NEW ZEALAND LAW SOCIETY

NZLS EST 1869

IMMIGRATION AMENDMENT BILL (NO 2)

12/02/2014

SUBMISSION ON THE IMMIGRATION BILL (NO 2)

1. The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the Immigration Amendment Bill (No 2) (the Bill). The Law Society's submissions address:

   (a) proposed new powers of entry and search without warrant, and

   (b) proposed amendments regarding the non-supply of "relevant information" in support of visa applications.

Clause 61: new powers of entry and search without warrant

2. These submissions address proposed increases to powers of entry, search, seizure and questioning, to be conferred on immigration officers by proposed new section 277A contained in clause 61 of the Bill. While the focus is on proposed section 277A, the concerns expressed and the proposals for modification apply equally to existing section 277 of the Immigration Act 2009 (the principal Act), having regard to the proposal, under clause 60 of the Bill, to extend the powers conferred by that provision to include entry of "premises" which are dwellinghouses.

3. The Commentary to the Bill states as one of the Bill's key purposes the need to address the exploitation of migrant workers. The expanded powers contained in proposed section 277A are being introduced in support of that aim. The Law Society is concerned about two aspects of the proposed expanded powers of immigration officers, namely:

   (a) the extension of existing powers of entry and search without warrant to powers of entry of *any* premises, including a dwelling house, if the immigration officer has reasonable grounds to believe certain circumstances exist; and

   (b) the conferral upon immigration officers of powers to require answers to questions in certain circumstances.

The conferral of new powers of entry and search without warrant

4. The Law Society notes that the extensions of powers proposed in this Bill trigger Bill of Rights interests, specifically the right under section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA) to be free from unreasonable search and seizure. As the Law Society pointed out in its August 2010 submissions on the Food Bill:[1]

[1] NZLS submission to the Primary Production Select Committee, 31 August 2010.

> *"In the context of s21 NZBORA, the requirements of New Zealand law, the rule of law and the International Covenant on Civil and Political Rights are that in order for a curtailment of any right to be reasonable and justified in a free and democratic society:*
>
> - *the intrusion must be justified by a sufficient countervailing public interest;*
> - *where the purpose of the intrusion is the collection of evidence for a criminal investigation, there must be specific and sufficient grounds for the searching of the particular person or property; and*
> - *without such special circumstances, any intrusion should occur only with prior and independent authorisation.*
>
> *A warrant ensures that these conditions are met. It also ensures that the decision to undertake a search and seizure is not made by the person who conducts it.*
>
> *It is therefore important for consistency with NZBORA that the power to search without a warrant be as limited as possible and that it not be available for the purpose of collecting evidence for a criminal investigation."*

5. The Law Society also re-affirms the views expressed by the Law Commission in its June 2007 report on search and surveillance powers, especially the view that "The principle that searches by law enforcement officers must first be authorised by an independent officer acting judicially should be departed from only in exceptional cases".[2] In the absence of any compelling case for departure from that view, it is inappropriate to extend existing warrantless search and entry powers to non-police law enforcement officers in the manner proposed. In this respect we draw specific attention to the principles and recommendations expressed by the Law Commission in its report relating to warrantless searches by non-police officers.[3]

6. While the Law Society notes that a bare minimum threshold[4] for exercising these wider powers has been included in proposed section 277A, its operation is unconstrained by criteria that respond to threat to human life or personal or public safety. In that regard the following points are emphasised.

7. First, there appears to be no evidence to suggest that exploitation of migrant workers or indeed the general regulation of unlawful employment of foreigners involves pressing threats or risks so as to require the application of expanded warrantless entry and seizure powers to include private

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2 Law Commission Report, *Search and Surveillance Powers* NZLC R 97, at [16].

3 Note 2 above, at [5.88]-[596].

4 The immigration officer must believe on reasonable grounds that a "specified person" or a "specified employee" is at the premises in question. In addition, the proposed section 277A(3) powers can only be exercised in the circumstances identified in subsection (5).

residences (in particular), to address such risks (if any).[5] Without such supporting evidence, there does not appear to be a reasonable justification for creating intrusive powers of entering on private property without independent prior authorisation. The Law Society considers that the other proposals in the Bill, such as increased fines for breaches of visa requirements, are an adequate response to the suggested problem and there is no public interest in extending the existing powers of entry and seizure under the principal Act.[6]

8. Secondly, employment relationships involving migrant workers arise in a wide range of contexts. They can and will operate in environments other than commercial premises, such as private homes. It is therefore reasonable to expect the level of intrusion represented by the proposed warrantless powers to be soundly justified. We do not see that justification as made out.

9. Thirdly, the fact that the principal Act already contains warrantless powers of search conferred on immigration officers[7] does not mean that the powers envisaged by proposed section 277A should be available without warrant. The existing powers may be open to justification on particular grounds, such as that they are excisable only at the border (where urgency and/or practical considerations arguably prevail) or in relation to persons posing a flight risk (such as those liable to deportation). Plainly the fact that there are existing warrantless powers conferred on immigration officers cannot of itself justify making the proposed section 277A powers exercisable without warrant.

10. Fourthly, the proposed provisions are likely to create inconsistency with the approach taken under the Search and Surveillance Act 2012, which attempts to regularise search powers "across the statute book".[8] The Law Society notes that having State search and surveillance power regulated uniformly in one enactment was an important part of the purpose of enacting the 2012 Act. As a matter of public policy the Law Society considers that there should be consistency of search and surveillance powers enacted post the 2012 Act, and cannot see a justification for abandoning those principles in this Bill. Indeed there is a case for including in the Bill an express statement as to the provisions (of

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5 We note the Regulatory Impact Statement "Protecting Migrant Workers from Exploitation: Agency Disclosure Statement" – Ministry of Business, Innovation and Employment (27 May 2013) does not specifically address the issue of enhanced powers for searching property and in fact confirms the lack of empirical data to establish the extent of the problem. The RIS is also available at: http://www.mbie.govt.nz/about-us/publications/ris/protecting-migrant-workers-from-exploitation.pdf/view,

6 The principal Act already provides for warrantless entry and search of premises of an accommodation provider (s 276), warrantless search of business premises (s 277) and to request the issue of a warrant to perform search and seizure functions (s 293A).

7 See for example ss 276, 277, 278, 279, 282, 283 and 286.

8 Justice and Electoral Select Committee report 4.11.10 on the Search and Surveillance Bill http://www.legislation.govt.nz/bill/government/2009/0045/37.0/DLM2136536.html. In the second reading of the Search and Surveillance Bill the Minister of Justice stated: "The bill provides a coherent, consistent, and certain approach to our search and surveillance laws."

Part 4 in particular) of the Search and Surveillance Act that apply to search and seizure powers under the principal Act, whether under warrant or warrantless.[9]

11. Overall, without a demonstrated sound basis for departing from section 21 NZBORA and the principles under the Search and Surveillance Act, the Law Society considers the public interest is best served by requiring the issue of search warrants for premises such as dwelling houses. That view of proposed section 277A is strengthened when the proposed ancillary powers of seizure and of questioning (addressed below) are taken into account. We note also in that regard that where the obtaining of a warrant is impractical, existing legislation provides adequate powers to achieve the Bill's objectives. For example, section 8 of the Search and Surveillance Act provides for warrantless entry by a police officer in circumstances that may appropriately justify entry in immigration circumstances envisaged by this Bill.[10]

Proposed Powers of Questioning Upon a Warrantless Entry by Immigration Officers

12. Under proposed section 277A(3)(c) and (f), an immigration officer who has entered premises is empowered to require certain categories of person to answer questions concerning immigration status and legality of employment.

13. Powers to demand answers to questions contemplate short-term "detention" of the subject (engaging s 22 NZBORA) and may well engage the privilege against self-incrimination. It is likely that any person required to answer questions put by an immigration officer under the proposed powers would be seen as "detained under an enactment" in terms of section 23(1) of the NZBORA, and therefore entitled to the rights conferred by section 23 – including 23(4)(d) – and of course that conferred by section 25(d) of NZBORA. While the proposed questioning concerns matters of immigration control in relation to entitlement to work and visa compliance, questioning about such matters plainly has the potential to expose the person questioned to criminal prosecution, if not as a principal offender then as a party to an employer's offending.[11]

14. The breadth of these proposed powers contrasts with the more limited existing powers under the principal Act to require information, which are specific about the information that a person interviewed is required provide (see, for example, ss 279(1) and 280(1)). Failure to answer the

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[9] Currently ss 285A, 293A and 328 of the principal Act require compliance with specific Search and Surveillance Act standards. By implication, all other search and seizure powers conferred by the principal Act do not.

[10] Police Officers may already exercise the powers of Immigration Officers under the principal Act – see section 293 Immigration Act 2012.

[11] Note also s 138 of the Search and Surveillance Act relating to the privilege against self-incrimination, and s 142 relating to privileged material.

immigration officer's questions will be an offence subject to a $5,000 fine (ss 344 and 355(b) Immigration Act 2009).

15. The effect of the new powers is therefore to compel speech, which on its face creates an inconsistency with the freedom of expression in section 14 NZBORA. It also removes the privilege against self-incrimination by necessary implication, if not expressly. While such removal is provided for under section 60 of the Evidence Act 2006, given the long-standing importance of the privilege, incursions on it should be limited to the maximum extent possible.

16. Further concerns arise in relation to the exercise of the proposed powers in practice. While limited in scope, they are likely in practice to be treated as general powers of questioning, effectively under compulsion. Those subject to the proposed powers are likely not to have English as their first language, but there are no safeguards to address these issues.

17. Statutory conferral of powers to demand answers to oral questions is uncommon in New Zealand. The powers conferred under section 27 of the Serious Fraud Office Act 1990 are a well-known example. These are of course counter-balanced by section 28 of that Act, which prevents the self-incriminating answer from being used in evidence against the person questioned, except in defined circumstances. The present Immigration Act contains powers to demand information at the border and on departure; see for example sections 119(1) and 282(3). Arguably such powers may be distinguished from those proposed on the grounds that the former are plainly necessary for border protection purposes, particularly when entry into New Zealand is sought by a non-resident/non-citizen.

18. Previous advice under section 7 NZBORA in relation to the provision of similar compulsion powers to customs officers under section 145A of the Customs and Excise Act 1996 concluded:

> *"While compelling a detainee to answer questions is in direct conflict with the words of section 23(4) NZBORA, this Office has consistently adopted the position that the questioning of detained persons can be justified where either: (1) the answers to those questions cannot be used against the detainee in subsequent criminal proceedings; and/or (2) the detainee can refuse to answer questions put, if to answer them would tend to incriminate him or her. In this regard, proposed new section 145A(5) is significant. It provides that it is a reasonable excuse for the purposes of the offence provision (existing s 185 of the 1996 Act) to fail to answer*

questions put by a Customs officer, if a person fails or refuses to answer on the basis that a person's answer would incriminate or tend to incriminate that person".[12]

19. The Law Society has been unable to locate any section 7 NZBORA advice concerning the aspects of the Bill identified above, but the Crown Law advice referred to above provides a useful analogous discussion of issues of principle.

Recommendation

20. In order to address the Law Society's concerns about the proposed powers of questioning, it is recommended that the proposed new section 277A be amended so that it:

    (a) provides that the answers to any questions put by an immigration officer under subsections (3)(c) and (f) cannot be used in proceedings against the person interviewed; and

    (b) specifies the matters that can be addressed in questioning, along the lines of sections 145(2) or 145A(3) of the Customs and Excise Act 1996.

Clause 17: proposed amendments to section 58 of the Immigration Act 2009 (and related amendments) – effect of failure to provide "relevant information"

21. Section 58 of the Immigration Act 2009 imposes a duty on an applicant for a visa to provide certain information in support. In particular under section 58(3), the applicant must inform of any "relevant fact", including any material change in circumstances while the application is pending. Section 58(5) currently provides that failure to comply with the section 58(3) obligation "amounts to concealment of relevant information for the purposes of sections 157 and 158".

22. Clause 17 of the Bill proposes to amend section 58(5) so that it reads:

    For the purposes of sections 157 and 158, an applicant is treated as having concealed relevant information if he or she fails to comply with the obligations in subsection (3).

23. Amendments corresponding to the proposed change to section 58(5) also appear in clause 26 (amending s 96(6)) and clause 34 (amending s 112(5)).

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[12] Crown Law Office advice on Border Security Bill, 2 May 2003, at paragraph 41: http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights/border-security-bill.

24. The overall effect of these changes is to lump together both deliberately and innocently withheld "relevant information". Except perhaps as a matter of administrative discretion, no distinction is to be drawn between deliberate "concealment" and innocent error, when it comes to the imposition of immigration sanctions such as deportation.

25. Secondly, it appears that the Bill intends at least partially to remove or "de-couple" the existing causal link between the information which has not been supplied and the successful application for a visa or entry permission. That is to say, the fact that the omitted information (if it had been available before decision) would not have altered the outcome is no longer to be treated as material. The present Act stipulates in numerous provisions that the visa or other immigration advantage in question (such as refugee status) must have been "procured by" the "concealment of relevant information" (or other fraudulent conduct): see sections 145(b)(i); 147(2)(a)(i); 158(1)(a)(i) and (ii), (b)(i) and (ii); 158(2)(a) and (b); 198(2)(b)(i) and (ii); 202(c)(i) and (ii) and 202(f)(i) and (ii).

26. The "de-coupling" intent is further apparent from the consequential amendments to be made to section 202 by means of clause 55, and to section 343 (clause 77) and section 349 (clause 79).

27. Provisions such as proposed new section 58(5) operate for the purposes of existing sections 157 and 158. The Bill proposes amendments to section 157 (clause 41) and section 158 (clause 42). These aim both to render irrelevant the question whether the "relevant information" not provided was truly "concealed" by the applicant, and to de-couple the link or nexus, required by the present Act, between the information (not) provided by the applicant and the grant of the visa or other immigration advantage. Thus under proposed section 158(1)(a), the liability for deportation arises on conviction of an offence if "**any** relevant information was concealed". Under new section 158(1)(b), the same outcome equally applies if (without benefit of trial and conviction) the Minister determines that "**any** relevant information was concealed". Proposed new section 158(1A) further de-couples actual fault from immigration sanction, by providing that subsection (1) applies whether or not the visa holder was the person who provided (or concealed) the relevant information as established or determined to have been concealed.

28. These proposed changes leave some existing provisions which turn on "procurement" intact, while amending others. That creates anomalies. The Law Society considers that there should remain a nexus between alleged "concealment" of the particular "relevant information" in question and the obtaining of the visa or other immigration advantage. The existence of the nexus is particularly important given the inherent vagueness of the concept of "relevant information", which is not defined or otherwise elaborated on in the Act itself.

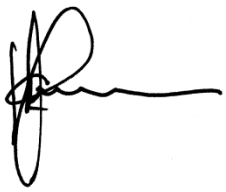
29. It is also noted that the explanation of this clause in the Explanatory Note to the Bill misstates its effect. It suggests that the clause offers no more than tidying up a phrase that is not used consistently. However, what the clause does is replace provisions that effectively allow a person to explain why they did not inform Immigration New Zealand (INZ) of something, and INZ or the Immigration and Protection Tribunal to consider that explanation, with a provision that makes it obligatory to condemn them for something that may have been done innocently. In respect of individuals whose misstatement led to a visa consequent on refugee status, it would appear to invite a breach of New Zealand's international obligations under Article 31 of the Convention on the Status of Refugees. Article 31 obliges New Zealand not to penalise those who have made illegal entry provided they show good cause for that.

Recommendation

30. For the foregoing reasons, the Law Society is opposed to this set of changes, in particular those proposed to existing sections 158 and 202. The Law Society recommends that the existing statutory nexus between non-supply of "relevant information" and obtaining of the visa or other immigration advantage be retained. Secondly, the Law Society recommends that the statutory concept of "concealment of relevant information" should not be so broadly defined as to make no distinction between deliberate "concealment" and innocent non-provision of relevant information.

Conclusion

31. The Law Society wishes to appear in support of this submission.



Chris Moore
President
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