New Zealand Law Society
Te Kāhui Ture o Aotearoa

Immigration (Fiscal Sustainability and System Integrity) Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

28 July 2025

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill (**Bill**). The Bill proposes various amendments to the Immigration Act 2009 (**Act**).

1.2 This submission has been prepared by the Law Society's Immigration and Refugee Law, Human Rights and Privacy, Criminal Law, and Public Law Committees.[1] It gives the Law Society's feedback on the following issues and concerns:

(a) Definitional details in clauses 4 and 5, relating to the meaning of "first available craft", the desirability of defining "detention", and the proposed amendment to section 9A of the Act, which defines "mass arrival group".

(b) New Ministerial powers to make class-related special directions.

(c) Changes to the deportation liability, for criminal offending, of residence class visa holders.

(d) The consistency with international obligations of proposed new section 317AA(4), which would define "failing to comply with this Act" as a threat or risk to public order.

(e) Room for improvement in the proposed new powers in clause 40, sections 324B to 324I (relating to release on conditions of refugee claimants and non-claimants).

(f) A potential breach of New Zealand's refugee non-refoulment obligations, which requires rewording of section 324J(2)(e).

(g) Possible modifications to strengthen new section 351A, prohibiting immigrants' and refugees' exploitation by charging them a premium for employment.

(h) The need to provide exceptions for certain categories of visa holders from the proposed provisions for extended immigration levies.

1.3 The Law Society **wishes to be heard** on this submission.

2 Definitions: clauses 4 and 5

"First available craft"

2.1 In clause 4 of the Bill, the proposed definition of "first available craft" refers to criteria necessary to trigger the definition, including that "the person has no further rights of appeal under this Act".

2.2 The Law Society notes that, in this context, the use of the phrase "rights of appeal" may be at odds with its normal meaning. As normally defined in litigation, "right" means "as of right" (that is, if you need leave, you do not have a "right" of appeal). For immigration

[1] More information about the Law Society's law reform sections and committees is available on the Law Society's website: NZLS | Branches, sections and groups.

matters, leave is required to the High Court and Court of Appeal, including for judicial review applications.[2]

2.3 In the Law Society's view, allowing for deportation while a right to apply for leave to bring judicial review remains unexhausted may be problematic: for example, because it infringes section 27(2) of the New Zealand Bill of Rights Act 1990 (**Bill of Rights Act**). While it may be that "impediments" in para (c) of the proposed definition is intended to cover such a situation, it is unclear and seems an imprecise approach.

2.4 To address this concern, the Law Society recommends adding a new paragraph after para (b) of the proposed definition: "the person has not applied for leave to bring judicial review proceedings within 28 days of any determination by the Tribunal, or leave has been declined; and". This would be consistent with the drafting in section 249 of the Act.

Defining "detention"

2.5 Part 9 of the Act provides a tiered detention and monitoring regime for individuals who are liable for deportation or turnaround. Part 1, subpart 8 of the Bill inserts new provisions which would:

(a) enable a judge to issue a warrant of commitment authorising the claimant's detention in certain circumstances; and

(b) enable the release (on conditions) of individuals who have been detained in custody, or individuals who were liable to arrest and deportation.

2.6 However, we note that the Bill and the Act do not offer a definition of 'detention'. Given the significance of these provisions, we suggest defining this term to improve the clarity and intended scope of the Act.

Section 9A: "mass arrival group"

2.7 Clause 5 proposes that in section 9A of the Act, which defines "mass arrival group", subsection (2) should be repealed. This is to ensure that the definition of such a group no longer excludes groups of people arriving in New Zealand on a craft that is travelling on a scheduled international service. According to the Ministry for Business, Innovation and Employment (**MBIE**), this is increasingly among the possible ways that a mass arrival group may enter the country.

2.8 The Law Society is concerned that the repeal of section 9A(2), without further modification of section 9A, could have unintended consequences. Section 9A(1) permits "mass arrivals" to be so defined even if they arrive on board different craft (which are part of a group). Arguably, the phrase "on board the same group of craft and within such a time period *or* in such circumstances that each person arrived, *or* intended to arrive, in New Zealand as part of the group" in section 9A(1)(c) could enable the definition to extend to different commercial aircraft arriving within a short timeframe if they happen to have over 30 asylum seekers on them. To address this concern, we recommend minor revision of the drafting to tighten para (c): "on board the same group of craft ~~and~~ within such a time period ~~or~~ **and** in such circumstances …".

[2] Immigration Act 2009, s 249.

3 New Ministerial powers to make class-related special directions: clauses 7 to 11 and 15

3.1 Clauses 7 to 11 and 15 of the Bill create new powers for the Minister to make class-related special directions. The new powers are intended to enable more flexibility in the immigration system, by allowing special directions to be made to respond to any unusual circumstance, any circumstance that is unable to be dealt with under any other provision of the principal Act, any circumstance that is outside the control of the Ministry, and any circumstance that poses a challenge to the immigration system. In such situations, the Minister will be able to, for example, grant visas for individuals or classes of people without applications needing to be made, amend conditions on existing visas for classes of people, and waive application requirements for classes of people.

3.2 Earlier submissions provided by the Law Society on immigration-related legislative amendments responding to COVID-19 have noted that the Act is presently not well-equipped to deal with major unique events such as the COVID-19 pandemic.[3] The Law Society therefore generally supports this proposal. Safeguards are proposed on the exercise of the new powers, which the Law Society also supports. For example:

(a) the Minister must consider that the exercise of a particular power must benefit, or at least not disadvantage, the persons concerned; and

(b) the special directions must be published and may be disallowed by the House of Representatives.

3.3 This conclusion is subject, however, to some concerns. There remains a need for further changes to improve this proposal, in the Law Society's view. As our 2020 and 2021 submissions on previous Bills considered:

(a) Any decision to issue a special direction under the proposed amendments would be in the absolute discretion of the Minister,[4] 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.

(b) Measures requiring special directions made under this legislation to be published together with an explanation of the effect of the special direction are commendable. However, such checks only occur after the special direction is issued. This makes additional safeguards important.

3.4 The Bill could be adjusted in several ways to assist with these concerns, by amending it to:

(a) Provide that, unless there are special circumstances justifying a shorter period, special directions made under this legislation should only commence on a date not less than 28 days after the directions are made. A default 28-day period will ensure that adequate notice of a special direction is given.

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3 The submissions are available on the Law Society's website: Immigration (COVID-19 Response) Amendment Bill 2020 and the Immigration (COVID-19 Response) Amendment Bill 2021

4 Immigration Act 2009, s 378(8).

(b) Adjust the threshold test, by providing that the Minister *must not make* a special direction (rather than 'may not make'), unless doing so *is reasonably necessary* to respond to the specified circumstances. The present drafting requires the Minister only to be satisfied that the direction is being made in response to one or more specified circumstances. This would ensure there is a higher threshold than presently proposed for exercising the Minister's absolute discretion and powers to make special directions.

(c) Include a provision which requires these provisions to be reviewed within three years of their commencement, the scope of the review to include any exercise of the Minister's special direction powers.[5]

(d) Provide that the absolute discretion provision in section 378(8) of the Act does not apply to the new special directions. This would improve the transparency and accountability of decisions made using the new powers and enable those decisions to be more easily reviewed.

(e) Narrow the scope of the proposed powers. The ability to make special directions because of circumstances that are 'outside the Department's control' or 'that pose a challenge to the immigration system', are widely drafted, and could apply to a range of scenarios. Resourcing or financial issues could pose a challenge to the immigration system if funding from fees and levies are no longer sufficient to cover costs. Policy decisions made by Cabinet, or by other departments, may be outside Immigration New Zealand's control. The intention that these provisions should apply to circumstances involving, for example, natural disasters, humanitarian issues, or unprecedented events such as a global pandemic is appreciated. However, the legislation could more clearly convey that these circumstances must be related to (for example) the ability to apply for a visa, the ability to process and make decisions about visa applications, or the ability for individuals to enter or leave New Zealand.

4 Cancellation of residence class visa of person threatening security: clause 13, new section 75A

4.1 Clause 13 of the Bill inserts new section 75A, which creates a new power for the Minister to cancel a person's residence class visa if the Minister certifies that the person is a risk or threat to security, but a refugee and protection officer has determined that the person cannot be deported. Under new section 75A(2), if the Minister cancels a residence visa, the Minister must grant that person a temporary visa (for example, a work visa) of a type that the Minister thinks fit.

4.2 The Law Society strongly supports the approach of prescribing that the Minister *must* (rather than 'may') grant a temporary visa. It is consistent with recommendations previously made to MBIE by the Law Society following an earlier consultation, and assists in ensuring consistency with New Zealand's obligations under article 7 of the

5 As recommended in the *Regulatory Impact Statement: facilitative powers to benefit groups or individual migrants* (4 September 2024) at 3.

ICCPR. It avoids the situation where the individual cannot be deported but also is visa-less, and thereby becomes unlawful.

4.3 New Zealand's obligations to people who are refugees, stateless people and asylum-seekers must also be considered. A change in a person's visa status is likely to affect their ability to claim ancillary state entitlements and protections which are available to New Zealand residents and citizens. The Law Society notes that according to the Regulatory Impact Statement (**RIS**), "[r]efugees 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".[6] The Law Society welcomes the advice in the RIS, noting the importance of assurance on this point in achieving consistency with international rights obligations.[7]

5 Deportation liability of residence class visa holders: clause 18

5.1 Clause 18 of the Bill proposes changes to section 161 of the Act, relating to residence class visa holders. Currently under section 161, a residence class visa holder "is liable for deportation if he or she is *convicted*" of an offence specified in that section. Following the proposed clause 18 amendment, section 161 will provide that "[a] residence class visa holder is liable for deportation *if they plead that they are guilty, are found guilty, or are convicted*" of a specified offence.

5.2 The scope of the provision will, therefore, be broadened. The Law Society is aware of and acknowledges MBIE's view that the integrity of the immigration system requires the ability to deport someone who has pleaded guilty to an offence, and that these changes are to ensure consistency across all circumstances where individuals are considered 'guilty' (rather than where they are 'convicted'). Section 161 is also framed in terms of 'liability for' deportation, and enables appeals to be made to the Immigration and Protection Tribunal (**Tribunal**) on either humanitarian grounds or (in the case of a refugee) against any decision of a refugee and protection officer that the person may be deported.[8] However, as outlined below, this places a high legal hurdle before appellants, one which is more likely than not to be insurmountable in practice for many, even in circumstances where this risks being severely unjust. The proposed change is sufficiently broad that it will extend to cases in which the person has pleaded or is found guilty of an offence, but on sentencing the court considers it appropriate to discharge the visa holder without conviction under section 106(1) of the Sentencing Act (meaning that they are deemed 'acquitted' under section 106(2)). The automatic triggering of deportation liability in such cases will place the person in jeopardy of severe immigration consequences, even where a court has determined (by applying the proportionality test in section 107 of the Sentencing Act) that the consequences of a conviction would be out of proportion to the gravity of the offending. Because humanitarian appeals involve a

6 At [4].

7 See for example the Committee on Economic, Social and Cultural Rights' General Comment No 19, which provides that "Refugees, stateless persons and asylum-seekers, other disadvantaged and marginalised individuals and groups, should enjoy equal treatment in access to non-contributory social security schemes, including reasonable access to healthcare and family support, consistent with international standards."

8 Immigration Act 2009, s 161(2).

distinct and more exacting test than the discharge without conviction assessment, there is consequently a real likelihood that the change proposed could result in disproportionate outcomes.

5.3 In the Law Society's opinion, while it is likely the proposed amendment falls short of the high threshold that would be considered to breach section 9 of the Bill of Rights Act (which provides that everyone has the right not to be subjected to disproportionately severe treatment or punishment),[9] there remains reason for concern. The amendment could have broader consequences than have been contemplated.

5.4 For these reasons, further explained below, our preference would be to maintain the status quo, and to enable the courts to continue to assess whether deportation liability is a proportionate consequence to an individual's offending under the Sentencing Act framework. The courts are now very familiar with the immigration consequences of a conviction and are well-placed to undertake such assessments. We do not agree that maintaining the status quo undermines the integrity of the immigration system.[10] The courts already have the ability to consider whether deportation liability should be an appropriate consequence of the offending. The current framework has to date struck an appropriate balance between the interests of the affected person, the public interest, and the integrity of the immigration system, by enabling the courts to address low level criminal offending where appropriate under a well-established sentencing structure, and providing adequate safeguards for those who do not meet the section 206 test in the Immigration Act.

The likelihood of disproportionate outcomes

5.5 Section 161 captures a wide range of offending. While the RIS for this proposal does discuss that the discharge without conviction category may include charges for a range of offending including traffic and vehicle regulatory offences, assault offences, and dangerous or negligent acts endangering persons,[11] it does not appear to fully consider in detail the range and nature of offending which would be captured under section 161(1)(a) of the Act if this proposal was to be implemented. It could capture, for example, anti-social offending (for example, disorderly behaviour under section 3 of the Summary Offences Act 1981, disorderly assembly under section 5A of that Act, and associating with convicted thieves under section 6 of that Act). It could also, however, capture strict liability offending (for example, operating a motor vehicle recklessly under section 35 of the Land Transport Act 1998), where, in the circumstances of different cases, culpability can significantly vary.

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9 Section 9 sets a high test: see for example *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429, per Blanchard J at [172]–[176], per Tipping J at [289]; *Puli-uvea v Removal Review Authority*, CA236/95, 24 May 1996; *Fitzgerald v Attorney-General* [2021] NZSC 131 per Winkelmann CJ at [76]. The Law Society considers that the section 207 humanitarian appeals test would invariably be met in cases in which an individual's deportation liability would "shock the national conscience" to a degree engaging section 9 of the Bill of Rights (for example, because of the situation in the country to which they are being deported).

10 As noted in the RIS at 8.

11 *Regulatory Impact Statement: Clarify deportation liability is a consequence of criminal offending* (4 September 2024) at [17].

5.6 The proposal (if implemented) could remove the opportunity for an individual whose conviction would trigger deportation liability under section 161 of the Immigration Act from having their circumstances assessed under the well-established sentencing framework for criminal offending in the Sentencing Act 2002. This requires the court to engage in a three-step process:

(a) identify the gravity of the offence;

(b) identify the direct and indirect consequences of a conviction; and

(c) determine whether the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offending.

5.7 The court must only discharge an offender without conviction if it is satisfied that the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence. This sentencing process is designed to identify the seriousness of the individual's offending, take account of (among other things) mitigating and aggravating factors including personal circumstances of the offender, and to determine the *overall consequences* which should flow from that particular offending in order to avoid disproportionate outcomes. However, the proposals in the Bill, rendering liability for deportation automatic, will constrain the court's ability in some proportion of cases to avoid a disproportionate outcome. We note the Supreme Court has observed in *Bolea v R* that "there may be situations where mere exposure to the procedures relating to deportation may be a disproportionate consequence".[12] An automatic statutory consequence of deportation liability in the event of a discharge without conviction — "deemed to be an acquittal"[13] — effectively circumvents the courts, and undermines the Sentencing Act.

Hurdles for accessing appeals to the Tribunal

5.8 Table 2 of the RIS includes an analysis of the proposed changes to the Act against key criteria, and notes that "humanitarian considerations [could be] considered through the established statutory appeals framework, rather than sentencing decisions".[14]

5.9 This comment overlooks a significant distinction between an assessment under the Sentencing Act, and section 206 of the Immigration Act (which provides for appeals to the Tribunal on humanitarian grounds).

5.10 The Sentencing Act framework focuses on proportionate consequences for offending, as well as other principles set out in section 8 of the Sentencing Act. The section 206 test under the Immigration Act focuses only on the individual's circumstances through a humanitarian lens. As a result, individuals would need to satisfy a much higher threshold under the section 206 test to successfully appeal against their liability for deportation.

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12 *Bolea v R* [2024] NZSC 46 at [54], in which the Court also referred to *Jeon v New Zealand Police* [2014] NZHC 66 at [21], noting: "where the High Court said the issue was 'whether [the defendant's] momentary inadvertence resulting in a driving offence of moderate seriousness, and assessed against an otherwise exemplary life, should have the automatic consequence of the risk of deportation hanging over [the defendant] and his family for possibly up to 10 years'".

13 Sentencing Act 2002, s 106(2).

14 At 8.

5.11 To illustrate this point with an example: where a person has resided in New Zealand for five years, has recently been granted residence, is single with no children, maintains professional employment, holds professional New Zealand qualifications, and has been convicted of a strict liability offence under the Land Transport Act for operating a motor vehicle recklessly under section 35 of that Act:

(a) it is likely a court would consider granting a discharge without conviction under section 106 of the Sentencing Act based on those factors; however

(b) they are unlikely to meet the significantly higher threshold for establishing "exceptional circumstances of a humanitarian nature" under section 206 of the Immigration Act, which requires there to be circumstances "well outside the normal run of circumstances, and, while they do not need to be unique or rare, they do have to be truly an exception rather than the rule".[15]

5.12 We also note the section 206 test is sequential in nature. The person must establish exceptional circumstances before the Tribunal can consider whether it would be unjust or unduly harsh to deport the appellant from New Zealand, and whether it would be contrary to the public interest to allow the appellant to remain in New Zealand.[16] The level of offending is traditionally only considered at this second stage of the assessment, but only if the person satisfies the initial assessment.

5.13 Due to the high legal threshold for establishing the first part of the assessment, an individual could find themselves in a position of being unable to seek consideration of factors which would support them remaining in New Zealand. The Tribunal could not consider the trigger for deportation (which, in a proportion of cases, may reflect low-end offending) which is relevant and considered under the section 106 Sentencing Act analysis.

5.14 The amendments proposed in the Bill could therefore unfairly disadvantage a proportion of persons and potentially lead to significant immigration consequences based on comparatively inconsequential offending.

Implementation / practical concerns, if the proposal proceeds

5.15 In the Law Society's view, the proposed amendment should not proceed. However, if it proceeds, attention will be needed to monitor and address two practical concerns:

(a) Automatic deportation liability will likely lead to an increased number of appeals to the Tribunal, which could create backlogs if not properly resourced (in turn, raising access to justice concerns). While this is unlikely to be something that can be fixed through legislation, it is a practical matter which requires careful consideration.

(b) A further implementation point relates to the need for a training update for criminal lawyers. As counsel practising in this space will likely already be aware of the similar issue which can arise in respect of temporary visa holders,[17] the

15 *Ye v Minister of Immigration* [2008] NZCA 281 at [34].
16 Immigration Act 2009, s 207.
17 Immigration Act 2009, s 157 (deportation liability of temporary entry class visa holder for cause).

gap in knowledge is unlikely to be significant. However, it will be important to ensure that counsel are informed and in a position to fully advise their clients of the new consequences that will flow from a guilty plea, if the change proceeds.

6 New section 317AA: clause 32

6.1 Clause 32 inserts new section 317AA, which sets out the options available to a District Court judge on an application for a warrant of commitment. The Law Society generally supports the requirements of the new provision. However, there are concerns regarding the definition of the phrase "threat or risk to public order" in new section 317AA(4)(b), which provides that a threat or risk to public order includes failing to comply with the Act.

6.2 Neither the UNHCR's *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (**UNHCR Guidelines**) or Victoria Casey KC's report on *Restriction of Movement of Asylum Seekers* (**Casey Report**) identify failing to comply with the Act as a factor which justifies detention.[18] Both publications state that short-term detention may be justified where there are threats to national security or public safety, or where there are genuine and real risks of absconding.

6.3 In the Law Society's view, detention is not justified outside of these limited circumstances. We recommend narrowing the definition of "threat or risk to public order" to only include threats or risks of absconding. As presently drafted, the proposed definition sets an inappropriately low threshold for detention, which is likely to be inconsistent with the UNHCR Guidelines and the recommendations in the Casey Report (even though the policy proposals presented to Cabinet note these reforms are intended to respond to concerns that the Casey Report identified).[19]

7 Providing for release on conditions: clause 40

7.1 Clause 40 of the Bill proposes inserting new sections 324B to 324I to the Act. These new sections allow individuals who have been detained in custody, or who are liable to arrest and deportation (for example, because they have insufficient evidence of their identity to satisfy a refugee claim), to be released on conditions (including with electronic monitoring).

7.2 The alternative would be to hold these individuals, who have not actually committed an offence, in Corrections facilities. Given this, the Law Society supports this proposal. We acknowledge that the new provisions, such as new section 324F providing for conditions such as refraining from associating with named individuals or individuals associated with named organisations, may involve limits on rights protected under sections 14 and 17 of the Bill of Rights Act and articles 19 and 22 of the ICCPR (freedom of expression

18 Victoria Casey *Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment: Restriction of Movement of Asylum Seekers* (23 March 2022).

19 Hon Erica Stanford, Minister of Immigration *Immigration (Fiscal Sustainability and System Integrity) Amendment Bill – Policy Proposals* at [21].

and freedom of association).[20] Importantly, however, the Bill now specifies the purposes of imposing conditions and incorporates a requirement that conditions imposed on an individual should be reasonable in all the circumstances, proportionate, and the least restrictive measure necessary to manage that threat or risk.[21]

7.3 The Law Society is satisfied that this safeguard provides an adequate response to Bill of Rights Act concerns we previously raised on this question. However, although the provisions, as now drafted, are less concerning than previously, two further amendments would assist in fully addressing concerns about the proposed new sections.

New sections 324B and 324C

7.4 New sections 324B and 324C allow immigration officers to apply for orders releasing a person on conditions, and require an application to include a statement of the reasons why the person should be released on conditions. However, as presently drafted it does not seem that (or make clear whether) the application process allows the person who is the subject of an application made under either of these sections to have any opportunity to convey their views and to provide evidence such as:

(a) why they believe they should be released on conditions; or

(b) whether, for example, they believe certain conditions (such as electronic monitoring) should not apply to their release.

7.5 The Law Society suggests amending these provisions to ensure those who are the subject of applications made under new sections 324B and 324C do have the ability to provide input during the application process, to ensure natural justice principles are upheld.

New section 324F: requirement to take a specified action for the purpose of facilitating deportation or departure

7.6 New section 324F(3) provides for District Court judges to impose any conditions that the judge thinks fit on a person who is to be released on conditions, including refugee claimants who are to be released under new section 324E. This could include a condition that the refugee claimant take a specified action for the purpose of facilitating their deportation or departure from New Zealand.

7.7 The Law Society is concerned this would not be appropriate where the refugee claimant's claim has not been finally determined, and deportation or departure risks breaching New Zealand's non-refoulment obligations under the Refugee Convention. The condition proposed in section 324F(3)(d) should be limited to individuals who are not "claimants" for the purposes of the Act. As presently provided for in subsection (3)(d), its scope is *not* confined to non-claimants. We recommend that the Bill is amended to address this issue.

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20 "Consistency with the New Zealand Bill of Rights Act 1990: Immigration (Fiscal Sustainability and System Integrity) Amendment Bill" (27 March 2025).

21 Clause 40, new sections 324E(5) and 324F(4).

8 Electronic monitoring: clause 43, new sections 324J and 324K

8.1 As part of the proposed framework for releasing an individual on conditions discussed under clause 40 above, the Bill enables electronic monitoring to be used as an alternative to detention when doing so would be reasonable, feasible, proportionate, and the least restrictive measure necessary to manage the threat or risk in respect of a person.[22] In the Law Society's view, to the extent that this proposal may enable a less restrictive approach than detention to be taken, it is positive. However, safeguards will be important. In particular, the requirements to report on the use of electronic monitoring provided for in new section 324K provide an important and appropriate safeguard, by requiring information about the use of electronic monitoring to be included in the Ministry's departmental annual report.

8.2 Attention is recommended to one small but important detail. New section 324J(2) lists the purposes for which information obtained about a person through electronic monitoring may be used — including, in section 324J(2)(e), "where reasonably necessary to locate a person who is subject to a condition imposed under section 324F(3)(a) *in order to place them on the first available craft*". The Law Society's concern is that individuals being monitored under section 324J may include refugee claimants released on conditions under new sections 324E and 324F(3)(a). The purpose proposed in new section 324J(2)(e) would not be appropriate where the individual cannot be deported because their refugee claim is still to be determined, or where deportation breaches New Zealand's non-refoulment obligations under the Refugee Convention. This provision should be updated to reflect this, perhaps by deleting the italicised words.

9 Exploitation of victims by charging premium for employment: clause 47, new section 351A

9.1 The Law Society supports this provision in principle as this is a common action by exploitative employers, and the current interpretation of the law under the Wages Protection Act 1983 means employees cannot currently do anything about the unlawful charging of premiums in the New Zealand jurisdiction. The wording of "seeks or receives" in new section 351A is also appropriate, as many employers tend to use third parties overseas to obtain the premium.

9.2 There remain two matters which, if addressed, could assist in strengthening this clause.

(a) It is possible that this section could be read to apply to an employment premium that is not related to the obtaining of a visa, and it could therefore be too broad. New section 351A could therefore be narrowed, for example, by referring to "seeks or receives any premium in respect of employment, or potential employment, of a person in New Zealand, *where that employment allowed, or would allow, the person to obtain a visa*".

(b) We also invite officials to consider whether it would be appropriate to include — either in clause 48 of the Bill, amending s 355 of the Act (which sets out general penalties), or an amendment to the Wages Protection Act — orders to

22 Clause 42, new section 342F(5A).

compensate, or to return any premiums charged to the affected employees (or prospective employees).

9.3 There is a further question regarding this provision's intended extraterritorial application. By inference from the definition of "New Zealand-based" in subsection (5), it seems that the offence could be intended to potentially apply extraterritorially.

9.4 The Committee may wish to ask officials to clarify why extraterritorial application is proposed, and whether it is intended, for example, to address matters like premiums being charged overseas. As there is a presumption against statutes' extraterritorial application, the Law Society would advise that if the offence is intended to be extraterritorial, that should be stated expressly in the new clause.

10 Provision for extended immigration levy: clause 56

10.1 In clause 56 of the Bill, new section 399AB provides for extended immigration levies to be imposed on and collected from certain persons. In the Law Society's view, extended immigration levies should not be imposed on Victims of Family Violence visa holders, Refugee Family Support Category visa holders, or refugees and protected persons. We recommend providing exceptions for these cases in new section 399AB.

11 Recommendations

11.1 The Law Society recommends:

(a) In clause 4:

(i) Adding a new paragraph to the following effect after para (b), referring to section 249 of the Act: "the person has not applied for leave to bring judicial review proceedings within 28 days of any determination by the Tribunal, or leave has been declined; and".

(ii) Defining "detention".

(b) In clause 5, additional drafting changes to section 9A(1)(c), to delete the word "and" and substitute "and" for "or" ("on board the same group of craft ~~and~~ within such a time period ~~or~~ **and** in such circumstances …").

(c) In regard to class-related special directions (clauses 7–11 and 15), providing that:

(i) Unless there are special circumstances justifying a shorter period, special directions made under this legislation should only commence on a date not less than 28 days after the directions are made.

(ii) The Minister *must not make* a special direction unless doing so *is reasonably necessary* to respond to the specified circumstances.

(iii) These provisions must be reviewed within three years of their commencement, including any exercise of the Minister's special direction powers.

(iv) 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.

(v) The circumstances outside the Department's control, or that pose a challenge to the immigration system must be related to (for example): the ability to apply for a visa, the ability to process and make decisions about visa applications, or the ability for individuals to enter or leave New Zealand.

(d) In clause 18, not proceeding with the change proposed to section 161(1) of the Act.

(e) In clause 32, new section 317AA, narrowing the definition of "threat or risk to public order" to only include threats or risks of absconding.

(f) In clause 40:

(i) Amending proposed new sections 324B and 324C to ensure those who are the subject of applications made under these new provisions can provide input during the application process.

(ii) Limiting the condition proposed in new section 324F(3)(d) to individuals who are not refugee claimants.

(g) In clause 43, new section 324J(2), deleting the words "*in order to place them on the first available craft*" from (or otherwise rewording) proposed paragraph (e).

(h) In clause 47, new section 351A:

(i) Tightening the drafting by adding the italicised words "seeks or receives any premium in respect of employment, or potential employment, of a person in New Zealand, *where that employment allowed, or would allow, the person to obtain a visa*".

(ii) Providing — either in clause 48 of the Bill, amending s 355 of the Act (which sets out general penalties), or an amendment to the Wages Protection Act — for orders to compensate, or to return any premiums charged to the affected employees (or prospective employees).

(iii) Stating extraterritorial application expressly in the provision. if intended.

(i) In clause 56, providing that new section 399AB does not enable extended immigration levies to be imposed on Victims of Family Violence visa holders, Refugee Family Support Category visa holders, or refugees and protected persons.

Nāku noa, nā

David Campbell
Vice President