



NEW ZEALAND
LAW SOCIETY

NZLS EST 1869

Immigration (COVID-19 Response) Amendment Bill 2020

07/05/2020

Submission on the Immigration (COVID-19 Response) Amendment Bill 2020

1 Introduction

- 1.1 The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Immigration (COVID-19 Response) Amendment Bill 2020 (**Bill**). This submission has been prepared under urgency with input from the Law Society's Immigration and Refugee Law Committee and Public and Administrative Law Committee.
- 1.2 The Law Society accepts that the Immigration Act 2009 (**Act**) is not well-suited to respond to some of the issues arising from the COVID-19 outbreak and agrees that there is a need for a new legislative framework. The Law Society also accepts the need to deal with these issues urgently.
- 1.3 Overall, the Law Society supports the intention behind the Bill. The amendments proposed in the Bill will allow Immigration New Zealand (**INZ**) to be better equipped in the immediate future to efficiently manage "mass" or "class" visa changes in direct response to the issues arising from the COVID-19 outbreak. However, it is equally important to ensure there is accountability and transparency in the exercise of the powers granted and that there are commensurate safeguards in place to protect the rights of migrants, especially as the Bill is being passed under a truncated procedure. The Law Society proposes some changes to the Bill in this regard.

2 Powers exercisable by special direction

- 2.1 The Bill proposes to allow the Minister to exercise, by special direction, broad powers which apply to *classes* of individuals. This is an extraordinary discretionary power, which in some circumstances will effectively vary provisions of the Act. It is therefore important that the proposal is carefully scrutinised. At present, the scope for the making of special directions in relation to classes of individuals is much more limited, as provided in section 378(2):
applying to:
 - (1) temporary visa waivers or temporary suspensions of visa waivers;
 - (2) temporary classifications of persons to whom a transit visa applies or temporary suspensions of transit visa waivers.
- 2.2 Any decision to issue a special direction under the proposed amendments would be in the absolute discretion of the Minister,¹ and would lack the degree of transparency that is normally expected of legislation that will affect a large number of individuals. The proposed powers also effectively allow the Minister to vary otherwise applicable provisions of the Immigration Act itself.
- 2.3 We understand the Bill has been drafted as such to grant the Minister the power to make decisions quickly and efficiently. It is, however, worth noting that regulations and Orders in Council can also be brought into force within a short timeframe if the 28-day rule is waived.²

¹ Immigration Act 2009, s 378(8).

² The 28-day rule may be waived where a legislative instrument is made in response to an emergency. See Cabinet Office *Cabinet Manual 2017* at [7.97].

A waiver of the 28-day rule could no doubt be justified in managing or responding to consequences of the COVID-19 outbreak.

- 2.4 The Law Society recognises that the instruments created by special direction under this Bill will be published on the internet and subject to parliamentary scrutiny (by tabling in the House, scrutiny by the Regulations Review Committee and subject to disallowance). While these measures are commendable, such checks only occur after the instrument is made.
- 2.5 It is the Law Society's view that the kind of matters that could be provided by special directions in respect of classes of people under the proposed amendments would benefit from a more considered process that can still be responsive and flexible in time of emergency but would nevertheless include the following steps:
- (a) consultation with relevant departments, the government caucus, other parties represented in the House and independent members of Parliament, and affected groups (to the extent permissible in the time available);
 - (b) consideration and decision-making by the Cabinet (rather than a single minister);
 - (c) clear drafting by the Parliamentary Counsel Office;³
 - (d) further authorisation by Cabinet and submission of the regulations to the Executive Council
 - (e) notification in the Gazette and publication on the legislation.govt.nz website as Legislative Instruments.
- 2.6 The Law Society therefore recommends that the powers in the Bill in respect of classes of people be exercisable by regulations or Orders in Council and not by special direction.
- 2.7 If it is determined that these matters should nonetheless be dealt with by special directions, it is recommended that:
- (a) The Bill is amended to provide that the absolute discretion provision in section 378(8) of the Act does not apply to the special directions in respect of classes of people provided in the Bill. This will remove any doubt that the making of special directions under the proposed amendments are reviewable by the Court.
 - (b) The Bill is amended to provide additional criteria that a special direction provided in the Bill can only come into force on a date no less than 28-days after it is made. The 28-day period should be the default, to ensure that adequate notice of a special direction is given, unless there are special circumstances justifying a shorter period.
 - (c) The Committee carefully consider whether the sunset period of 12 months provided for in the Bill is appropriate, and whether a shorter provision is necessary. It may be that a shorter period (e.g. six months) is more appropriate.

³ Note the concerns forwarded to the Committee by the Regulations Review Committee, in its letter to the Director-General of Health dated 20 April 2020, in respect of the unclear drafting of notices issued under section 70 of the Health Act 1956 and the recommendation (since adopted) that the Ministry of Health make greater use of legal drafters to improve the certainty and clarity of the notices.

3 Potential negative impacts on migrants and refugees

Purpose statement

- 3.1. The Law Society suggests that the Bill include a ‘purpose statement’ to ensure that the welfare of migrants, refugees and visa applicants will be a key factor in the decision-making processes contemplated by the Bill. The inclusion of such a purpose statement is likely to assist the interpretation and application of the resulting Act.
- 3.2. Alternatively, it is suggested that the Bill be amended to include a requirement that the Minister must be satisfied that any special direction issued under the proposed amendments will not be detrimental to migrants and cannot be exercised in a way that could be detrimental to migrants, including but not limited to the removal of existing rights under the Act.
- 3.3. In addition, the Bill should contain a provision stating that it is subject to Part 5 and Schedule 1 (being the text of the Refugee Convention) as well as section 165, which requires that an immigration officer must have regard to those provisions “when carrying out his or her functions under this Act in relation to a claimant, a refugee, or a protected person”.
- 3.4. Without these changes, there is a risk that special directions under the proposed amendments could be detrimental, or exercised by immigration officers in a way that could be detrimental, to migrants. In essence this recommendation provides an appropriate safeguard that will allow changes to be made that are in the public interest, but not at the expense of the rights already held by those existing migrants.

Special directions must be “necessary” (and not “desirable”)

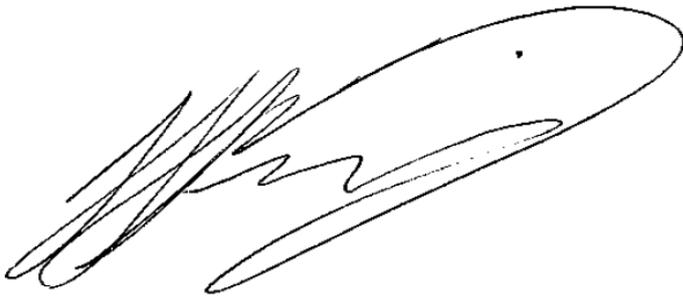
- 3.5. If the amendments relating to special directions are to be retained, it is recommended that those clauses relating to the exercise of powers be amended to remove the reference to “*or desirable*”, as follows:

However, the Minister may not make a special direction under [subsection] unless satisfied that doing so is necessary ~~or desirable~~ to manage the effects, or deal with the consequences, of—

- (a) *measures taken under this Act or any other enactment to contain or mitigate the outbreak of COVID-19 or its effects; or*
 - (b) *any other measures (whether in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.*
- 3.6. The proposals in the Bill relating to special directions set out an extraordinary power exercisable by the Minister, with potential effect on a large number of people. It is appropriate that there be a high test for its application. The test of ‘desirability’ is too low.

Power to suspend the ability to make applications

- 4.1 The powers granted under clause 16 (proposed new sections 401A and 401B) allow the suspension of the ability to make applications for visas and expressions of interest. This could be detrimental to those applicants who may 'age out' during a suspension period.⁴
- 4.2 It is therefore suggested that clause 16 be amended to include a provision that accommodates timelines and policy age limits to ensure migrants are not disadvantaged by any inability to submit an application due to a suspension under new sections 401A and 401B.
- 4.3 We also suggest only limiting the application of proposed new section 401A to those individuals *outside* of New Zealand to ensure that regulations made under this section are not detrimental to migrants within New Zealand.



Tiana Epati
President
7 May 2020

⁴ Some work to residency temporary visas and resident visas have maximum age limits (including dependent children age limits) as at the date of receipt of the application.