

**Epidemic Response Committee
Parliament Buildings
Wellington**

Re: Immigration (COVID-19 Response) Amendment Bill

We appreciate the opportunity to make comment on the Immigration (COVID-19 Response) Amendment Bill.

This submission is made on behalf of Auckland District Law Society (ADLS), New Zealand Association of Migration and Investment (NZAMI), and New Zealand Association of Immigration Professionals (NZAIP). We understand that the New Zealand Law Society (NZLS) will be making their own submissions that broadly aligns with ours.

We, as professional representative bodies working within the immigration sector, have taken the proactive step to unite at this unprecedented time, so as to ensure that migrants and their employers are given a collective voice.

We have had an opportunity to read the Immigration (COVID-19 Response) Amendment Bill and its supporting rationale. We have also been afforded the opportunity to discuss the proposed powers in the Bill with representatives of Immigration New Zealand.

We broadly support the Bill as written and are supportive of its intentions.

SAFEGUARDS

In making a submission on this Bill, we consider it important to ensure that migrants do not experience any loss of rights as a result of the proposed legislation. We also consider it desirable to ensure that decisions made as a result of the powers granted do not negatively impact on New Zealand businesses or New Zealanders.

We are, to a degree, satisfied that the Bill as drafted has sufficient safeguards in ensuring that the Minister of Immigration is unable to delegate the majority of the special direction powers, and that Parliamentary scrutiny will apply where such powers are exercised. Further, the Bill provides safeguards in respect of temporarily suspending the ability of persons to make applications, by making this power subject to an Order in Council. We also note the inclusion of a 12-month sunset clause.

PURPOSE

It is noted that most provisions are premised on the basis that the powers are only to be exercised where it is necessary or desirable to manage the effects, or deal with the consequences, of—

- measures taken under the principal Act or any other enactment to contain or mitigate the outbreak of COVID-19 or its effects; or

- any other measures (whether in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.

We, however, consider that the Bill would be strengthened, and a further check placed on the powers granted, by the inclusion of a purposive clause. This is especially required as many clauses contain reference to the powers only being exercised where it is necessary or desirable to deal with the effects of COVID-19. In reality, the effects of COVID-19 could be potentially infinite.

We, therefore, propose that the Bill should include a purposive provision that outlines the intention underpinning all powers exercised. To that end, we propose the following purposive clause be inserted in the Bill:

1. *The purpose of this Bill is to enable New Zealand's immigration system to pragmatically respond, and where necessary on the basis of classes of persons, to the COVID-19 outbreak.*
2. *To achieve this purpose, the Bill provides powers that are to be used to –*
 - i. *Contribute to the welfare of migrants who are practically unable to leave New Zealand due to the COVID-19 outbreak; and*
 - ii. *Manage the expectations of persons wanting to travel to New Zealand due to COVID-19 Border restrictions.*

It is our view that the above suggested purposive clause squarely aligns with the intentions of the Bill as described in its explanatory note, the related statements of the Minister of Immigration, and the Departmental Disclosure Statement.

Alternatively, where a purposive provision is not included, we submit that all references within the Bill to the powers only being exercised “where it is necessary or desirable to manage the effects, or deal with the consequences, of...”, should be amended to remove the words “or desirable”. Thus, limiting the exercise of the power more broadly in alignment with the stated intention.

ABSOLUTE DISCRETION

It is further submitted that the following clauses should be amended to ensure that the new special direction decision powers of the Minister are not ones to which absolute discretion applies (as defined in section 11 of the principal Act).

Clause 5 amending section 50

Insert section 50(4D)(c): is not in the absolute discretion of the Minister.

Clause 6 amending section 52

Insert section 52(4D)(c): is not in the absolute discretion of the Minister

Clause 7 amending section 53

Insert section 53(4D) (c): is not in the absolute discretion of the Minister.

Clause 8 amending s 57

Insert section 57(6)(c): is not in the absolute discretion of the Minister.

Clause 9 inserting new section 61A

Insert section 61A(6)(c): is not in the absolute discretion of the Minister.

Clause 11 inserting new section 78A

Insert section 78A(6)(c): is not in the absolute discretion of the Minister.

The rationale for this submission is that the Minister of Immigration should be required to provide reasons for issuing special directions. While it could be said that there are safeguards in limiting the power of special direction to matters where the Minister must first be satisfied that it is necessary or desirable to manage the effects, or deal with the consequences of COVID-19, this does not ensure that reasons are actually provided. It is our submission that the integrity of the immigration system is strengthened by ensuring reasons are provided for such special directions.

RIGHT TO JUSTICE

We note the comments in the Report of 28 April 2020 provided to the Attorney General by the Ministry of Justice regarding the consistency of the Bill with the New Zealand Bill of Rights Act (NZBORA).

This Report comments in paragraphs 16 to 22 on the special direction powers to be granted to the Minister of Immigration, and the extent to which the exercise of these powers would impinge on the Right to Justice arising from NZBORA.

The Report's conclusion that the Bill is consistent with the rights protected by NZBORA is reliant on the motivation of the amendments expressed by its proponents in supplementary material. The Report says at paragraph 20:

As in the discussion of discrimination above, the listed powers all act to benefit the visa holder, with the exception of allowing the Minister to impose a visa condition to require visa holders to follow public health directives.

We question whether the exercise of all powers intended to be granted to the Minister inevitably benefit the affected visa holders. The Minister's ability to vary or impose conditions is not constrained by the Act as being for their benefit. Further, the Minister could conceivably vary conditions on a visa in a manner that would deprive the visa holder of the benefits and the rights intended and originally conferred by the visa.

We consider the powers conferred by clauses 5 and 6 (amending sections 50 and 52 of the principal Act) should be amended to clarify that the Minister's powers cannot be exercised to deprive visa holders of substantive rights.

This could be done by amending clause 5 of the Bill to state:

(4A) The Minister may, by special direction in relation to a class or classes of persons holding resident visas,—
(a) vary conditions that would otherwise apply to visas of the relevant types, or that were imposed under this section, that relate to travel to New Zealand;
(b) vary or cancel conditions that would otherwise apply to visas of the relevant types, or that were imposed under this section, that relate to employment in New Zealand,
provided that such variation or cancellation does not deprive the visa holder of the substantive rights or benefits provided for by the visa.

Clause 6 of the Bill should be amended accordingly to state:

- (4A) The Minister may, by special direction in relation to a class or classes of persons holding temporary entry class visas,—
- (a) impose further conditions on the visas, whether or not the conditions are specified in the temporary entry instructions in relation to visas of the relevant types;
 - (b) vary or cancel conditions that would otherwise apply to visas of the relevant types or that were imposed under this section,
provided that such imposition, variation or cancellation does not deprive the visa holder of the substantive rights or benefits provided for by the visa.

This would, in our submission, ensure that the effect of the Minister’s variation or imposition of conditions does not amount to a de-facto cancellation of the visa, in relation to which the visa holder has no natural justice entitlements, and no ability to appeal against.

LIMIT POWER TO PREVENT THE MAKING OF NEW APPLICATIONS

It is submitted that in keeping with the rationale for the Bill that the ability to temporarily suspend the right to make a visa application or an Expression of Interest should be limited to those persons outside of New Zealand.

Accordingly, it is submitted that clause 16 should be amended by providing that the proposed new section 401A(1) reads: “Without limiting the generality of section 400, regulations made under that section may suspend the ability of all persons **outside of New Zealand** or of any class of persons **outside of New Zealand** to— ...”

Such amendments would ensure that those migrants within New Zealand remain able to apply for visas and to express their interest in becoming residents, whether through skilled employment or otherwise.

REGULARISE STATUS OF PERSONS UNLAWFULLY IN NEW ZEALAND

It is submitted that a humanitarian and pragmatic response to COVID-19 includes the temporary regularisation of undocumented persons in New Zealand (or those unlawfully residing in New Zealand). Everyone in New Zealand has to some extent or another been affected by COVID-19. Many of those currently undocumented in New Zealand will be unable to leave New Zealand due to border restrictions around the world. Making these people liable for deportation or issuing them with deportation orders is unrealistic at this time. In particular, our Pacific neighbours who are COVID-free would be placed at risk of transmission, were New Zealand to deport undocumented persons. Some have recent cyclone impacts. New Zealand has accepted a special responsibility for our Pacific neighbours. Public health imperatives, including the wellbeing of New Zealand family members and dependants outweigh normal immigration requirements during this unprecedented time. There is a further risk to those undocumented in New Zealand at this time, of being at risk of exploitation by unscrupulous employers.

It is submitted that the Bill should include specific provisions to ensure that all persons in New Zealand that are undocumented should be granted a temporary visa for six months. This will provide an avenue for those eligible to apply under other immigration avenues, either temporary or resident. For those

ineligible to apply, the regularisation of their visa status in New Zealand would allow them the opportunity to lodge an appeal to the Immigration and Protection Tribunal to test out their ability to remain in New Zealand on humanitarian grounds, pursuant to section 207 of the Immigration Act 2009.

Alternatively, provision should be made for the temporary suspension of deportation liability under section 154 of the Immigration Act 2009. Further that a temporary amendment is made to section 154 of the Act to allow humanitarian appeals to be lodged to the Immigration and Protection Tribunal during the Epidemic Notice period outside of the normal 42-day period.

CONCLUSION

We thank the Committee for the opportunity to make comment on the Immigration (COVID-19 Response) Amendment Bill.

Yours Faithfully