of decision making for deportation liability.

Executive Summary

MBIE has identified an opportunity to strengthen the integrity of the immigration system by amending the Act to clarify that residence-class visa-holders who are guilty of criminal offending are liable for deportation, subject to existing legislative thresholds, irrespective of whether they are discharged without conviction or not.

This clarification is needed to address an unintended consequence of current legislative design whereby residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts.

The overarching objective of this suite of proposals is to enhance the integrity of the immigration system. A sub-objective for this proposal is to clarify the statutory “good behaviour bond” intended by s161 whereby residence-class visa-holders may jeopardise their immigration status due to criminal offending.

We have analysed two options:

- Option One: status quo.
- Option Two: amend the Act to clarify that deportation liability is a consequence of criminal offending rather than criminal conviction **(preferred)**.

The preferred option will clarify the policy intent by ensuring that residence-class visa-holders are unable to avoid deportation liability at the discretion of sentencing decisions in the Criminal Courts. This supports the objectives of our deportation provisions and also ensures regulatory coherence with the established avenue to appeal to the IPT against deportation liability on the basis of exceptional humanitarian circumstances.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Bill and subsequent amendments to the Immigration (Visa, Entry, Permission, and Related Matters) Regulations 2010 (the Visa Regulations) will be in place before the end of 2025. These timeframes mean that external consultation before Cabinet decisions has been limited to informing key stakeholders through one-on-one meetings and receiving their initial feedback on the proposals. We have not undertaken significant engagement (such as through discussion documents seeking detailed comments).

Engagement on an Exposure Draft of the Bill will occur later in 2024 ahead of Cabinet Legislative Committee decisions.

We informed the following stakeholders of the proposals between 29 July and 9 August 2024:

- BusinessNZ
- the Employers and Manufacturers Association
- the New Zealand Council of Trade Unions
- the New Zealand Law Society
- the Office of the Ombudsman
- Immigration New Zealand's (INZ) Immigration Focus Group.

Responsible Manager(s) (completed by relevant manager)

Stacey O'Dowd
Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE

4 September 2024*
*Information in Annex One was updated in November 2024.

Quality Assurance (completed by QA panel)

Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS *Immigration Amendment Bill (System Integrity proposals).* The panel has determined that each RIS provided meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

The Act provides a graduated framework for determining deportation liability of residence class visa-holders with criminal convictions

1 The immigration system regulates the flow of people into New Zealand. The purpose of the Act is to "manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals".

2 Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act.

3 Part 6 of the Act sets out the broad framework for deportation liability of non-citizens and associated procedures within the immigration system. The purpose of Part 6 is to support the integrity of New Zealand's immigration system and the security of New Zealand, by prescribing the system for the deportation of people who are not New Zealand citizens and who fail to comply with immigration requirements, commit criminal offences, or are considered to pose a threat or risk to security.

4 Section 161 of the Act sets out a graduated framework by which residence-class visa-holders are liable for deportation for criminal offending. Liability depends on a combination of factors, including when the person first held a residence-class visa and its relation to the date of the offending, and the sentence received, or potential sentence the Court could impose.

5 There are three main tiers when determining deportation liability under s161:

i. First – when a residence-class visa-holder is convicted of an offence and that offending occurred while they were unlawfully in New Zealand, held a temporary visa, or not later than two years after first holding a residence-class visa. The offence must be one which the Court has the power to impose imprisonment for a term of three months or more; they do not have to actually be sentenced to three months' (or longer) imprisonment.

ii. Second – when a residence-class visa-holder is convicted of an offence, and that offending occurred not later than five years after first holding a residence-class visa, and the Court has the power to impose imprisonment for a term of two years or more. Again, they do not have to be sentenced to two years' imprisonment, but they must be convicted, and the Court must have the power to impose two years' imprisonment or more.

iii. Third – when a residence-class visa-holder is convicted of an offence and that offending occurred not later than 10 years after first holding a residence-class visa. The Court must have the power to impose imprisonment for a term of five years or more for a person to be liable under this tier.

The graduated framework takes into consideration connection to New Zealand and level of offending

6 The graduated framework intends to balance the national interest with the rights of individuals. It establishes a lower bar for deportation liability for people who offended while in New Zealand on a temporary basis (if they now hold a residence-class visa) or have a less established connection to New Zealand, relative to people who have lived in New Zealand as residence-class visa-holders for a longer period.

7 The framework effectively creates a statutory 'good behaviour bond' for new residence-class visa-holders, where even minor offending may put their immigration status in jeopardy. For example, traffic offences may lead to liability for deportation for new residence-class visa-holders, but not for longer-term residence-class visa-holders.

8 This 'good behaviour bond' takes into consideration the length of time for which a residence-class visa-holder has been in New Zealand. This is important because residence-class visa-holders who have been in New Zealand for some time are likely to have close community connections and family in New Zealand, may have spent formative years in New Zealand (i.e. came here as children), and may have contributed to New Zealand through their employment.

9 The s161 provisions, therefore, are intended to give a clear, statutory direction on when compliance action can be taken against residence-class visa-holders on account of criminal offending and enable immigration risks to New Zealand to be managed.

10 If a residence-class visa-holder is liable for deportation under s161, the Minister of Immigration (or their delegate), may, in their absolute discretion, make a decision to cancel or suspend their deportation liability. If the Minister determines that the residence-class visa-holder should be deported, the visa-holder will have a right of appeal to the IPT on humanitarian grounds.

11 Section 207 of the Act provides that the IPT must allow an appeal against liability for deportation on humanitarian grounds where it is satisfied that:

i. there are there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and

ii. it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

Section 161 does not capture people who have been discharged without conviction

12 The specific wording of s161 means that deportation liability is determined first and foremost by a criminal conviction.

13 Because criminal deportation liability provision relies on a conviction, in instances where a person is discharged without conviction under s106 of the Sentencing Act 2002, s161 of the Act is not triggered and they are not automatically liable for deportation. Section 106(1) of the Sentencing Act 2002 requires a person to be found guilty or plead guilty before a discharge can be considered.

14 MBIE is aware of a number of instances in which residence-class visa-holders have been discharged without conviction for criminal offending for which they would otherwise have been liable for deportation.

15 This undermines the intention of s161 and means that residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts.

Scale of the issue

16 Unfortunately, neither MBIE nor the Ministry of Justice (MOJ) hold reportable data on the number of discharges without conviction that specifically relate to the immigration system.

17 What we can glean is that in 2023, there were 4,403 charges that resulted in an outcome of discharge without conviction (this is the entire discharge without conviction cohort, rather than the residence class visa-holding subset).[1] Of those, the most common offence type was traffic and vehicle regulatory offences (33 per cent of discharges without conviction), but 20 per cent of charges with a discharge without conviction outcome were for assault (acts intended to cause injury) offences. A further 12 per cent of discharges without conviction related to dangerous or negligent acts endangering persons.

Decisions to discharge without conviction must weigh the consequences of a conviction with the gravity of offending

18 Section 107 of the Sentencing Act 2002 sets out that, when determining whether an offender can be discharged without conviction, the court must determine whether the consequences of a conviction would be out of all proportion compared to the gravity of the offence. This means that decisions to discharge without conviction are at the discretion of the courts, subject to consideration of the consequences of a criminal conviction against the offending.

19 A recent Supreme Court decision (*Bolea v R* [2024] NZSC 46) has determined that, if credible evidence shows that a deportation liability notice will typically be issued on conviction, both the risk of deportation liability and the subsequent risk of deportation should be treated as consequences of a conviction.

20 This means that if credible evidence suggests that deportation liability would be triggered by a conviction, this outcome must be considered when determining whether the consequence of conviction (i.e. deportation liability) would be out of all proportion compared to the gravity of the offence. Given deportation is generally considered to be a serious consequence, the proportionality limb of s107 of the Sentencing Act is likely to be weighted in cases involving residence-class visa-holders.

21 In effect, this means that:

i. potential deportation liability for criminal offending, as set out in the Act, can be treated as a factor in sentencing, which undermines the objective of the s161 provisions to support the integrity of New Zealand's immigration system and the security of New Zealand,

ii. the statutory 'good behaviour bond' is undermined if a residence-class visa-holder can avoid deportation liability through a discharge without conviction, and

[1] Offence and charge outcomes. *Ministry of Justice*. Data tables | New Zealand Ministry of Justice.

iii. residence-class visa-holders have grounds to obtain a discharge without conviction that isn't available to New Zealand citizens.

What is the policy problem or opportunity?

22 There is a government regulatory failure with the design of s161 settings, which means that outcomes can be misaligned with the original policy intent. This has been made more apparent through the recent Supreme Court decision.

23 There is nothing to indicate that deportation liability for criminal offending was intended to exclude people who have pleaded guilty or been found guilty of criminal offending but discharged without conviction. The Act already provides avenue for people liable for deportation to appeal on humanitarian grounds and sets out the considerations that must be made for such a decision. As noted above, the IPT must consider whether there are exceptional humanitarian circumstances that would make it unduly harsh on unjust to deport a criminal offender from New Zealand when considered against the public interest.

24 There is an opportunity to strengthen the integrity of the immigration system by amending the Act to clarify that residence-class visa-holders who are guilty of criminal offending are liable for deportation, irrespective of whether they are discharged without conviction or not. Residence-class visa-holders will therefore not be able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts but will continue to be able to appeal to the IPT on the basis of exceptional humanitarian circumstances.

25 There is precedent for this sort of provision: under s383(1)(b) of the Companies Act 1993; discharge without conviction can disqualify a New Zealander from being a company director.

Stakeholders impacted by the problem

26 We have identified the following affected groups and the nature of their interest:

i. **Regulated group:**

- Residence-class visa-holders who commit criminal offences.

ii. **Regulators:**

- MBIE's Resolutions team, which supports decision-making on deportation liability for residence-class visa-holders and requests for Ministerial intervention
- MBIE's Immigration Compliance and Investigations (ICI) team, which undertakes investigation and compliance activities for instances of non-compliance with the Act
- the IPT, which considers humanitarian appeals on deportation liability
- the Criminal Courts, which consider requests for discharge without conviction under s106 of the Sentencing Act 2002.

27 The population group mostly impacted are migrants. We consulted with the Ministry for Ethnic Communities, Ministry of Justice, and Ministry for Pacific Peoples, who had no adverse reactions to the proposal.

28 We also held initial discussions with key stakeholders (BusinessNZ, the Employers and Manufacturers Association, the New Zealand Law Society, the Office of the Ombudsman, and INZ's Immigration Focus Group) on the proposals and no significant concerns were raised. We will undertake more substantive engagement with stakeholders on an exposure draft following Cabinet policy decisions.

What objectives are sought in relation to the policy problem?

29 The overarching objective across the suite of proposals is to enhance the integrity of the immigration system. A sub-objective specific to this proposal is to close a legislative gap by clarifying the statutory 'good behaviour bond' intended by s161 whereby residence-class visa-holders may jeopardise their immigration status due to criminal offending.

30 These objectives align with the Government's commitment to ensure that regulatory systems remain fit for purpose and work well.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

31 The following criteria, which support the objectives identified for this proposal, have been developed to guide the analysis:

i. **Supports the integrity of the immigration system:** Option ensures that residence-class visa-holders who are guilty of criminal offending are liable for deportation and are subject to the existing statutory appeals framework, by clarifying the rules around deportation liability as set out in the Act rather than being determined through sentencing decisions, and

ii. **Ease of implementation:** Option supports a seamless implementation process and is feasible operationally, with limited additional costs for government.

What scope will options be considered within?

32 As part of the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill, the Minister of Immigration has agreed to address a gap in Part 6 of the Act specific to residence-class visa-holders who are guilty of criminal offending and should be liable for deportation, irrespective of whether they are discharged without conviction or not.

33 Options have been considered within the parameters set out in the purpose section of the Act.

What options are being considered?

34 Two options are being considered:

i. **Option One:** Status quo – Continue with current provisions and no change to s161 of the Act. This means residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts ***(not recommended)***.

ii. **Option Two:** Amend s161 of the Act to clarify that deportation liability for criminal offending applies where a residence-class visa-holder is "found guilty or pleaded guilty" of an offence as set out in s 161(1)(a) - (d) ***(preferred)***.

35 There are no non-regulatory options being considered as the problem identified is due to a regulatory failure identified with current legislation.

How do the options compare to the status quo/counterfactual?

36 **Table Two** sets out analysis of the two options against the criteria established under paragraph 31.

Table Two: Analysis of options against key criteria

	Option One: **Status Quo – Continue with current provisions and no change to s161 of the Act.**	**Option Two:** **Amend s161 of the Act to clarify that deportation liability is a consequence of criminal offending**
Supports the integrity of the immigration system	**-1** Option One maintains existing settings, which contain a known gap that allows residence-class visa-holders to circumvent intended policy. This undermines the objective of the s161 provisions to support the integrity of New Zealand's immigration system and the security of New Zealand by limiting the ability for New Zealand to deport a non-citizen for criminal offending.	**3** Option Two supports the integrity of the immigration system by ensuring that: • residence-class visa-holders can be liable for deportation for criminal offending, even if they are discharged without conviction, and • humanitarian considerations are considered through the established statutory appeals framework, rather than sentencing decisions.
Ease of implementation	**0** Option One requires no additional implementation effort as maintains status quo.	**1** Option Two will have low costs to implement. A Memorandum of Understanding will need to be developed between MBIE and MoJ to enable data-matching on discharges without conviction for residence-class visa-holders. There may be a small increase in the numbers of people liable for deportation, which may have a small impact on MBIE's Resolutions team and IPT resourcing.
Overall assessment	**-1**	**4**

Scoring scheme against criteria	
-1	Negatively impacts criteria
0	Not at all or not applicable
1	Marginal positive impact
2	Partially meets or addresses
3	Meets or addresses well

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

37 MBIE recommends Option Two as it clearly meets the two criteria.

38 This option will address a government regulatory failure, which has allowed for unintended consequences due to the design of the legislative provisions for deportation liability for criminal offending. It will support the integrity of the immigration system by ensuring that deportation liability decisions remain the purview of the immigration system and the IPT rather than the Criminal Courts.

What are the marginal costs and benefits of the option?

39 This section focuses on the costs and benefits of the preferred option (Option Two).

40 Given that most of the costs and benefits associated with Option Two relate to intangible factors such as strengthened immigration system coherence and the security of New Zealand, MBIE has not attempted to accurately describe the non-monetised costs and benefits of this option.

41 We have identified the following affected groups:

i. **Regulated groups:** residence-class visa-holders who have committed criminal offences.

ii. **Regulators:**

- MBIE's Resolutions team, which supports decision-making on deportation liability for residence-class visa-holders and requests for Ministerial intervention
- MBIE's ICI team, which undertakes investigation and compliance activities for instances of non-compliance with the Act
- the IPT, which considers humanitarian appeals on deportation liability
- the Criminal Courts, which consider requests for discharge without conviction under s 106 of the sentencing Act.

iii. **The public:** will have confidence that the immigration system is working as intended.

42 **Annex One** sets out the non-monetised costs and benefits of the preferred option: amending s161 of the Act to clarify that deportation liability for criminal offending applies where a residence-class visa-holder is "found guilty or pleaded guilty" of an offence as set out in s161(1)(a), in comparison to the status quo.

Section 3: Delivering an option

How will the new arrangements be implemented?

43 Implementation arrangements will come into effect when the Bill is passed in late 2025. MBIE's Resolutions and ICI teams will be responsible for its implementation and operation. A communications strategy will be developed to ensure residence-class visa-holders and immigration legal professionals are informed of the change.

44 A Memorandum of Understanding will need to be developed between MBIE and MoJ for information-sharing in relation to discharge without conviction decisions.

45 Residence class visa-holders who are discharged without conviction and issued a deportation liability notice will still have recourse to appeal their deportation liability. However, this will now be through the single established channel (the IPT).

How will the new arrangements be monitored, evaluated, and reviewed?

46 MBIE intends to conduct an implementation review a year after the proposal takes effect. This would monitor the progress and effectiveness of the proposal, scale of investigations and prosecutions captured, the proportion that resulted in deportation, and any issues and unintended consequences associated with its enforcement.

47 The implementation review will also consider the degree to which the proposal has impacted IPT workload.

Annex One: Costs and benefits of preferred option (Option Two)

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action (status quo)			
Regulated groups *Residence-class visa-holders who commit criminal offences*	Nature of cost: Increased risk of deportation liability for criminal offending Type: ongoing Comment: This risk already exists as the decision to discharge without conviction is at the discretion of judges in their sentencing decisions and offenders do not have certainty about the outcome.	Low	High. MBIE is aware that residence-class visa-holders are already at risk of becoming liable for deportation due to criminal offending.
	Nature of cost: Cost to making a humanitarian appeal if there is the ability for the judge to consider Type: one-off Comment: Currently people going through the Criminal Courts have access to legal aid, whereas legal aid is not available in all cases for the IPT.	Low	High. From consultation with MOJ, MBIE is aware that legal aid could potentially be available for s161 deportation liability claims in the IPT and those made under s162 of the Act.
Regulators *MBIE Resolutions & ICI* *IPT* *Criminal Courts*	Nature of cost: Increased Resolutions and IPT workload Type: ongoing Comment: This change will mean that there may be a small increase in the number of people liable for deportation on the basis of criminal offending.	Low	High. MBIE considers that the proposal has a low impact on IPT and Resolutions. MOJ noted the expectation of a small increase in the work for the IPT given that, as a result of the proposal, the humanitarian appeal process in ss206 and 207 of the Act would be the only remaining avenue for challenging deportation liability.
	Nature of cost: Costs to regulators (MoJ and MBIE) for increased monitoring and reporting on decisions to discharge Type: ongoing Comment: This could place additional resourcing burden on agencies and, without an established process, there is a risk that residence-class visa-holders discharged without conviction are not identified.	Low–Medium	Medium. MBIE is aware that there is an established data-sharing system between MBIE and Corrections to identify visa-holders that have been given a custodial sentence for the purpose of enforcement of the Act. However, there are no formal mechanisms for identifying when visa-holders have been discharged without conviction.
Others *Public*	No additional cost.	N/A	High. MBIE knows that the public will not face costs in relation to the preferred option.
Total monetised costs	N/A		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action (status quo)			
Regulated groups *Residence-class visa-holders who commit criminal offences*	Nature of benefit: Greater clarity in respect of deportation liability outcomes Type: ongoing Comment: Visa-holders will have greater transparency about when criminal offending will put their immigration status in jeopardy, as well as their responsibilities under the Act and consequences on non-compliance.	Low	High. MBIE knows that Option Two will clarify the deportation liability settings, including responsibilities and consequences for non-compliance.
Regulators *MBIE Resolutions & ICI* *IPT* *Criminal Courts*	Nature of benefit: Strengthens system integrity Type: ongoing Comment: Supports wider system integrity and regulatory coherence, by enabling MBIE ICI to manage immigration risk to New Zealand within an existing set of legislative guidelines, and deportation settings to work in concert with our immigration appeals framework.	High	High. MBIE knows that Option Two will strengthen the integrity and coherence of the immigration regulatory system.
	Nature of benefit: Clarifies the policy intent for s161 of the Act Type: ongoing Comment: Enables MBIE ICI to take compliance action against people who have committed criminal offences as intended.	High	High. As part of the proposal, MBIE knows that Option Two will clarify the intent of s161 of the Act. If no action is taken, outcomes can be misaligned with the original policy intent. Deportation liability for criminal offending was not intended to exclude people who have pleaded guilty or have been found guilty of criminal offending but discharged without conviction.
Others *Public*	Nature of benefit: Enhanced confidence in regulatory system Type: ongoing Comment: The public will have confidence that immigration regulatory settings are working as intended.	Medium	High. MBIE knows that an amendment will support the integrity of the immigration system and will provide the public the confidence that people who commit offences are liable for deportation.
Total monetised benefits	N/A		
Non-monetised benefits	Medium		

Regulatory Impact Statement: facilitative powers to benefit groups or individual migrants

Coversheet

Purpose of Document	
Decision sought:	This analysis has been produced to inform Cabinet decisions
Proposal	Amend the Immigration Act 2009 to enable the Minister of Immigration to exercise flexible powers, with appropriate safeguards (including that they may only benefit the people affected), in response to circumstances that are unusual, or outside the agency's control, and that pose operational challenges to the immigration system
Advising agency:	Ministry of Business, Innovation and Employment (MBIE)
Proposing Minister:	Minister of Immigration
Date finalised:	4 September 2024

Problem Definition

The Immigration Act 2009 (the Act) does not provide adequate powers to efficiently manage large numbers of visa applicants and visa-holders, where this is necessary to respond to circumstances that are unusual, or are outside the agency's control, and that pose challenges to the immigration system.

Executive Summary

Background

New Zealand's immigration system is based on an individual submitting an application either for a visa, or to vary the conditions of an existing visa, and an authorised decision-maker then determining the outcome of that application. While that process generally works well, in exceptional circumstances the legislated obligations to make and determine individual applications, and to waive requirements (such as paying fees or submitting passports for applications), on an individual basis can be impractical, can place huge pressures on migrants and Immigration New Zealand (INZ) staff, and may result in migrants becoming unlawfully in New Zealand through no fault of their own.

Our experience with such situations informs this proposal. The COVID-19 pandemic that began in 2020, which led to border closures in New Zealand and overseas and a series of domestic lockdowns, significantly impacted the ability of non-New Zealanders to enter or leave New Zealand (and the New Zealand labour market), and meant many foreign nationals in New Zealand were unable to fulfill the conditions of their visas (such as to study, or to work in a specified job). Thousands of people were facing illegality. In addition, some industries (such as supermarkets) badly needed workers, but few migrants were lawfully able to work there. INZ offices were closed, and even online applications could not be processed.

In May 2020, in response to these challenges to the immigration system, Parliament unanimously passed the Immigration (COVID-19 Response) Amendment Act 2020 (the 2020 Amendment Act). It introduced eight powers, to enable the Government to respond appropriately and efficiently to the COVID-19 outbreak by providing additional flexibility in the immigration system to manage the visa assessment and decision-making process.

The powers were created subject to a number of safeguards, including that they could only benefit (or, at a minimum, not disadvantage) the people they applied to, they were explicitly linked to issues arising in relation to COVID-19, they were transparently published and were disallowable, and they expired after a year. In 2021, Parliament extended the powers by a further two years, and they finally expired on 15 May 2023. A list of the class Special Directions used over the period they were in force is set out in **Annex One**, from page 22. (These are summaries of the actual Special Directions: the second column has hyperlinks to the full texts published on the Gazette site, which include the Minister's declarations.)

The explicit enabling of those powers in the Act clarified what could or could not be done to manage operational immigration responses to exceptional circumstances. As a result, the immigration system is arguably less responsive than it was in 2019, as it is now very clear what the current legislation does not allow.

However, pressure continues to be placed on migrants and the New Zealand government's immigration system, randomly, by domestic or international issues. These include wars, natural disasters, large-scale IT outages, airline failures, public health emergencies, and significant weather events. There have therefore been a number of situations since the powers expired where it is clear that they could have benefited individuals and saved the New Zealand government cost and time.

Specific situations where flexible powers would have been useful include: Confidential advice to Governr , where New Zealand citizens wished to bring their families home rapidly but their spouses did not hold appropriate visas; the collapse of Air Vanuatu, which stranded hundreds of Recognised Seasonal Employer scheme (RSE) workers in New Zealand at the imminent risk of becoming overstayers; and the Hunga Tonga-Hunga Ha'apai volcanic explosion, which closed Tonga's airspace and similarly meant many visiting Tongan citizens were stuck in New Zealand.

It is therefore proposed to reinstate five positive powers, to enable the Minister of Immigration to exercise flexible, appropriate, and human rights-supporting responses to unusual circumstances (or circumstances outside INZ's control) that pose operational challenges to the immigration system.

Of the three powers that are **not** proposed for reinstatement, two removed rights – the ability to close the border to non-citizens, and the ability to prevent applications being made offshore for temporary entry-class visas. The third applied to transit travel and applied only to situations involving border closures.

Proposals

The proposals aim to enable the immigration system to maintain its integrity in a wider range of challenging situations, by enabling positive (only) immigration decisions to be made for groups of people, including maintaining the lawful status of people onshore. The

Minister of Immigration would be able to exercise any of the powers for a group of migrants, on or offshore, if that Minister:

- considered that there was a circumstance that was unusual, or outside the agency's control, and that posed challenges to the immigration system,
- considered that it was reasonably necessary to invoke the specified provisions, and
- had undertaken consultations they considered appropriate prior to that certification.

The specified "flexible powers" would therefore be made permanently available, with appropriate safeguards, including that:

- their use with regard to classes of visa-holders or applicants is done through non-delegable Special Directions which are secondary legislation (requiring notification in the Gazette, being disallowable by the House of Representatives, and published on the www.immigration.govt.nz website), and
- they must benefit, or at least not disadvantage, the people to whom they apply.

One of the powers (to grant a visa to an individual in the absence of an application) would be able to be delegated by the Minister to appropriately designated officials and could be exercised in a wider range of circumstances. It would parallel the long-standing ability to grant visas as exceptions to policy to people unlawfully in New Zealand (under section 61 of the Act). This means that its exercise would not require any of the explicit considerations or publication obligations that would apply to the class powers exercised by the Minister, noting that its use can only benefit the individual concerned.

As a further safeguard, the use of the powers will be formally reviewed three years after they come into effect.

Requirement for Government intervention

The Government is the only body able to determine and administer the policy and legislative framework governing border entry and immigration settings. The proposed changes are a sensible and proportionate response to known risks, including of future significant earthquakes, and take into account lessons from the response to public health issues, outbreaks of war overseas, natural disasters and significant weather events, and large-scale IT problems. They would also insure Parliament from having to pass such legislation in a timely manner in a future emergency (such as a large earthquake affecting Wellington).

Options considered

Two main options have been considered:

- **Option 1:** Status quo: no legislative amendment. This would maintain the current settings. In the event of a future emergency, Parliament could potentially pass bespoke legislation (if that was practical) and Cabinet would otherwise decide policies with regard to visa applications. The Minister of Immigration would continue to have certain Special Direction powers with regard to "associated" groups of foreign visa applicants (much less flexible than the full powers proposed, and without any of the safeguards).
- **Option 2:** Amend the Act to provide for enduring and transparent flexible powers, with safeguards, at an appropriate constitutional level ***(preferred)***.

Identified impacts

As these class powers would be used relatively rarely, they would in general have low to no impacts on the immigration system or New Zealand community. If used, they would benefit classes of visa-holders and applicants (and potentially also their families and employers) efficiently, transparently, and with parliamentary oversight. The flexible power that could be employed to grant a visa to an individual in the absence of an application would also only benefit those individuals (and potentially also their families and employers). INZ would have marginal but real improvements to its efficiency. In the case of an emergency, air carrier collapse, or other circumstance, New Zealand would be able to manage the immigration status of potentially large numbers of foreign nationals compassionately and relatively quickly.

Stakeholders' views

The Minister of Immigration's expectation is that the Amendment Bill is in place by October 2025. These timeframes mean that external stakeholder consultation before Cabinet decisions has been limited to informing the key stakeholders of the proposals, rather than significant engagement. This has constrained our understanding of how the proposals will be more widely received, although there have been no 'show-stoppers'. We informed the following stakeholders of the proposals between 29 July and 9 August 2024:

- BusinessNZ
- the Employers and Manufacturers Association
- the Council of Trade Unions
- the Casey Review Focus Group
- the New Zealand Law Society
- the Office of the Ombudsman
- INZ's Immigration Focus Group.

While stakeholders appreciated the assistance these powers would have provided during recent situations, one stakeholder expressed concern that the powers could be used, for example, in the case of future border closures, to prioritise the access to New Zealand of classes of non-citizens. We advised that the powers were not employed for that purpose during the COVID-19 period (Ministers used standard Cabinet policy processes to make border exceptions decisions). Other than that, there was general support for the proposals.

We also note that the proposals have been informed by feedback provided during previous consultation processes:

- The following agencies were consulted during the development of the original (2020) policy proposals and their feedback was incorporated into its development: the Ministries of Foreign Affairs and Trade and Justice, the Department of the Prime Minister and Cabinet (Policy Advisory Group, COVID-19 Response), the New Zealand Customs Service, the National Emergency Management Agency, the New Zealand Police, the Treasury, and the Crown Law Office. The Ministries of Education and Social Development were informed.
- Limited consultation was undertaken with stakeholder groups (representing sectoral employers, the immigration advice industry, and migrants) in the context of the initial (2020) Amendment Bill that created the COVID-19 powers. Specific

feedback received during the Select Committee process for the 2020 Amendment Bill was incorporated into the Amendment Act (by adding an additional safeguard with regard to the class Special Direction Power, that its exercise must explicitly benefit, or at least not disadvantage, the migrants affected).

Slightly wider consultation was able to be undertaken in the context of the second (2021) Amendment Bill that then extended the 2020 powers (noting that this continued to relate to the use of the powers in a pandemic situation rather than in the enduring and broader range of situations currently proposed). There were 165 written submissions received during the Select Committee process for the 2021 Amendment Bill, and the Committee heard over 35 individual oral submissions.

- Submitters generally supported the Bill, though some proposed a 12-month sunset clause for the powers, as opposed to two years (this was focused however on proposals which were privative and are not included here, specifically the powers to close the border and to suspend offshore applications for temporary entry class visas). Most individual submissions, and a number of submissions from organisations, related to areas of immigration policy or practice which were not the subject of the either Bill or these proposals (in particular, they focused on: the border exceptions policies which were managing entry to New Zealand, family reunification issues, residence visa categories and decision-making, and immigration policy settings concerning partnership).
- Some submissions which did relate to the Bill's powers (such as those relating to amendments to the visa expiry dates of classes of temporary visa-holders) sought specific uses of the powers (which implicitly indicated support for the retention of the powers).

Limitations and Constraints on Analysis

Time pressure on this work has impacted on the development of these proposals and, in particular, the ability to undertake wide-ranging consultation external to government ahead of Cabinet policy decisions, although some targeted consultation has been carried out and feedback has informed additional safeguards.

However, MBIE considers that this is balanced by the three years' worth of experience in administering the COVID-19 powers (including equivalent comprehensive safeguards). The full six-month Select Committee process will enable community and industry voices to be incorporated into the final version as appropriate.

As noted above, the previous Amendment Bills which addressed the COVID-19 powers also mean that feedback has been received on them (including feedback received following a year of operation) from interested employer, union, immigration advice community, and migrant voices.

Responsible Manager(s) (completed by relevant manager)

Stacey O'Dowd

Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE

4 September 2024

Quality Assurance (completed by QA panel)	
Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS *Immigration Amendment Bill (System Integrity proposals).* The panel has determined that each RIS provided meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The Immigration Act 2009 (the Act) is the fundamental source of New Zealand immigration law. Among other things, it establishes that only New Zealand citizens have the right to enter and be in New Zealand; it requires all non-citizens to hold a valid visa to be lawfully in New Zealand; it sets out who needs a visa to travel to New Zealand and how the conditions[1] on stay in New Zealand are established; and it provides for the certification of immigration instructions (expressions of government policy), and the rules and criteria for the grant of visas.

2. The Act is predicated upon individual persons making individual applications for visas (or for variations of conditions (VoC) on their existing visas), which are considered and decided by an individual immigration officer. However, the limitations of this approach became apparent from early 2020, when lockdowns in New Zealand and overseas significantly reduced visa applicants' ability to make applications and Immigration New Zealand's (INZ's) ability to decide them.

Gaps in Act's structure were exposed by the COVID-19 pandemic in 2020

3. The COVID-19 lockdowns impacted both New Zealand's labour market (such as with the need for supermarket workers in 2020 and for seasonal workers over the entire period) and on visa-holders' ability to undertake the activities for which their visas were granted (such as to study, or to work for a specific employer), at the same point that INZ office closures meant it was almost impossible to amend the conditions on visas or to grant new visas, especially at scale. This significantly impacted aspects of the labour market (food workers were in short supply) and meant many foreign nationals in New Zealand were unable to fulfill the conditions of their visas (such as to study, or to work in a specified job), meaning they were technically in breach of those visas.

4. Border closures in New Zealand and overseas made it difficult for people to leave New Zealand as well as to enter. This meant that people in New Zealand were at risk of becoming overstayers, while people outside New Zealand who had been granted visas could not use them to travel here before their ability to travel expired. (Unused visas generally expire within a year.)

Time-limited emergency immigration powers were created and then extended

5. In response, Parliament agreed that changes needed to be made to the Act to address these issues, and unanimously passed the Immigration (COVID-19 Response) Amendment Act 2020 (the 2020 Amendment Act) on 15 May 2020. The 2020 Amendment Act gave the Minister eight time-limited and heavily safeguarded powers (the COVID-19 powers) to address the direct and indirect impacts of the COVID-19 pandemic, many of which enabled the Minister to make Special Directions for classes of visa-holders or applicants.

[1] For example, whether the visa-holder can work or study, and when they must leave by, if they have not been granted a further visa in the interim.

6. While most of the powers could only be used to benefit individual and classes of migrant, the 2020 Amendment Act also enabled the suspension of the ability to apply offshore for classes of temporary entry class visas, tweaks to transit visa requirements (needed while people were seeking to get home via New Zealand, especially from the Pacific), and the denial of entry permission to certain persons otherwise deemed to hold it.

7. The COVID-19 powers were initially set to expire on 15 May 2021, but COVID-19 did not lessen as rapidly as had been hoped. The Immigration (COVID-19 Response) Amendment Act 2021 (the 2021 Amendment Act) extended powers a further two years, to 15 May 2023. By then the borders were reopening and normal visa processing had resumed.

The immigration system continued to benefit from the powers while they were available

8. The Minister of Immigration continued to make COVID-19-related Special Directions for classes of migrants up to April 2023, in each case subject to the legislated safeguards (i.e. that making the Special Direction was reasonably necessary to respond to the impacts of COVID-19 or measures taken in response to COVID-19, and was likely to benefit, or at least not disadvantage, the migrants concerned).

    8.1. For example, a Special Direction of late 30 May 2022 benefited almost 10,000 Critical Purpose Visitor Visa-holders, by amending their visas from single entry to multiple entry; this reflected the removal of border restrictions and Managed Isolation and Quarantine requirements and meant that people who wished to leave and re-enter New Zealand did not need to individually apply for a VoC of their travel conditions, pay the associated fee, and wait for the application to be decided by INZ. The last class Special Directions made granted new Working Holiday Visas to thousands of young people overseas whose visas had lapsed during the border closures, so that those who still wished to have a working holiday in New Zealand could do so.

9. The delegated power to grant visas to individuals in the absence of an application was used up to the date that the legislation expired in May 2023, and towards the end of that time to facilitate the evacuation from Afghanistan of numerous people who had worked with the New Zealand Defence Force and whom the government had agreed to resettle here for their protection.

What is the policy problem or opportunity?

New Zealand should take the opportunity to strengthen its immigration framework to be more resilient and able to manage challenges efficiently

10. There is an opportunity to re-establish some of those powers in the Act, to support an ongoing, clear, humane, robust, and consistent approach to situations which could challenge or place strain upon New Zealand’s immigration system.

11. At the more serious end, this could be another global pandemic, a local or national civil (or other) emergency, a situation akin to the 2024 CrowdStrike event which impacted air travel globally, or a cyberattack which took down INZ's IT systems. However, even below an emergency state, flexible powers are useful. For example:

    11.1. In the absence of the ability to grant visas without an application, Free and frank opinions [redacted]

    11.2. Processing issues have arisen when managing the immigration statuses of Confidential advice to Government [redacted], the many Tongan citizens who could not leave New Zealand when the Hunga Tonga-Hunga Ha'apai volcano closed their airspace and, most recently, the hundreds of RSE workers suddenly trapped in New Zealand when Air Vanuatu collapsed. Even a severe storm in Auckland, shutting down the airport for several days, can inadvertently turn hundreds or thousands of foreign nationals into overstayers, with potential negative implications on their future ability to travel.

    11.3. The ability to waive any regulatory requirements (such as fees or photos) for certain classes of application would have been periodically useful at points where cyclones in the Pacific have closed Visa Acceptance Centres.

The previous powers worked well and should be available with safeguards in the future

12. Unusually, there is already three years' experience with the exercise of very similar powers, established in response to the challenges imposed by the pandemic. **Annex One,** from page 22 below, has a comprehensive list of the class Special Directions made at that time and (for each) the estimated number of people who were affected or benefited. (Note that they did not require the "unusual circumstances" now proposed, just a connection to COVID-19; note also that no Special Direction invoked more than two powers at one time.)

13. By the time the powers expired, various Ministers of Immigration had between them gazetted 43 "beneficial" Special Directions and one (no. 10) "non-beneficial" Special Direction (it established a new condition on existing temporary entry class visas, namely to obey the direction of a Medical Officer of Health).

14. Many of the Special Directions contributed positively to New Zealand's foreign relationships: for example, it was important to the US that New Zealand was able to facilitate the arrival of people under the Antarctic Treaty while our borders were closed, and many Pacific nations in particular appreciated that New Zealand enabled people to live and work here while travel to their home countries was not possible.

15. The last few Special Directions, while still maintaining a connection to COVID-19 (required by the legislation), mopped up after borders re-opened, and were used as part of a range of mechanisms to address the then- challenging workforce shortages. One extended the expiry dates of the approximately 7,500 working holiday visas of holders onshore, and others reinstated the visas of people offshore whose Working Holiday Visas or Post Study Work Visas had expired while borders were closed. Doing this through the standard mechanisms would not have been worthwhile. It would have involved establishing a policy, which would have required a new visa type, ICT changes,

and people who qualified then making individual applications (either with a fee – dissuading to applicants – or without – expensive for INZ or the Crown), followed by individual decisions. As the reinstatement of those visas was largely a goodwill gesture, it would have been difficult to justify prioritising at that point, especially as it was not clear how many of the approximately 20,000 people eligible would have been interested in taking up the offer.

16. Therefore, while there has not been a formal evaluation, our experience of use means that we have considerable confidence about both their usefulness (from a client and a system efficiency perspective), and the design of the safeguards. The powers that are proposed to be reestablished are set out in **Table One** below.

Table One: Time-limited immigration powers that are proposed to be made permanent

	Immigration Act 2009 section/s	Description
1	s52(4A) (temporary entry class visas)	The power to impose, vary, or cancel conditions for classes of temporary entry class visa-holders, by Special Direction
2	s50(4A)	The power to vary or cancel conditions for classes of resident visa-holders, by Special Direction
3	s78A(1) (temporary entry class visas)	The power to extend the expiry dates of visas for classes of people, by Special Direction
4	s61A(1) and s61A(2)	The power to grant visas to individuals and classes of people in the absence of an application, by Special Direction (Note: 61A(1), which relates to individuals, did not have to address COVID-19 impacts, unlike s61A(2) Special Directions, which applied to classes of person)
5	s57(3) and s57(5)	The power to waive any regulatory requirements for certain classes of application, by Special Direction

17. For completeness, **Table Two** below shows the powers not proposed to be extended – they were border measures that related directly to the pandemic, and are not considered necessary at this time.

Table Two: Time-limited immigration powers that are not proposed to be recreated

	Immigration Act 2009 section/s	Description
6	s86(4A) and s86(4B)	The power to: • waive the requirement to obtain a transit visa in individual cases, by Special Direction • suspend a transit visa waiver made by Regulations, for an individual
7	s401A and s401B	The power to suspend the ability to make applications for visas or submit Expressions of Interest in applying for visas by classes of people, by Order in Council (Note: will not benefit the visa applicants)
8	s113A	The power to revoke the entry permission of a person who has been deemed by Regulations to hold a visa and have been granted entry permission. (Note: not required to be related to COVID-19, and will not benefit the person)

18. The changes that were made in 2020 worked well, and were able to be put in place quickly. However, the Law Commission has in the past identified that there are risks associated with making rapid changes in response to emergencies: useful changes may not be identified in time, while legislation enacted at pace in an emergency is likely to include wider powers than are necessary and to omit necessary safeguards. It may also not be the best use of official or parliamentary resource to enact just-in-time legislation at a time of national emergency.[2]

19. Finally, as previously noted, some of the powers have been or would be useful in light of situations overseas which have not directly impacted New Zealand. For example, the volcano in Tonga and the Confidential advice to Government both led to decisions that their citizens in New Zealand could remain here even if their temporary entry-class visas were about to expire: class Special Directions were a transparent mechanism for providing certainty in this situation without requiring formal visa applications.

What objectives are sought in relation to the policy problem?

20. The overarching objective across the suite of proposals is to enhance the integrity of the immigration system. This proposal specifically aims to enable the immigration system to respond efficiently, for the benefit of migrants, where there are circumstances that pose operational challenges outside MBIE's control.

21. These objectives align with the Government's commitment to ensuring that regulatory systems remain fit for purpose and work well.

[2] Law Commission, *Final Report on Emergencies* (NZLC R22, 1991).

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo and what scope will options be considered within?

22. The objectives for the change package underpin the criteria we have used to consider the options against the status quo. Broadly: would a proposal support the objective of:
    - enabling the immigration system to respond in a resilient and efficient fashion,
    - when there are circumstances that are unusual, or outside the agency's control, and that pose challenges to the immigration system.

23. At a secondary level, would a proposal be:
    - Effective (enable the immigration system to respond in a resilient and efficient fashion to circumstances that are unusual or outside INZ's control and that pose challenges),
    - adequate (proportionate and administratively workable),
    - transparent,
    - benefit migrants.

24. The scope of the consideration of options is "possible change to the Immigration Act 2009" (and any subordinate Regulations or immigration instructions).

What options are being considered?

25. Two major options are considered for each proposal. They are the status quo (no powers), and the proposed legislative changes. Some of outcomes sought by the proposals could be addressed in other ways and where appropriate these are also discussed below.

Option 1: (Status quo) use existing mechanisms

26. INZ has managed difficult and challenging situations without the powers, both before they existed and since they expired. Over time, INZ's investments into technology have enhanced its ability to respond to some of the situations that posed issues at the point that the borders were closed in 2020. At that point many visa applications could only be made on paper (an online option did not exist), and therefore could not be received or processed if offices were closed. In addition, INZ staff could not or could only minimally work from home: the technology used at the time did not support the transition to the remote provision of many services, remote access to servers was rationed, and it was not possible to undertake banking functions outside the office.

27. INZ is now better placed to deliver a range of services and functions remotely, providing greater resilience to disruptions. It has moved most application types online. Windows 10 and changes to processes mean that staff can work from home. In a future major emergency, Cabinet can decide policies with regard to rules and criteria for the grant of applications for visas.

28. The Minister of Immigration continues to have certain Special Direction powers with regard to “associated” groups of foreign visa applicants under s378 of the Act, for a limited range of issues already contemplated by the Act (such as exempting identified people who are associated together from certain visa application requirements), although without the safeguards[3] of the COVID-19 powers. We have demonstrated that we can, if necessary, pass tailored emergency legislation quickly.

29. However, the status quo is not ideal from a number of perspectives. At one end, if an emergency arose, it might not be practicable to pass legislation quickly. In that case, as the Minister would not be able to make flexible Special Directions, most Cabinet policy decisions addressing the emergency would have to be reflected through new visa policies. These would require individual applications to be made and assessed when INZ might have very limited capacity, for example because of staff illness or because offices or IT systems had been impacted by an earthquake or major cyberattack.

30. From a more mundane perspective, the existence and then removal of the previous powers has made it clear that the Act has a gap with regard to efficiently managing groups of non-citizens in circumstances that challenge the immigration system but are out of INZ’s control. For example, where classes of temporary entry class visa-holders are suddenly unable to easily return home due to offshore emergencies (such as the Tongan volcano or the Confidential advice to Government), it is not possible to extend their visa expiry dates as a class. In equivalent situations, Immigration Officers are often encouraged to exercise discretion (under section 11 of the Act) to individuals in a compassionate fashion. This is arguably contrary to the intended use of discretion, and the outcomes are not transparent.

31. Otherwise, staff must deal with individuals one-by-one, making individual Special Directions to, for example, waive fees and the requirement to provide a photograph for a visa application. This is inefficient, non-transparent, and frustrating for all parties concerned.

Option 2: Amend the Act to re-establish “flexible powers”, a subset of the previous powers, with appropriate safeguards

32. The proposed legislative package is set out in the tables below. **Table Three** elaborates Table One above), while **Table Four** scores the two options (status quo and flexible powers).

33. For further information, **Annex One** summarises the 44 Class Special Directions made by the Minister of Immigration to date under the two Immigration (COVID-19 Response) Amendment Acts. **Annex Two** sets out the powers proposed to be re-established, with a summary of their safeguards.

[3] That is, that the decisions are transparent (because they are published) and disallowable, are considered to be reasonably necessary, and may not disadvantage the migrant(s) concerned.

Table Three: Proposed powers, how they are exercised, and existing options where available

	Description	Instrument	Section	Options
1	To impose, vary or cancel conditions for classes of temporary entry class visa-holders	Special Direction	s52(4A) (temporary)	The status quo has two options: • Temporary visa-holders could be advised to apply for a VoC on their existing visa (costing $325), which would be granted under s52(2). Cabinet could decide to waive the fees (likely requiring regulatory amendment). Processing the applications for VoCs would be time consuming and inefficient, and expensive for the Crown if fees were waived. • For a class of persons, Cabinet could agree a new visa policy, and could agree to waive the application processing fees. This would be even more time consuming and inefficient, and more expensive for the Crown.
2	To vary or cancel conditions for classes of resident class visa-holders	Special Direction	s50(4A)	As above with regard to individuals applying for VoCs (s50(2), s51(3)) No real policy option, as a resident visa is effectively permanent (i.e. it does not make sense to apply for a replacement resident visa with different conditions).
3	To extend the expiry dates of visas for classes of people, for up to nine months	Special Direction	s78A(1) (temporary)	No other option apart from applying for a new visa and meeting the policy requirements as set out in 1 above (existing individual Special Direction powers do not include expiry date changes)
4a	To grant visas to individuals in the absence of an application	Special Direction	s61A(1)	No other option
4b	To grant visas to classes of people in the absence of an application	Special Direction	s61A(2)	No other option
5	To waive any regulatory requirements for certain classes of application	Special Direction	s57(3) and s57(5)	Very limited option for a Special Direction under s57(1) waiving requirements for an individual or linked individuals through regulations[4]; individuals need to be known and identified so inefficient and time-consuming.

34. The major risk identified with this option is that the relative ease of use of these powers to address issues may lead to the lobbying of future Ministers (especially once "moral precedents" are set) and may slightly lower the pressure on officials to quickly address problems in policy settings or IT systems. These will be managed through the certification

[4] Regulation 34(2) of the Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010.

and consultation processes required of a Minister before a group power is exercised, and clear messaging about the Minister's intentions.

How do the options compare to the status quo?

35. **Table Four** below sets out the two options against the criteria established under paragraph 22 above, which are:

    A Effective (enable the immigration system to respond in a resilient and efficient fashion to circumstances that are unusual or outside INZ's control and that pose challenges)

    B Adequate (proportionate and administratively workable)

    C Transparent (to stakeholders and the public)

    D Benefit migrants

36. The scoring schema is:

    0 Not at all or not applicable

    1 Marginal

    2 Partially meets or addresses

    3 Meets or addresses well

Table Four: Scoring the two options for the proposals

		Status quo					Act change				
	Description	A	B	C	D	**Avg**	A	B	C	D	**Avg**
	POWERS										
1	To impose, vary or cancel conditions for classes of temporary entry class visa-holders	1.5	2	2	1	**2.0**	3	3	2.5	2.5	**3.5**
2	To vary or cancel conditions for classes of resident class visa-holders	1	1	2	1	**1.5**	3	3	2.5	2.5	**3.5**
3	To extend the expiry dates of visas for classes of people for up to six months	1	1	2	2	**1.8**	3	3	3	3	**3.8**
4a	To grant visas to individuals in the absence of an application	0	0	0	0	**0.0**	3	3	3	3	**3.8**
4b	To grant visas to classes of people in the absence of an application	0	0	0	0	**0.0**	3	3	3	2	**3.5**
5	To waive any regulatory requirements for certain classes of application	1	1	0	2	**1.3**	3	3	3	2.5	**3.4**
	Average scores					**1.1**					**3.6**

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

37. The status quo option (Option 1) does not meet the broad aim of enhancing the immigration system's integrity, by enabling it to respond in a resilient and efficient fashion to circumstances that are unusual or outside INZ's control and that pose challenges. From a day-to-day perspective, INZ and migrants sometimes face issues and circumstances which are not easily addressed using the current settings. With regard to future extreme emergencies, there are no guarantees that it would be feasible to quickly pass bespoke legislation again (for example, in the case of a large earthquake in Wellington) and in any case it would not be a good use of Parliament's or officials' time to focus on making rapid legislative change when the powers could be in reserve. A broader discussion of its disadvantages is set out from paragraph **Error! Reference s ource not found.**.

38. Option 2 (establishing enduring and transparent flexible powers) better meets the criteria set out from paragraph 22 above. These powers would enable the Minister to respond appropriately and efficiently to exceptional or unusual circumstances by providing additional flexibility in the immigration system, with appropriate safeguards.

What are the marginal costs and benefits of the option?

39. Given the nature of the proposed changes, it is not feasible to identify monetised costs and benefits of their existence. In particular, with regard to a possible future major event or emergency, it is not in general possible to accurately estimate costs or benefits, as they would be specific to the particular situation (and even then would be difficult to quantify – emergencies generate a lot of costs).

40. With regard to the more day-to-day use of the powers, their impact would mean greater efficiency in the face of unusual circumstances, but again this would be difficult to quantify.

41. Broad stakeholder/impact groups have been identified below, noting that this is indicative, and not exhaustive (again, different situations will involve different groups; airlines and maritime carriers may have a strong interest in people being able to travel to New Zealand or not, the international education industry will focus on foreign students, the immigration advice industry maintains a close interest in immigration settings generally, and other governments may have an interest in how their citizens are treated in challenging situations).

    - Parliament
    - The New Zealand government (Cabinet)
    - INZ
    - Onshore temporary visa-holders
    - Onshore visa applicants
    - Onshore families of migrants
    - Onshore employers
    - Offshore visa-holders and applicants
    - Other governments (to the extent that their citizens are advantaged).

42. **Table Five** below sets out the identified stakeholder groups and a description of how the proposed changes from the preferred option might impose costs or generate benefits with regard to the package as a whole. Officials note that the evidence cited relates to experience over the three years that the COVID-19 emergency powers were in force.

Table Five: Description of costs and benefits for stakeholder groups

Affected groups	Comment	Impact.	Evidence Certainty
Additional costs of the preferred option compared to taking no action			
Parliament	There is a cost to considering this legislation against other legislative programme priorities; if there are no emergencies in the next several decades, MPs' time might have been better spent on other Bills.	Medium (Bills are resource intensive)	This is one part of a broad amendment Bill so its marginal costs are not high, given that the rest of the Bill is progressing. With regard to future emergency situations, this is essentially insurance.
Government (Cabinet)	As above, with regard to policy proposals.	Low	As above.
INZ	Implementation costs to MBIE to support the legislation then create processes for use if the legislative powers are introduced.	Low	The costs are relatively small (design of templates and processes rather than IT changes). As above, they are insurance against having to do the same things in very tight timeframes, or having to operate processes which are not fit for purpose. They are more than balanced by the efficiency gains of having the flexible powers available. Evidence certainty is high given actual experience.
Onshore temporary visa-holders	No cost associated with making the legislative change. No cost if an exceptional/unusual circumstance does not transpire. The proposals, where they impact on the group, in the case of an exceptional circumstance would strongly reduce potential costs of e.g. having to apply for further visas or VoCs.	Low / none	In the event of an emergency or unusual circumstance, numbers of onshore temporary visa-holders could see their purpose for being in New Zealand (to work or study) not being able to be fulfilled, or could face their visa being about to expire, potentially when it was difficult to leave. The package would enable (free) changes to be made to benefit them (such as the extension of their visas or changes to their visa conditions).
Onshore temporary visa applicants	No cost associated with making the legislative change. No cost if an exceptional circumstance does not transpire. The proposals, where they impact on the group, could compensate for offices being closed, IT systems being down, etc.	Low / none	As above, plus the changes could, in the event of a situation where it might be difficult to make applications, allow for application requirements to be waived.
New Zealand family members of people offshore	(On the assumption that family in New Zealand would like their foreign family members to be able to remain or come here.) Where this benefits their offshore or temporarily onshore family members it will remove/ reduce costs.	Low	
Onshore employers	No cost associated with making the legislative change. No cost if an exceptional/unusual circumstance does not transpire. The proposals would enable employees to remain lawfully in New Zealand, have relaxed work conditions, etc., if necessary	Low / none	Class Special Directions are made at no cost to the people they benefit.
Offshore visa applicants/ holders	No cost associated with making the legislative change. No cost if an exceptional/unusual circumstance does not transpire. Benefits if it is difficult to make applications, as could allow for application requirements to be waived.	Low	
Additional benefits of the preferred option compared to taking no action			
Parliament	The converse of the cost analysis above: the benefit to the preferred option is that, in the event of an emergency, Parliament would be able to focus on more pressing matters.	Zero (no emergency) or very high (emergency)	
Government (Cabinet)	As above: in the event of an emergency, Cabinet would be able to make decisions and have them implemented relatively easily, and would not have to wait for enabling legislation.	Low (no emergency) or very high (emergency)	The proposals overall will improve efficiency.
INZ	Major benefits to INZ/the immigration system in the event of an emergency or exceptional/ unusual circumstances with significant impacts on the immigration system; plus ongoing benefits to respond to general non-emergencies that nonetheless pose challenges.	INZ: Low (no emergency) or high to very high (emergency/ exceptional circumstances)	The experience of the three years that the powers existed provides high certainty.

Affected groups	Comment	Impact.	Evidence Certainty
Onshore temporary visa-holders	Benefits to people onshore who cannot easily return to their homes, for example visas will be able to be extended as a class at no charge. The proposals, where they impact on the group, in the case of an emergency or exceptional/unusual circumstances, would remove the costs of, for example, having to apply for further visas or VoC and would improve certainty.	Low (no emergency) or high/very high (emergency/ exceptional circumstances)	Note the numerous Special Directions that were made removing requirements or extending visa expiry dates etc for classes of person onshore.
Onshore temporary visa applicants	The proposals, where they impact on the group, in the case of an emergency or exceptional/unusual circumstances would compensate for offices being closed etc., and would provide more options and more certainty.	Low (no emergency) or high (emergency/ exceptional circumstances)	As above.
New Zealand family members of people offshore	(On the assumption that family in New Zealand would like their foreign family members to be able to remain or come here.) Where this benefits their offshore or temporarily onshore family members it will remove/ reduce costs and uncertainty.	Low to medium	The ability to grant visas to people offshore whose visas have expired, or to extend their validity until it is possible to travel again, will benefit some New Zealand families.
Onshore employers	In the case of an emergency or exceptional/unusual circumstances, the proposals could enable employees to remain lawfully in New Zealand, have relaxed work conditions, etc., if necessary.	Zero (no emergency) or high (emergency/ exceptional circumstances)	For example, enabling students to work in supermarkets with no requirement to apply for and be granted a VoC to do so (actual need from early days of pandemic).
Offshore visa applicants/ holders	No cost associated with making the legislative change. No cost if an emergency or exceptional / unusual circumstances does not transpire.	Low	High where eg visa application requirements waived The changes could, in the event of an emergency where it was difficult to make applications, allow for application requirements (such as x-rays) to be waived.

Section 3: Delivering an option

How will the new arrangements be implemented?

43. If Cabinet agrees to proceed with the proposed package and Parliament then passes the legislative changes, officials will implement them as set out below.

Amendments to powers

44. **Table Six** below sets out how the flexible powers would be exercised. Implementation will in the first instance involve the development of documentation (templates/processes), and appropriate messaging for reference in the case that the powers are exercised.

Table Six: Scope and safeguards, and relationship to powers

Process step	Comment
Circumstances	• For groups: A case would be made that there were circumstances that were unusual, or outside the agency's control, and that posed challenges to the immigration system, and that it was reasonably necessary for the Minister of Immigration to make a Special Direction in respect of a specified group in order that they could benefit from it. The Minister would need to agree. • For Individuals (s61A only) A DDM would become aware of an individual whose circumstances indicated that they should be granted a visa, but who could not apply or for whom it would be impractical for them to apply.
Person / body invoking the powers	• For Groups: The Minister of Immigration would make one or more Special Directions that were Gazetted. • For Individuals: A Minister or DDM could make the decision.
Procedures to be followed	As set out under Circumstances and Person/body invoking the powers; noting that: • For Groups: The Minister would undertake any consultations that they considered appropriate (this could include seeking Cabinet's formal noting or agreement to the proposed course of action), and would certify that they considered that the other conditions were met. Officials would organise the formal Gazetting of the Special Direction, and the publication on MBIE's INZ website. If changes to Immigration Instructions were required, standard processes would be followed for preparation, certification, and publication (see paragraph 46 below). • For Individuals: The Minister or DDM would make the decision. They would not be required to consider any request, or to provide reasons for their decision (including any decline decision) or refusal to consider.
Scope of the powers	The flexible powers are set out below: • The power to impose, vary or cancel conditions for classes of temporary entry-class visa-holders, by Special Direction. • The power to vary or cancel conditions for classes of residence class visa-holders, by Special Direction. • The power to extend the expiry dates of visas for classes of people, by Special Direction [for a maximum of nine months]. • The power to grant visas to individuals and classes of people in the absence of an application, by Special Direction [note that the power relating to individuals would not be required to respond to exceptional or unusual circumstances]. • The power to waive any regulatory requirements to make an application for certain classes of people, by Special Direction.

Process step	Comment

Controls / Safeguards	• Each instrument that gave effect to the exercise of the powers would be secondary legislation that would be notified in the Official Gazette, would be disallowable, and would be subject to judicial review (by leave).
	• In making any Special Direction, the Minister of Immigration would be required to declare that:
	  ○ making the Special Direction was reasonably necessary to manage the effects, or deal with the consequences, of the specified situation, whether in New Zealand or overseas, as existing measures were not sufficiently responsive; and
	  ○ they considered that the exercise of the power or powers would benefit, or at least not disadvantage, the people to whom it applies; and
	  ○ they had undertaken any consultation that they considered to be appropriate prior to that certification. (As above, this could include formal consultation with Cabinet.)
	• The Special Directions and Orders/Notices would have a maximum life of six months and would have to be renewed for their effect to be continued. As above, it is proposed that the duration of the temporary visas granted or extended or extended by Special Direction would be limited to nine months' duration at one time (to reduce uncertainty for holders as the expiry date of the Special Directions approached).

Implementation will include planning for use and publication of information

45. A process map and indicative templates will be drawn up. A description of the impacts of the new legislation will be published on the INZ website, alongside existing descriptions of the Act and the Amendment Acts which have been passed since it was enacted.

46. With regard to the exercise of any of the class flexible powers, their use will be published (as below). If any changes to Immigration Instructions are required through policy decisions that also invoke the use of a class Special Direction power, the amended Instructions will be certified by the Minister of Immigration and published on MBIE's INZ website.

How will the new arrangements be monitored, evaluated, and reviewed?

47. The flexible powers have a number of monitoring and review points built in. The class Special Directions are notified in the Gazette with an explanation, and presented to the House of Representatives, and also published on MBIE's INZ website. They are "disallowable instruments" in terms of the Legislation Act 2019.

48. MBIE's Annual report will also report on the number of times that class Special Directions have been used in the relevant year, and for the previous three years (if relevant) with a summary of the reasons. This will support transparency, and any future reviews.

49. Finally, a review of the use of the powers will be carried out three years after they come into effect. Current planning for a broader review of the Act means that any recommended adjustments to legislation are likely to be able to be made in a timely manner.

Annex One: COVID-19 Class Special Directions made by a Minister of Immigration June 2020 – April 2023

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
1	19-Jun-20	1-Jul-20	57(3)	2020-go2869 Reduce application requirements for transit visa applicants (including remove requirement for forms and fees)	Not fixed but approximately **2,200** applications had been made as at February 2021 (final number of applicants will be higher)
2	6-Jul-20	10-Jul-20	78A	2020-go3070 Extend temporary work visas to enable people whose visas would other expire to remain and work lawfully in New Zealand	Approximately **19,500**
3	7-Jul-20	10-Jul-20	61A(2)(b) and 61A(5)	2020-go3037 Grant new limited visas to onshore RSE workers	Approximately **1,000** visas
4	17-Aug-20	23-Sep-20	78A	2020-go4469 Extend duration of visas held by certain partners and dependants (children) of employer-assisted workers	Approximately **3,000** partners and dependents
5	2-Sep-20	11-Sep-20	78A	2020-go4233 Extend temporary visitor visas to enable people whose visas would otherwise expire to remain lawfully in New Zealand	Approximately **16,600**
6	3-Sep-20	21-Sep-20	57(3)	2020-go4242 Waive prescribed fees and levy charges to persons associated with Antarctic Treaty programme	Not fixed. As at December 2020, approximately **1100** personnel had been approved an EOI (able to apply for visa to enter New Zealand)
7	11-Sep-20	22-Sep-20	50(4A) and 50(4C)	2020-go4425 Vary travel conditions on resident visas to extend the time available for offshore resident visa holders with expired travel conditions to travel to New Zealand	**5,600** offshore resident visa holders had travel conditions extended OR were granted new resident visas
8	11-Sep-20	22-Sep-20	61A(2)	2020-go4426 Grant resident visas to offshore persons whose resident visas are no longer valid to extend the time available for their travel to New Zealand	
9	11-Sep-20	25-Sep-20	52(4A)(b) and 53(4A)b)	2020-go4483 Vary the conditions of visitor visa holders in New Zealand to allow the holders to study or to attend school for up to six months in a year	Approximately **13,200** individuals had their study condition amended
10	11-Sep-20	25-Sep-20	52(4A)(a)	2020-go448 Impose a condition on temporary entry class visa holders to comply with COVID-19 health regulatory requirements (**note: this is the only non-beneficial Special Direction, and relates to s52(4B(b)(ii)**)	**184,881** temporary visas had this condition added
11	11-Sep-20	25-Sep-20	78A	2020-go4485 Extend visas held by certain employer-assisted workers (Religious Workers and Foreign Fishing Crew), and by the partners and dependants of work visa holders, to enable them to remain lawfully in New Zealand (and to work, study, or visit as appropriate)	Foreign fishing crew - **650**. Religious workers - **160**. Religious workers partners and dependents - **58**.

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
12	1-Oct-20	12-Oct-20	61A(2) and 61(A)(5)	2020-4727 Grant supplementary seasonal employment visas to onshore working holiday visa holders whose visas are expiring to enable them to remain lawfully in New Zealand and work in seasonal industries	Estimated to be around **3,000** visas
13	1-Oct-20	9-Oct-20	61A(2) and 61(A)(5)	2020-go4728 Grant new RSE limited visas to persons who were previously granted limited visas as stranded RSE workers	Estimated to be up to approximately 990 people
14	17-Dec-20	12-Jan-21	78A	2021-go58 Extend working holiday visas, and ease work restrictions, to persons in New Zealand on working holiday visas which are expiring	Total eligible estimated to be **7,800**.
15	17-Dec-20	19-Jan-21	78A	2021-go153 Extend the visas of some employer-assisted work visa holders and of their partners and dependants to enable them to remain lawfully in New Zealand (and work, study, or visit as appropriate).	Estimated to be around **13,300** EAWV holders and **7,000** partners and dependents - currently underway
16	17-Dec-20	2-Feb-21	57(3) and 57(5)	2021-go359 Waive the requirement to provide a Chest X-Ray Certificate for certain RSE Limited Visa Applications, to streamline the process for applicants travelling from Samoa, Tonga or Vanuatu who are arriving before 30 March 2021	Around **1930** RSE workers likely to be impacted.
17	17-Dec-20	3-Feb-21	57(3)	2021-go358 Waive the requirement to pay the prescribed fee and any levy for certain Recognised Seasonal Employer Limited Visa Applications during COVID-19 Travel Restrictions, to remove a barrier to the movement of RSE workers to where the greatest workforce need is and remove a cost normally borne by the RSE worker; noting this also benefits RSE workers who are already onshore and continue to be affected by COVID-19 measures offshore, primarily affecting their repatriation.	Around **1,650** (as at 16/2/2021)
18	18-Feb-21	22-Feb-21	78A	2021-go605 Extend the temporary visitor visas of holders who are in New Zealand on 19 February 2020, and whose visitor visas expire before 31 March 2021, for two months; to reflect that many visitor visa holders who were onshore before the border closures have been unable to return home due to travel restrictions imposed globally. This decision reflects previous action undertaken to enable people to remain lawfully in New Zealand while border closures have been ongoing to mitigate the spread of COVID-19.	Around **9,500**
19	26-Apr-21	3-May-21	57(3)	2021-go1659 Waiver of Requirement to Provide a Chest X-Ray Certificate for Certain Onshore RSE Limited Visa Applications in Order to Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak or Effects of COVID-19.	Around **5,500**
20	13-May-21	14-May-21	57(3)	2021-go1846 Waive the requirement to sign the application, provide a passport or certificate of identity, provide two photographs, and pay the prescribed fee for persons in Tonga or Samoa who are required to apply for and obtain a transit visa to travel to and be in New Zealand as a transit passenger and who can provide copies of their passport or COI with their	

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
				application. This will simplify the transit visa application process, which is currently impracticable due to COVID-19, as the relevant INZ offices are closed.	
21	9-Jun-21	22-Jun-21	57(3)	2021-go2459 Waiver of Certain Requirements for the Making of a Transit Visa Application From Tonga and Samoa During Covid-19 Travel Restrictions	
22	9-Jun-21	22-Jun-21	78A	2021-go2458 Extension of Visas Held by a Class of Onshore Persons Whose Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken To Contain or Mitigate the Outbreak of COVID-19 or its Effects - extends visas of Working Holidaymakers by 6 months	Around **6,000 - 7,500**
23	24-Jun-21	29-Jun-21	52(4A)	2021-go2611 Variation of Conditions of Visas Held by a Class of Onshore Persons to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or Its Effects - Working Holidaymakers who hold visas extended by 6 months under go-2458 (on 9 June) are able to work in any employment except permanent employment	Around **900**
24	22-Aug-21	1-Sep-21	50(4A) and 50(4C)	2021-go3695 Vary the Travel Conditions for a Class of Offshore Resident Visa Holders to Manage the Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak or Effects of COVID-19 - relates to 7 & 8 above	Approximately **8,000**
25	27-Sep-21	29-Sep-21	61A(2)(a) and 61A(5)	2021-go4207 Grant of Limited Visas With Critical Purpose Conditions to Certain Persons who are Former Holders of Recently Expired RSE Limited Visas to Manage the Effects and Deal With Consequences of Measures Taken to Contain or Mitigate COVID-19 Outbreaks - grants new visas to enable workers on flights that were cancelled to travel to New Zealand on future flights	Potentially **2,013**
26	28-Sep-21	1-Oct-21	61A(2)(a) and 61A(5)	2021-go4227 Grant of Limited Visa to Stranded RSE Workers to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - grants new visas to RSE workers stuck onshore: expires 31 August 2022	Potentially **2,013**
27	28-Sep-21	1-Oct-21	57(3) and 57(5)	2021-go4228 Waiver of the Requirement to Provide Passport Photographs for Certain Recognised Seasonal Employer Limited Visa Applications During COVID-19 Travel Restrictions - for RSE workers onshore applying for further RSE visas	n/a
28	28-Sep-21	13-Oct-21	57(3) and 57(5)	2021-go4255 Waiver of Requirement to Provide a Chest X-Ray Certificate for Certain Onshore RSE Limited Visa Applications in Order to Deal with Consequences of Measures Taken to Contain or Mitigate the Outbreak or	Samoa - max **1,200 RSE workers**; Tonga - max **1,300 RSE workers**; Vanuatu - max **4,400 RSE workers**

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
				Effects of COVID-19 - for RSE workers onshore applying for further RSE visas: expires 31 August 2022	
29	11-Oct-21	14-Oct-21	78(A)	2021-4469 Extension of Visas Held by a Class of Onshore Persons Whose Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - extends visas of WHMs: expires 30 June 2022	Around **3,100**
30	11-Oct-21	14-Oct-21	78(A)	2021-4470 Extension of Visas Held by a Class of Onshore Persons Whose Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - extends SSE visas: expires on 30 June 2022	Around **3,100**
31	21-Oct-21	3-Nov-21	378(6)	2021-go4663 Replacement Special Direction—Extension of Visas Held by a Class of Onshore Persons Whose Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - applies to SSE visa holders; revokes and replaces 2021-go4470 - same extension to 30 June 2022 but excludes people holding visas expiring in accordance with s63(2) of the Act (ie who are outside New Zealand)	n/a
32	3-Mar-22	4-Apr-22	61A(2)	2022-go1276 Special Direction – Grant Work Visas to a Class of Offshore Persons Whose Working Holiday Scheme Visas Have Expired, to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - This Special Direction grants new working holiday visas to persons who are not in New Zealand and who recently held working holiday scheme visas but were unable to enter New Zealand before their first entry travel date due to the border closure and as a result no longer hold working holiday scheme visas. These persons will have until 13 September 2022 to travel to New Zealand.	Around **19,500**
33	3-Mar-22	4-Apr-22	52(4A)	2022-go1277 Special Direction – Vary the Travel Conditions for a Class of Offshore Working Holiday Scheme Visa Holders to Manage the Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of COVID-19 or its Effects - this Special Direction varies the travel conditions for a class of offshore working holiday scheme visa holders, as classified in this direction, by extending the “First Entry Before” date to 13 September 2022. This means those persons will have a further 6 months past the date on which border restrictions are lifted for Working Holiday Scheme visa holders (13 March 2022), to travel to New Zealand on their work visas.	Approximately **80**
34	7-Apr-22	19-Apr-22	61A(2)	2022-go1492 Special Direction - Grant a resident visa to the class of persons who are currently outside of New Zealand and are of a nationality other than Australian; and made a resident visa application between March 2020 and December 2021 (or February 2020 if they were applying from	122

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
				China or Iran) and as a result, the border entry instructions that were in force now prevent them from entering New Zealand as a first-time resident; and have been determined by an immigration officer to meet requirements for that resident visa, with the exception of being eligible for entry permission. To facilitate the resumption of processing residence class visa applications that were submitted during the period that border instructions in force at the time would prevent them from entering New Zealand on that visa, if approved.	
35	7-Apr-22	19-Apr-22	61A(2) and 378(6)	2022-go1493 Special Direction - Grant a resident visa to the class of persons who are currently outside of New Zealand and are of a nationality other than Australian, and made a resident visa application between March 2020 and December 2021 (or February 2020 if they were applying from China or Iran). This is to address the fact that the border entry instructions that were in force now prevent them from entering New Zealand as a first-time resident. They must have been determined by an immigration officer to meet the requirements for that resident visa, with the exception of being eligible for entry permission.	3,600
36	7-Apr-22	19-Apr-22	57(3) and 57(5)	2022-go1495 Special Direction – Waiver of the Requirement to Give an Application Form and Physical Documents to an Immigration Officer for Persons Who are in Nauru, Kiribati or Tuvalu and are Applying for a Visa to Work for Recognised Seasonal Employers - Allows applicants located in Nauru, Kiribati and Tuvalu to apply for RSE limited visas by emailing their application and copies of their passport or certificate of identity to Immigration New Zealand rather than having to deliver them to an immigration officer in person or by registered post or courier. This is in response to the closure of the Visa Application Centres in Nauru and Kiribati due to falling visa applications due to COVID-19, and the lack of flights between the Pacific Islands, resulting in the applicants otherwise having to courier their applications and documents to a Visa Application Centre located in another country.	(Open to Nauru, Kiribati and Tuvalu population)
37	6-May-22	16-May-22	78(A)	2022-go1862 Special Direction – Every person who is in New Zealand on 9 May 2022 and who holds a temporary work to residence visa with a recorded expiry date of between 9 May and 31 December 2022, where the visa was granted under a specified category of immigration instructions, has their visas extended by six months; and secondary applicants associated with people who qualify.	**3,233** (2,021 principal work visa holders, 1,212 partners and dependent children)
38	6-May-22	16-May-22	61A	2022-go1863 Special Direction – grant a new visa that will expire two years after the date of expiry of the person's current visa, to onshore persons who currently hold a qualifying visa (including Ukrainians), where their current visa either expires between 9 May and 31 December 2022, or they hold a visa that was granted by the Minister's Special Direction of 10 March 2022	**16,283** (13,397 principal work visa holders, 2,866 partners and dependent children). This includes **130** Ukraine Nationals.

	Date signed by Minister of Immigration	Date published in gazette	Section/s of the Act	Gazette reference and effect	Impacts (including numbers of visa-holders impacted)
				and previous held a qualifying visa with an expiry date between 9 May and 31 December 2022 (including secondary applicants).	
39	30-May-22	22-Jun-22	53(4A)	2022-go2515 Special Direction – Variation of travel conditions of Critical Purpose Visitor Visas (CPVVs) – conditions are varied for the visas held by firstly every person who holds a CPVV on the date of the Special Direction, and secondly every person who applied for a CPVV before 12 May 2022 and is subsequently granted that visa, to enable multiple journeys to New Zealand; it expires on 31 December 2022 unless revoked	About **8,789** CPVV holders and **1,000** CPVV applicants (applications submitted before 12 May 2022), including partners and dependent children. From these numbers **5,098** are onshore and **3,691** are offshore.
40	11-Jun-2022	27-Jun-2022	61A	2022-go2931 Special Direction – Grant of limited visas to onshore RSE workers while they await repatriation to enable them to remain lawful and work while awaiting a flight	Between **500** and **1,000** individuals (estimated)
41	26-Aug-22	7-Sep-2022	78A and 52	2022-go3835 Special Direction – Extension of Visas Held by Class of Onshore Persons Whose Working Holiday Scheme Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of Covid-19 or its Effects	?
42	20-Oct-2022	27-Oct-2022	61A(2)	2022-go4616 Special Direction – Grant Work Visas to a Class of Offshore Persons Whose Working Holiday Temporary Visas Have Expired	?
43	3-Feb-2023	14-Mar-2023	61A(2)	2023-go756 Special Direction – Grant of Work Visas to a Class of Offshore Persons Whose Post-Study Work Visas have Expired	Estimated 1,800 eligible
44	2-Apr-2023	16-May-2023	78A and 52	2023-go2020 Special Direction – Extension of Visas Held by Class of Onshore Persons Whose Working Holiday Scheme Visas are Expiring to Manage Effects and Deal With Consequences of Measures Taken to Contain or Mitigate the Outbreak of Covid-19 or its Effects	?

Annex Two: Summary of proposed changes

#	Power	Exercisable by	Relevant section/s	Safeguards and limits				Examples of how the power may be used
				Exercisable only where responding unusual circumstances that pose a challenge to the immigration systems[5]	Publication requirement, disallowance, presented to the House[6]	Only where it benefits or does not disadvantage affected migrants	Other	
1	To impose, vary or cancel conditions for classes of temporary entry class visa-holders	Special direction	s52(4A) (temporary)	✓	✓	✓	Maximum currency of 6 months	To grant work conditions, e.g. to allow visitors onshore who cannot leave to work lawfully
2	To vary or cancel conditions for classes of resident class visa-holders	Special direction	s50(4A)	✓	✓	✓	Maximum currency of 6 months	To allow offshore resident visa-holders more time to enter New Zealand
3	To extend the expiry dates of visas for classes of people for up to nine months	Special direction	s78A(1) (temporary)	✓	✓	✓	Maximum currency of 6 months	To extend visa expiry dates for classes of persons offshore who may not be able to travel to New Zealand within the validity of their visa; or persons onshore who cannot leave due to an emergency offshore
4a	To grant visas to individuals in the absence of an application	Special direction	s61A(1)	✖	✖	✓	Delegable to an immigration officer	To grant visas to individuals who are unable to submit an application, e.g. they are in New Zealand and hold a limited visa
4b	To grant visas to classes of people in the absence of an application	Special direction	s61A(2)	✓	✓	✓	Maximum currency of 6 months	To grant visas to classes of people who are unable, to submit an application, e.g. they are in a country that is undergoing an invasion
5	To waive any regulatory requirements to make an application for certain classes of people	Special direction	s57(3) and s57(5)	✖	✓	✓	Maximum currency of 6 months	To waive fees or other application requirements which may be currently impractical to meet, e.g. a cyclone in the Pacific has wiped out a Visa Application Centre

[5] Specifically, where the Minister considers that the exercise of the power or powers is reasonably necessary to manage the effects, or deal with the consequences, of the specified situation, whether in New Zealand or overseas.

[6] Special directions affecting a class of visa-holders or people are “disallowable instruments” in terms of the Legislation Act 2019; and will, with an explanation, be notified in the Gazette, published on MBIE’s website; and presented to the House of Representatives.