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# BILLS DIGEST

Digest No. 1684

## Immigration Bill 2007 (2008 No 132-2)

<b>Date of Introduction:</b>	08 August 2007
<b>Portfolio:</b>	Immigration
<b>Select Committee:</b>	Transport and Industrial Relations
<b>Date report presented</b>	21 July 2008
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<b>Published: 07 May 2009</b>  Prepared by <b>John McSoriley</b> BA LL.B, Barrister  Legislative Analyst  P: (04) 471-9626 (Ext. 9626)  F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status.  Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

### Purpose

The aim of the Bill is to restate or reform the law of New Zealand in relation to immigration and to modernise and simplify it. The existing legislation is the Immigration Act 1987 (the 1987 Act)

The Bill as introduced is described in [Bills Digest 1538](#).

### Main changes to the Bill

*The Select Committee has recommended many detailed changes to this large and highly technical Bill. The following recommendations appear to be the most important.*

#### New Zealanders must prove their citizen status to enter New Zealand

The Bill as introduced provides that every New Zealand citizen has "by virtue of citizenship" the right to enter and to be in New Zealand at any time.

The Select Committee recommended that this right be limited by providing that a citizen must prove his or her citizenship and establish his or her identity by complying with border requirements to access the right (*Part 2, amending Clause 7*).

#### *Comment*

This changes the onus of proof from the Crown to prove that a person has no citizen right to enter New Zealand to the person seeking to enter New Zealand to prove that they do have a citizen right to enter New Zealand.

### Reasons must be given for declining a visa application

The Bill as introduced provides that where a person who applied for a visa "onshore or in an immigration control area" so requests, that person must be given the reasons in writing for any decision to refuse to grant a visa or refuse to grant a visa of a particular type.

The Select Committee has recommended that this provision also apply to a refusal to grant entry permission at the border and that the reasons for such refusal must not only be given in writing but that they must also contain the information required under Section 23 of the Official Information Act 1982 as if that request for reasons were a request to which that section applied. Section 23 of the Official Information Act 1983 requires that the following information be provided:

- the findings on material issues of fact;
- with qualifications, a reference to the information on which the findings were based; and
- the reasons for the decision or recommendation (*Part 2, amending Clause 25*).

### Use of biometric information in decision making

The Bill provides for the use of biometric information to establish a record of a person's identity, to verify identity, and to assist decision making.

The Select Committee has recommended that the Bill be amended to ensure privacy, particularly in relation to the collection and storage of biometric information, and to make it clear that the collection of biometric information may be done by an automated system or otherwise, by an immigration officer or refugee and protection officer, or by an agent on their behalf.

The Select Committee has also recommended that provision be made in the Bill for the collection of biometric information from non-citizens leaving New Zealand and has also recommended the creation of an offence for any person (citizen or non-citizen) to refuse to supply biometric information at the border (*Part 2, inserting New Clauses 29A and 29B into the Bill; Part 4, inserting new Clause 110A into the Bill; Part 10, amending Clause 307 of the Bill*).

### Classified information

The Bill as introduced provided that classified information may be used in making decisions under this Bill.

The Select Committee has recommended that classified information be limited to information received from listed security, defence, law enforcement, and border agencies as follows: Aviation Security Service; Civil Aviation Authority of New Zealand; Department of Corrections; Department of Internal Affairs; Department of Labour; Government Communications Security Bureau; Maritime New Zealand; Ministry of Agriculture and Forestry; Ministry of Fisheries; Ministry of Foreign Affairs and Trade; New Zealand Customs Service; New Zealand Defence Force; New Zealand Police; New Zealand Security Intelligence Service or "a government agency established in substitution for or set up to take over any function of a department or agency [listed above]. The Bill as introduced (*Clause 30(2)(b)*) also required first-instance refugee or protection matters using classified information to be referred to the Immigration and Protection Tribunal. However, the Select Committee has recommended that senior security-cleared refugee and protection officers should decide refugee and protection matters in the

first instance using classified information. Other amendments are recommended to the classified information provisions, especially in relation to procedural aspects of appeals involving classified information to the Immigration and Protection Tribunal (the Tribunal) and subsequent appeals to the High Court and the role of special advocates to represent appellants including non-citizens. Other amendments relating to special advocates including the provisions for their designation and removal from office are recommended (*Part 2, amending Clauses 30-36 and inserting new Clauses 36A and 36B; Part 1, Clause 4(1) amended definition of "relevant agency"; Part 5, deletion of Clause 137; amendments and insertions in respect of Part 7, Clauses 214-218*).

## Visas, arrivals and departures

The Select Committee has recommended changes to the universal visa system established by the Bill as follows:

- the inclusion of a power for the Minister or an immigration officer to vary conditions on a resident visa or a temporary entry visa subject to restricted temporary entry instructions after the visa is granted only if the visa is granted as an exception to immigration instructions (*Part 3, Subpart 1, deleting Clause 39, amending Clause 41 and inserting New Clauses 41A and 41B*);
- allowing the granting of any appropriate class or type of visa to a non-citizen who holds a visa granted in error (*Part 3, Subpart 1, amending Clause 56*);
- allowing non-citizens who wish to enter New Zealand for any purpose for which a temporary entry visa may be granted to apply for a temporary entry visa even if they are subject to a visa waiver (*Part 3, Subpart 2, amending Clauses 59, 68, and 70*);
- clarifying that a holder of a limited visa would be permitted to lodge a refugee or protection appeal (*Part 3, Subpart 2, amending Clause 74*);
- providing that the chief executive is not permitted to make a decision that adversely affects the boarding rights of a person travelling to New Zealand on a foreign passport with an endorsement indicating that the holder is a New Zealand citizen (consistently with the provision that such decisions may not be made in respect of New Zealand citizens boarding with New Zealand passports) (*Part 4, amending Clause 87*).

## Refugee and protection system

The Select Committee has recommended a number of amendments to the Bill in relation to the refugee and protection system including:

- providing that a non-citizen must be recognised as a refugee if he or she meets the requirements of the Convention Relating to the Status of Refugees (the Refugee Convention) (*Part 5, amending Clause 119*);
- redrafting so that the wording of some provisions is more closely aligned to the Convention Against Torture (the CAT) and the International Covenant on Civil and Political Rights (the ICCPR), in particular the clarification in the Bill that protection status only prevents a non-citizen from being returned to a country where he or she would be in danger of torture, arbitrary deprivation of life, or cruel treatment but it does not bestow a particular immigration status or prevent deportation to other countries where the non-citizen would not face that danger (*Part 5, amending Clauses 120 and 121*);
- clarification that where a claimant is able to access meaningful protection in their country of nationality or usual habitual residence, they cannot be recognised as a protected person in New Zealand (*Part 5, amending Clauses 120 and 121 and deleting Clause 122*);
- enabling residents or permanent residents, who were liable for deportation under Clause 152, and who were not served with a Deportation Liability Notice, to have their claim to refugee or

protection status considered (*Part 5, amending Clause 123; cf. Clause 152 (relating to liability for deportation)*);

- making consideration of whether a claimant had the protection of another country or had been recognised as a refugee in another country a matter to be taken into account in assessing a claim, rather than a reason to decline to consider a claim (*Part 5, substituted Clause 125*);
- allowing New Zealand to negotiate arrangements or agreements with other countries relating to the processing of claims for refugee or protection status (however any partner country must be a signatory to the Refugee Convention, the CAT and the ICCPR and have satisfactory processes for dealing with refugee and protection claims (*Part 5, substituted Clause 125*);
- clarifying that an adverse finding as to the claimant's "character" does not prevent the granting of protection status to a non-citizen (*Part 5, amending Clause 127*);
- overcoming a possible consequence in the introduced Bill that if a former refugee status claimant under the 1987 Act tried to lodge a protection claim, their claim would be refused if their circumstances had not changed. The Select Committee has recommended that a refugee and protection officer be required to dismiss a subsequent refugee claim, but not a protection claim, if there has been no significant change in circumstances, or if the change was created by the claimant for a purpose of creating grounds for recognition as a refugee, but allowing refugee and protection officers considering subsequent claims to rely on findings of credibility or fact made by refugee status officers and the Refugee Status Appeals Authority under the 1987 Act (*Part 5, amending Clause 130 and inserting new Clause 130A*);
- protecting the confidentiality of refugee and protection claimants, refugees, and protected persons, and all aspects of their claims while also continuing to allow information from refugee and protection status claims and proceedings to be disclosed as appropriate, for purposes including extradition and prosecution (the amendments are similar to Section 129T of the 1987 Act and reflect the decision of the Supreme Court overruling a judgment of the Court of Appeal in *Attorney-General v X and Z* [2007] NZCA 388) (*Part 5, substituted Clause 140*);
- making available the limitation on deportation, provided in the Bill as introduced for persons with, or claiming, refugee or protection status, to persons claiming refugee status (*Part 5, amending Clause 153(2)*).

## The appeals process

The Select Committee has recommended that the Bill be amended in relation to appeals as follows:

- allowing an appeal against residence class visa decisions made by the Minister where classified information has been relied on (*Part 7, amending Clause 171*);
- allowing appeals on subsequent claims for refugee and protection status, whether or not the refugee and protection officer recognised the person on one ground but not another (*Part 7, amending Clause 176 and inserting New Clause 176A*);
- allowing an appeal against the decision of a refugee and protection officer to refuse to accept a claim for consideration on the grounds that, in the light of an international agreement or arrangement, the person had the opportunity to, or did, lodge a claim for refugee or protection status in another country (therefore restoring a right of appeal allowed under the 1987 Act) (*Part 7, Clause 176(1), inserting new paragraph (aa)*);
- allowing the Immigration and Protection Tribunal to make orders delaying deportation if an appeal is unsuccessful (*Part 7, inserting New Clause 192A; cf. Clause 188*).

## Immigration and Protection Tribunal

The Select Committee has recommended amendments relating to the Immigration and Protection Tribunal (the Tribunal) including:

- clarifying that the Tribunal makes findings of fact and applies the relevant law and may take either an adversarial or inquisitorial approach, or a mixture of the two (*Part 7, substituting Clause 194*);
- clarifying that the Minister and department can be a party to any proceedings before the Tribunal (*Part 7, inserting New Clause 202A*);
- amending the provision that an appeal is deemed to be withdrawn from the Tribunal when a non-citizen leaves New Zealand if the appeal is against liability for deportation under specified clauses, or against the decision to decline refugee or protected status, by providing that if a non-citizen's liability for deportation is suspended, leaving New Zealand during this suspension period would not result in the automatic withdrawal of their appeal (*Part 7, amending Clause 213*).

## Powers of immigration officers

The Select Committee has recommended changes in the Bill to the powers of immigration officers including:

- providing that where an offence against the Act is suspected, if a non-citizen does not have information or documents in his or her possession that can clarify his or her name, date and country of birth, nationality and residential address, that he or she must give the officer details of where they can be found and who is holding them (*Part 8, amending Clause 247*);
- allowing an immigration officer to search premises and buildings for non-citizens in order to serve a deportation liability notice, or execute a deportation order (*Part 8, amending Clause 253*);
- requiring police officers to arrest a non-citizen if requested to do so by an immigration officer (*Part 9, amending Clause 275(1) (the clause is headed "Initial period of detention for up to 96 hours without warrant")*);

## Immigration officers

The Select Committee has recommended that immigration officers be issued with a warrant of designation, and be required to produce the warrant upon request, where they exercise the following powers provided for in the Bill: to deport a person; to enter and inspect; to require information or documents; to enter and search at the border; to enter and search relating to deportation; to obtain certain information pending a person's deportation; to detain a person liable for turnaround or deportation, or suspected of deportation or turnaround (*Part 11 Clause 346, substituted subclause (3) and amending subclause (8)*).

## Detention and monitoring

The Bill as introduced provides the Court with the discretion to issue a warrant for the further detention of non-citizens who hinder their own departure after six months unless "exceptional circumstances" apply.

The Select Committee has recommended the creation of a presumption that, except in exceptional circumstances, a non-citizen who hinders their departure will be detained. The Select Committee also recommended the exclusion of length of detention from the list of "exceptional circumstances" which may be considered (*Part 9, amending Clause 285*).

## Provision of false or misleading information

The Bill provides (as does the 1987 Act) that it is an offence to knowingly produce any false or misleading document to an immigration officer or refugee and protection officer without "reasonable excuse".

The Select Committee has recommended the removal of the reference to "reasonable excuse" but the insertion of a provision that no proceedings may be brought in relation to the offence of (as amended) "... produc[ing] or surrender[ing] any document or supply[ing] any information to an immigration officer or ... a refugee and protection officer knowing that it is false and misleading in any material respect" if the documents or information are supplied in the circumstances to which Article 31.1 of the Refugee Convention applies (*Part 10, amending Clause 305*).

### *Comment*

"New Zealand has an obligation under the Refugee Convention to ensure that genuine refugees who provide false documentation or information are not penalised where they "present themselves without delay to the authorities". Discretion is currently exercised in deciding whether or not to prosecute failed refugee status claimants who produce false or misleading documentation. We believe this should continue, but that explicit reference should be made in the legislation to New Zealand's obligations under the Refugee Convention"<sup>1</sup>.

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<sup>1</sup> Immigration Bill, 2008 No 132-2, As reported from the transport and Industrial Relations Committee, Commentary, pp. 28 and 29.