
Immigration (COVID-19 Response) Amendment Bill 2021

15/04/2021

Submission on the Immigration (COVID-19 Response) Amendment Bill 2021

1 Introduction

- 1.1 The New Zealand Law Society welcomes the opportunity to comment on the Immigration (COVID-19 Response) Amendment Bill 2021 (**Bill**). This submission has been prepared under urgency with input from the Law Society's Public and Administrative Law Committee and Immigration and Refugee Law Committee.¹
- 1.2 The Law Society accepts that the continuing effects of the global pandemic mean that it is necessary to maintain flexibility in the way that applications for temporary entry class visas are determined and to maintain an ability to amend visa settings for whole classes of visa holders where necessary under these unusual circumstances.
- 1.3 As acknowledged in the Departmental Disclosure Statement for the Immigration (COVID-19 Response) Amendment Bill 2020 (**2020 Bill**), the powers given to the Minister to exercise by special direction affect classes of visa holders or people. They are wide-ranging powers that can have a significant impact on the interests of temporary migrants in New Zealand and the interests of persons offshore wishing to enter New Zealand.
- 1.4 In general terms, as the Law Society submitted in relation to the 2020 Bill,² there are two important protections required:
- (a) accountability and transparency in the exercise of the extraordinary discretionary powers granted; and
 - (b) commensurate safeguards to protect the rights of migrants or potential migrants, especially as the Bill is being passed under a truncated select committee procedure (as was the 2020 Bill).
- 1.5 Consistent with the need for these protections, the Law Society recommends that the Bill be amended, as follows:
- (a) that the proposed extension to the repeal date for the Minister's special direction powers be reduced from two years to one year; and
 - (b) that the existing special direction powers 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.
- 1.6 Given these simple recommendations the Law Society does not consider it needs to be heard.

¹ The Bill was introduced on 1 April 2021 and referred to the Education and Workforce Committee on 8 April, with written submissions to the Committee due by 16 April. The Committee has been instructed to report to the House by 29 April 2021 under an expedited process.

² The Law Society's submission on the 2020 Bill to the Epidemic Response select committee, dated 7 May 2020, can be found at: <https://www.lawsociety.org.nz/assets/Law-Reform-Submissions/Immigration-COVID-19-Response-Amendment-Bill-7-5-20.pdf>.

2 Reduction in sunset period to one year

- 2.1 As a safeguard on the wide-ranging effects of the special direction powers conferred on the Minister, the 2020 Bill provided that the amendments it introduced would expire after one year.
- 2.2 The Law Society submits that no reason has been offered as to why these special direction powers need to be extended again for a further two years, as proposed in the Bill.
- 2.3 The Law Society considers that one year is an appropriate period after which Parliament should again review whether these special directions powers remain necessary. This is especially so given the truncated select committee processes for both the Bill and the 2020 Bill. This has not allowed time for submitters to prepare considered responses as to whether the special directions powers should remain in force for a longer period or, as the Minister initially wanted, indefinitely.³
- 2.4 As vaccination programmes continue to be implemented over the rest of 2021, in a slow return to relative normality, the Law Society considers a one-year sunset period will be an appropriate point at which to review whether these powers need to be extended again. This timeframe also appears to be consistent with the timeframe the Government has communicated around consideration of wider border entry criteria.⁴
- 2.5 Another option would be to require an affirmative resolution to be passed by the House of Representatives within 12 months, failing which the relevant provisions would be repealed.⁵ However, on balance, the Law Society considers a preferable check on the special direction powers would be to require a further mandate to be sought from the legislature within a further year, following review by select committee.

Recommendation

- 2.6 Accordingly, the Law Society recommends that clauses 4 – 17 of the Bill be amended to replace the year “2023” with “2022”.

3 Default 28-day commencement of special directions

- 3.1 The Immigration Act 2009 currently provides that the instruments created by special direction are published on the internet and subject to parliamentary scrutiny (by tabling in the House, scrutiny by the Regulations Review Committee and subject to disallowance).

³ Hon Kris Faafoi “Extension of powers under the Immigration (COVID-19 Response) Amendment Act”, Cabinet paper, February 2021, proactively released by the Ministry of Business, Innovation and Employment Hīkina Whakatutuki, at [7].

⁴ A one-year term would coincide approximately with the expiry of the Strategic Public Health Advisory Group’s term. This Group has been set up to provide independent advice and analysis to the Government (including analysis on “the interpretation of the epidemiological modelling so that Cabinet has the advice that it needs to make evidence-based decisions on any changes to border settings”). It makes sense that any extension of the temporary powers to align with the end of the Group’s term because the Group is responsible for providing advice which will inform any decision to re-open the border.

⁵ See COVID-19 Public Health Response Act 2020, s 3.

While these measures are commendable, the Law Society noted in its submission on the 2020 Bill that such checks only occur after the instrument is made.

- 3.2 For that reason, the Law Society recommended an amendment that a special direction would generally come into force at least 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.
- 3.3 The Law Society still considers that a 28-day rule, along the lines of the 28-day rule applicable to regulations, would be appropriate for instruments created by special direction.⁶
- 3.4 As well as allowing adequate public notice of the changes made by way of special direction, a 28-day rule for special directions would also help ensure there was adequate time for Immigration New Zealand to implement visa changes made by the Minister.⁷

Recommendation

- 3.5 The Law Society therefore recommends that relevant provisions in the Immigration Act 2009⁸ be amended to insert an additional requirement that special directions:

... must come into force no sooner than 28 days after publication unless the Minister is satisfied that extraordinary circumstances exist to justify earlier commencement.



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⁶ See Cabinet Manual 2017 at [7.96]: “It is a requirement of Cabinet that regulations must not come into force until at least 28 days after they have been notified in the *New Zealand Gazette*. The 28-day rule reflects the principle that the law should be publicly available and capable of being ascertained before it comes into force.”

⁷ For an example of implementation delays causing stress and inconvenience for visa holders see RNZ “Uncertainty for immigrants as visa extensions fail to materialise”, 24 September 2020, <<https://www.rnz.co.nz/news/national/426830/uncertainty-for-immigrants-as-visa-extensions-fail-to-materialise>>, accessed 13 April 2021.

⁸ Immigration Act 2009, ss 50(4D), 52(4D), 53(4D), 57(6), 61A(6), 69(4), 78A(6), 86(5).