



Immigration (COVID-19 Response) Amendment Bill

24—1

Report of the Education and Workforce Committee

April 2021

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Immigration (COVID-19 Response) Amendment Bill

Recommendation

The Education and Workforce Committee has examined the Immigration (COVID-19 Response) Amendment Bill and recommends that the bill be passed without amendment.

About the bill as introduced

In May 2020, Parliament passed the Immigration (COVID-19 Response) Amendment Act 2020. That Act amended the Immigration Act 2009 to give the Government eight time-limited powers so that the immigration system could respond flexibly to the COVID-19 pandemic.

The new powers allow the Government to deal with applicants as a group or class, rather than on an individual basis. Among other things, the powers allow it to:

- amend visa conditions for large groups of people
- extend the visas of large groups of people for varying periods of time (to enable staggered processing of applications by people who need to remain in New Zealand)
- stop people overseas from making applications while it is not possible to travel to New Zealand due to border restrictions
- enable revocation of deemed entry permission for people while border restrictions prevent travel to New Zealand.¹

Because the powers are wide-reaching and could affect large numbers of people, the 2020 Act incorporated various safeguards. One is that the powers would be automatically repealed after 12 months.

These powers are set to be repealed on 15 May 2021.

This bill seeks to extend the time limit on the powers by two years, to 15 May 2023. It would also extend from three to six months the time limit for regulations that suspend the ability to make visa applications or expressions of interest.

Legislative scrutiny

As part of our consideration of the bill, we have examined its consistency with principles of legislative quality. We wish to bring the House's attention to an issue relating to the proposed two-year extension period. We consider that the bill and its explanatory material do not adequately explain why the proposed extension is for a period of two years.

A number of submitters generally supported the purpose of the bill, but proposed that the new repeal date should again be set for 12 months after the legislation comes into force. They reasoned that the powers were brought into force as an emergency response, and that

¹ The explanatory note to the bill lists all of the temporary powers.

New Zealand's circumstances have since changed. They also argued that it is not possible to know whether circumstances would still require these powers in 12 months' time. They do not believe it would be overly burdensome for Parliament to reconsider the legislation annually.

We sought advice on the appropriateness of the two year extension, and on balance, the majority of us are satisfied with the bill as introduced. It was explained to us that the powers may only be used where it would be "reasonably necessary" to respond to the effects of COVID-19 specifically, which is in itself a time-limited restriction. The powers could only be exercised as long as the pandemic continues to affect New Zealand.

Many submitters commented on the use of the powers

A number of submitters made recommendations about the way that the powers could be used. They recommended that the powers be used for:

- family reunification through border exceptions and visa extensions
- visa extensions for offshore visa holders who are unable to travel
- the granting of new visas for those whose temporary visas have expired
- the granting of visas to persons unlawfully in New Zealand
- implementing a 28 day notice period for the commencement of any special directions.

A number of the issues raised by submitters cannot be addressed within the parameters of the bill or the time-limited powers that the bill would extend. However, in practice the Minister of Immigration has a range of options available to address the concerns. These include the ability to exercise other existing powers under the Act in individual cases, and the ability to certify new immigration instructions. We note that the Minister has recently announced border exceptions to allow for family reunification.

We are aware that the issues raised by submitters affect the livelihoods of a number of people, both within New Zealand and overseas, and that there is widely-felt uncertainty regarding visas and border restrictions. We wish to acknowledge and thank submitters for raising these concerns with us.

New Zealand National Party differing view

The National Party acknowledges that the continuing effects of COVID-19 mean that flexibility is needed in some cases, to be able to amend visa settings for whole classes of visa holders, and to be able to manage the way that applications for temporary class visas are determined.

This bill represents a significant transfer of extraordinary and wide-ranging powers to the Minister who, at the stroke of a pen, can make changes that have a significant impact on thousands of lives. This being the case, there must be safeguards built in to the bill that would limit any possible abuse of these powers.

The National Party believes that there are two important protections required in the bill, which we foreshadowed at the first reading, but which have not been added by the select

committee. Concerns around these lack of safeguards were echoed by many submitters. We believe that:

- the extension to the sunset clause for the Minister's special direction powers should be one year rather than two
- the existing special direction powers should be made subject to a default 28 day commencement (unless extraordinary circumstances exist to justify a shorter period), to ensure adequate notice of a special direction is given.

One year sunset clause

The Immigration (COVID-19 Response) Amendment Act 2020 was passed under an extremely truncated timeframe. It was noted at the time that an important safeguard contained in the bill was the one year sunset clause. The one year sunset clause went some way to mitigate the concerns of members around the lack of proper scrutiny, due to the extraordinary circumstances and shortened process.

Only a year later, Parliament has considered this bill under a similarly truncated process. There has been very little time for the public to properly submit, and many people were unable to submit at all. There has been no reason given as to why this bill could not have been introduced in late 2020, giving members time for a fuller process of proper consideration. Given that there are only three weeks between the bill's introduction and Royal assent, the same reasons for a one year sunset clause safeguard similarly apply as they did in 2020.

In 2020, extraordinary circumstances meant that extraordinary measures were taken. The situation today, however, is very different to a year ago, and in another 12 months, New Zealand's circumstances are likely to be very different again. No reason was offered as to the need for a two year sunset clause, other than inconvenience for the Government to have to bring the bill before the House again in a year. The enormity of the transfer of power, for what will be three years in total, deserves more robust reasons than simple inconvenience.

Last year, Ministers and officials outlined the scale of the problem they faced by giving the numbers of temporary visa holders in New Zealand:

To give us a scale of what the issue is here: as of the end of April this year, there were approximately 350,000 temporary visa holders here in New Zealand; just a little over 200,000 have work visas whose visa employment conditions may need to be varied as we respond to the COVID crisis; nearly 75,000 student visa holders, whose conditions may need to be amended in able to change their course of work or extra hours until the education providers are reopened; and a little under 57,000 on visitor visas whose expiry dates may need to be extended. So there is a scale that we have to deal with, and also a need to do that at speed and to also be nimble.²

² *Hansard*, Volume 751, Hon Kris Faafoi, first reading speech on the Immigration (COVID-19 Response) Amendment Act 2020, 5 May 2020.

These figures were cited at the time to argue that Immigration New Zealand (INZ) case officers would be unable to process such a large volume of work, made more difficult by their inability to work from home. While those arguments were accepted at the time, the situation is very different now, and many of those temporary visa holders referenced have since departed New Zealand. While there have been a few short alert level increases, mostly affecting Auckland, for the most part INZ officers have been able to work from their offices. As such, their processing capacity has not been impeded as was predicted in 2020.

Neither the Minister nor officials presented updated numbers of onshore temporary visa holders across different categories to justify the need for such an extraordinary transfer of power for two years. They also did not make mention of the processing capacity of INZ case officers, or present any reasons why processing could not take place as it normally would. It is worth noting that almost every organisation that submitted held the view that the bill should have a one year sunset clause, and raised similar concerns about the two year timeframe.

While there remains some need for flexibility for a period of time, there was no justification given to extend this out to two years. A one year sunset clause is a suitable protection, and if the Minister needs to extend the date again, we believe that he should have to justify this request to Parliament, regardless of any "inconveniences".

28 day commencement of special directions

The National Party shares the view of the New Zealand Law Society, and considers that a 28 day rule, similar to the 28 day rule applicable to the regulations, would be appropriate for instruments created by special direction.

Firstly, we note that in many cases the Minister issued directions giving visa extensions only a few days before whole classes of visas were due to expire. There was no reason given for such short-notice decisions, leading us to believe that rather than there being any exceptional circumstances, the Minister was not properly planning for the expiry of these visa classes.

Temporary visa holders are in a very vulnerable position in normal times. The COVID-19 pandemic has added a layer of extreme stress and anxiety for many temporary visa holders. At present these people are living from visa extension to visa extension, with no certainty about what their future holds. The Minister should be required to give them as much certainty and notice as is possible, to reduce their stress, and give them the ability to make decisions and plan their lives.

While we accept that there will be some extra circumstances that require nimble decision-making, for the most part there has been no obvious reason for the five day notice period the Minister has been giving to visa extensions. If a quick decision is required, the Minister should have to justify his decision.

Secondly, we note that at present when special directions are made, Immigration New Zealand does not have time to update the status of all those temporary visa holders affected by the change. This has led to migrants losing their jobs and children not being allowed to go back to school as their official status shows as "unlawful", despite the extension. A 28 day

rule for special directions would also help to ensure that there would be adequate time for Immigration New Zealand to implement visa changes made by the Minister.

Finally, a safeguard lauded by Ministers during readings of both the 2020 and 2021 amendment bills is the fact that special directions are disallowable instruments. While that may be the case, these checks only occur after the instrument is made. In light of this, the National Party believes that a special direction should come into force at least 28 days after it is made. If there are extenuating circumstances that require a shorter period, the Minister should justify his decision.

The National Party believes that this bill is, in part, more about convenience than need. We believe that the two key changes to the bill outlined in this view are required to give greater accountability and transparency in the exercise of the extraordinary discretionary powers that the bill grants.

Appendix

Committee procedure

The Immigration (COVID-19 Response) Amendment Bill was referred to the committee on 8 April 2021. The closing date for submissions was 16 April 2021. We received and considered 168 submissions from interested groups and individuals. We heard oral evidence from 43 submitters.

We received advice on the bill from the Ministry of Business, Innovation and Employment. The Office of the Clerk provided advice on the bill's legislative quality. The Parliamentary Counsel Office assisted with legal drafting. The Regulations Review Committee reported to the committee on the powers contained in Part 1 of the bill.

Committee members

Marja Lubeck (Chairperson)
Chris Baillie
Camilla Belich
Hon Paul Goldsmith
Jan Logie
Jo Luxton
Ibrahim Omer
Angela Roberts
Erica Stanford

Ricardo Menéndez March, Stuart Smith, and Jamie Strange participated in our consideration of this bill.

Advice and evidence received

The documents that we received as advice and evidence are available on the Parliament website, www.parliament.nz.