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SO 272 J.17

Legislative statement: Immigration (Mass Arrivals) Amendment Bill

This legislative statement supports the Third Reading of the Immigration (Mass Arrivals) Amendment Bill.

Overview

The Immigration (Mass Arrivals) Amendment Bill (the Bill) makes changes to the Immigration Act 2009 (the Act) to ensure the legislation functions as intended. A review in 2019 identified deficiencies with the current legislation; the current 96-hour deadline for the District Court to hear and decide on a group warrant of commitment may result in an application being made *ex parte* (without legal representation for those affected), which would be a breach of the right to natural justice under the Bill of Rights Act 1990 (BORA). That review, and a subsequent review, also identified ambiguity around whether members of a mass arrival might be considered passengers, and therefore deemed to hold temporary visas, were a group to arrive on a cargo or cruise vessel; and there was ambiguity as to whether group are required, or have the legal ability to, apply for entry permission and a visa.

The Bill will come into force the day after it receives Royal Assent. This reflects the Government's commitment to managing a mass arrival in a safe and secure manner.

Amendments made at Committee of the Whole House stage

The Bill was considered by the Committee of the Whole House (the Committee) on 22 May 2024, and was reported *with amendment*.

The Committee voted to include four amendments that had been proposed by the Minister of Immigration. These amendments are:

- **New sections 317A(2)(c)(iii-v) inserted:** requiring an immigration officer to establish, in making an application for a warrant of commitment:
    - why the proposed detention is necessary;
    - that the detention sought is for the least amount of time and is the least restrictive necessary to achieve the outcomes of detention;
    - how the proposed location of detention meets the Government's obligations under the Bill of Rights Act 1990; and
    - how the proposed location of detention meets New Zealand's obligations under the 1951 Refugee Convention, and other relevant international obligations;
- **New section 317AB(3) inserted:** requiring an immigration officer to report to the Court weekly on a mass arrival group during any period of warrantless detention;
- **New sections 317B(3A), 317C(5A), and 324A(4A) inserted:** enabling a Judge to order that the location of a warrant of commitment be varied on his or her own motion, or upon the application by either party; and
- **New section 330(2) inserted:** establishing that prison or a police station is not a location that can be approved by the Chief Executive of MBIE during a period of warrantless detention;

These amendments were proposed as safeguards, to allay concerns that a number of submitters at Select Committee raised in relation to the Bill.

Changing the definition of "passenger" in the Act

The Bill proposes to amend the Act to remove any possibility that members of a mass arrival group could be deemed to hold entry permission and a visa upon arrival to New Zealand.

Currently, Section 4 in the Act defines a "passenger" as any person who is carried on a craft with the consent of the carrier or the person in charge of the craft, other than a member of the crew. Such passengers are considered to have entry permission and a visa for up to 28 days. This does not allow a mass arrival group to be processed under the Mass Arrivals Response Framework, as the framework is triggered by an immigration officer refusing entry – but an immigration officer cannot refuse entry if entry permission has already been granted.

The amended Section 4 provides that members of a mass arrival group would not be considered a passenger. This enables an immigration officer to process and manage a mass arrival group.

Obligations on persons arriving in New Zealand

The Bill proposes to amend Sections 79 and 103 of the Immigration Act 2009 to clarify both that members of a mass arrival group may lawfully apply for entry permission and a visa on arrival, and that they are obliged to do so.

These changes address doubt that could arise from section 20 of the Act, which outlines that no person who is unlawfully in New Zealand may apply for a visa, which makes it legally ambiguous as to whether an immigration officer can process them in a safe and secure manner, in line with international best practice, as our border settings are geared towards managing legal and regular arrivals.

In addition to this, as there is presently no explicit requirement for members of a mass arrival group to apply for a visa and entry permission, immigration officers would not be able to conduct normal processing of visa applications.

This amendment clarifies the legal status of a mass arrival group. It will help smooth the processing of members of the group by enabling immigration officers to conduct interviews with the individuals in question, seek further information to help determine their identity, or formally require medical examinations.

Immigration officers hold the power to conduct such interviews and seek information under section 24(5) of the *Immigration (Visa Entry Permission, and Related Matters) Regulations 2010*.

Providing the Courts with more time to consider applications for group warrants of commitment

The Bill also proposes to amend sections 311 and 313 and insert a new section 317AB in the Act, to provide the Courts with more time to make a decision on a group warrant of commitment for a mass arrival group (the change to section 311 is consequential).

Group warrants of commitment are intended to enable Immigration New Zealand to manage a maritime mass arrival, should one occur, in an orderly and safe manner.

Section 313 currently enables an immigration officer to detain a group of migrants for up to 96 hours without a warrant of commitment. This section was designed to facilitate the turnaround of persons who have failed to be granted entry permission or a visa at the air border, and in the normal run of events enables them to be temporarily accommodated in an immigration control area until they can leave New Zealand.

Section 317A enables immigration officers to apply for a group warrant of commitment for members of a mass arrival group of up to 6 months' duration, which under section 317B must be determined by the judge within that initial 96 hours.

This Bill amends section 313, and inserts a new section 317AB, amending the timeframe in which an immigration officer may make a warrant of commitment application and for that application to be considered by the court.

The changes mean that an immigration officer must make an application for a group warrant of commitment within 96 hours upon presentation of members of a group, but the timeframe for a Judge to make a decision has been extended, from within 96 hours of a migrant's presentation to an immigration officer, to within seven days of the application being made. If the judge considers that this is not reasonably practicable, they may adjourn the proceedings, but must make a determination within 28 days of the application being made.

The maximum period of time spent in detention without a warrant allowable under this Bill is 32 days (the initial 96 hours, plus the additional seven days from the application being made, or up to 28 days after the application is made).

The current 96-hour deadline for a decision to be made on a group warrant of commitment application means that it is highly unlikely a mass arrival group would be able to obtain legal representation to support them during the determination of that application. By extending the deadline to seven days (or up to 28 days if the judge considers this to be necessary), this Bill upholds the human right to natural justice of migrants and better aligns the Act with the Bill of Rights Act 1990. The Ministry of Justice has analysed the Bill and has determined that it does not breach migrants' rights under BORA.

New Zealand must be prepared for a mass arrival event

Although a mass arrival event has never occurred in New Zealand, and may be considered a low-risk event, the risk is nonetheless very real and would have a significant impact, and New Zealand must be prepared.

This legislation is a key part of the Government's overarching mass arrivals strategy, ensuring that if one happens, we are prepared. Work to ensure that we are prepared for the complex operational details of a mass arrival response continue to be a part of Immigration New Zealand's work programme.

Ensuring that we are prepared to respond to a potential mass arrival in a safe, secure, and rights affirming manner will ensure the human rights of vulnerable people involved will be upheld. It will also protect Immigration New Zealand's, and the Courts', ability to continue to manage their day-to-day operational capability in the event of a mass arrival.