LEGISLATION ADVISORY COMMITTEE
PO Box 180
Wellington 6401

Phone 04 494 9897
Fax 04 494 9859
www.justice.govt.nz/lac
Email LAC@justice.govt.nz

7 February 2014

David Bennett MP, Chair
Transport and Industrial Relations Committee
Parliament Buildings
P O Box 18 041
WELLINGTON 6160

Dear Mr Bennett

IMMIGRATION AMENDMENT BILL (NO 2) (156-1)

Introduction

1. The Legislation Advisory Committee was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. It has produced, and updates, Guidelines on the Process and Content of Legislation as appropriate benchmarks for legislation, which have been adopted by Cabinet.

2. The terms of reference of the LAC include:

   - to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues;

   - to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

General Comments

3. Most clauses in the Bill are not problematic, in terms of the LAC Guidelines. However we submit there are three areas where the proposed provisions can and ought to be improved: powers of entry and search of a dwelling house; the revised immigration levy; and the extended consequences fraud, misleading information or concealing information in a visa or citizenship application. We discuss each area, below.

Powers of entry and search: search of dwellinghouses

4. The Bill includes several extensions of existing powers in the Act for warrantless entry, search or seizure. New powers have been added to allow search of employers' premises to locate records, or employees (cl 60, 61, ss 277 and 277A); power to search premises for identity documents when a person unlawfully in New Zealand is found (cl 64, s 281B); undertake a personal search at the border (cl 65, s 285A); and to apply for and execute a search warrant (cl 69, s293A). The new powers of search at the employer's premises or to search for documents expressly include any "dwellinghouse" that is part of the premises, or the intended deportee's abode.

5. In its 2007 Report the Law Commission noted that non-Police, warrantless searches of a dwellinghouse or marae are not allowed, and recommended that this prohibition continue – meaning searches of a dwellinghouse by non-Police agencies should only be by warrant.[1] The Law Commission reasoned that the considerations justifying warrantless searches of dwellinghouses by Police officers generally do not apply for other agencies. Many non-Police searches involve commercial premises; and the level of significance of the search or the evidence being sought does not typically justify a warrantless search of a dwelling.

6. In general, warrantless searches of dwellinghouses should not be allowed, unless there is a truly compelling reason – such as emergency, danger to life or risk of loss of significant evidence that apply to relevant Police powers. One section of the Act already provides for warrantless search of "any building or premises". Section 286 empowers an officer seeking to serve a deportation order or liability for deportation notice to enter and search for the intended deportee in any building or premises where the officer has reasonable grounds to believe the person named in the notice or order is. By necessary inference, "building or premises" must include a dwellinghouse. It may be that this existing power is justified as more akin to Police powers for warrantless search and pursuit – as the intention is normally that the person sought be expeditiously removed from New Zealand once located and served. However, the Bill will add to this power the ability to search for identity documents, including in the person's "abode".

7. In the RIS, Immigration and MBIE explain that having to apply for a warrant to search a dwellinghouse can be destructive of effective enforcement. If evidence of illegal workers is found during a (warrantless) inspection of business records, someone has to go and apply for a warrant - by which time such workers will be gone. The nature of the businesses involved means that the premises involved will often be wholly or partly dwellinghouses.

8. This difficulty may be largely addressed by new s 277A (but with the right to search a dwellinghouse without obtaining a warrant, removed). Officers would be able to search everywhere except any dwellinghouse portion of premises. More importantly, the Bill will for the first time allow immigration officers to apply for and execute warrants. If immigration officers can apply for and execute warrants then a requirement for a warrant before a dwellinghouse or 'abode' is searched would not create administrative difficulties, nor should it risk evidence being lost or the escape of persons unlawfully in New Zealand.

---

[1] R97 *Search and Surveillance Powers* (Law Commission, 2007, Wellington), [5.85] to [5.87]; recommendation 5.17.

It should be convenient in most circumstances for officers to apply for warrants before an enforcement activity that may lead to the search of a dwellinghouse.

9. In our submission, the s 286 power to enter and search a dwellinghouse without a warrant should not be further extended, and s 286 should go no further than it does at present. The potential administrative inconvenience of not being able to search for useful or needed documents is outweighed by the desirability of limited warrantless searches of dwellinghouses.

10. In summary, we recommend that of the Bill be amended to reflect that except in the limited circumstance of s 286, a warrant is still required before a search is carried out by Immigration staff of any dwellinghouse, or of a migrant's abode. Appropriate amendments could include:

    a. Cl 60 and amended s 277: delete proposed s 277(5) (which would have specified that "premises" includes "dwellinghouse"

    b. Cl 61 and new s277A: amend definition of "premises" in s 277A(1) to read"… any premises, other than a dwellinghouse or any section of premises that is or is used as a dwellinghouse";

    c. Cl 64 and new s 281B: delete proposed s 281B(1)(d)(ii) (which would include power to enter and search the "abode" of a person liable for deportation or turnaround).

Clarification of status of revised immigration levy

11. Only Parliament may levy money for the Crown.[2] Departments and other parts of the Executive may, subject to guidelines, impose reasonable fees or charges for services or benefits but not where these would amount to a tax.

12. Clause 94 of the Bill amends the existing Migrant Levy provided for in s 399 of the Act. The Migrant Levy is currently payable by migrants who are granted and actually take up a (permanent) residence visa, whereas cl 94 provides for a more general "Immigration Levy", payable by potentially all applicants for any class of visa, temporary or permanent, and regardless of whether a visa etc. is actually granted or the person ever visits or arrives in New Zealand. The categories or classes of applicants who will have to pay the new levy and at what level or levels are left to be determined by subsequent Regulations. There are no criteria or other guidance in the amendment or existing provisions as to how such determinations should be made.

13. While matters of detail can fairly be left to regulations, the Act authorising the levy should contain at least the principal criteria governing how the levy may be set, and who must pay. This is particularly important if, as appears to be expected, different classes of migrants may pay at different rates. Clearer specification of the levy in the Act will also help dispel any doubt as to whether the levy is actually a tax, as is discussed below.

14. The existing Migrant levy is narrowly focused, and raises approximately $4.5 million annually, or about 2 per cent of the Immigration budget. The current levy's purposes are expressly restricted to funding settlement programmes for

[2] LAC Guidelines Chapter 3, Part 4 at 58.

migrants and research into settlement issues and impacts of immigration. The levy is only collected from migrants likely to receive an appreciable benefit from what they are funding. The existing levy is clearly not a tax.

15. By contrast, the proposed Immigration Levy could be construed as a tax. Clause 94 broadens the potential purposes for the levy considerably, including helping pay for any immigration system infrastructure and operations and funding the Immigration Advisers Licensing Authority. In principle, such general expenditures should preferably be met from tax revenue or from properly targeted fees for services where these can be identified.

16. We understand that the expected increase in levy revenue may be to around $10 million per annum. Given this still relatively modest target, it should be possible and desirable to better define an adjusted levy or levies, to avoid the tax issue and still collect the desired revenue. Steps could include:

    a. separating out different levy classes: especially applicants and actual migrants, and temporary vs. permanent applicants;

    b. identify and record the privilege, benefit or service(s) etc. that different levy classes are expected to receive or benefit from (which therefore may justify a levy);

    c. ensure that the main criteria for separating classes, and setting levies accordingly are included in the Act, not Regulations;

    d. remove or better target and allocate the proposed general power to apply levy monies to any INZ operations, activities or infrastructure;

    e. if the power to set and amend levy rates remains in legislation, consider including realistic "maximum" rate or rates in the Act, so that Parliament at least sets the most that an individual or class of levy payer may be required to pay.

Consequences of fraud, forgery, misleading conduct or concealment of information

17. Clause 42 of the Bill proposes amendments to s 158 of the Act, which is currently entitled "Deportation liability... if visa or citizenship obtained by fraud, forgery, etc." Section 158 is not a criminal offence provision itself, but prescribes consequences (deportation or loss of citizenship if gained by fraud etc.) if a migrant has been convicted of an offence involving their procuring their residence visa or citizenship by fraud, forgery, false or misleading information or concealment of information; or where there has been no conviction but the Minister determines that the visa or citizenship was procured by fraud etc.

18. The amendments significantly widen the scope of s 158. It will no longer be necessary that the discovered fraud etc. contributed to or led to procuring the visa. It will be enough if any of the information provided is fraudulent, forged, false, or misleading or any information was concealed (see cl 42, s 158 new (1)(a)(i)). While migrants who are actually convicted of fraud will have satisfied *mens rea* requirements, it is further clarified that the loss of visa etc. results, whether or not the person holding the visa provided or concealed the information. This was arguably implicit in the existing section, but is now spelled out in new subsection (1A). So a migrant may lose their residence visa or citizenship due to the fraud or concealment of another, and regardless of

whether the fraud etc. contributed to or caused the gaining of the visa or citizenship. What appears to have been created is a species of strict liability (close to absolute liability) penalty provision for cases where the migrant is not the fraudster.

19. MBIE explains that the immigration system should be based on true and accurate disclosure, to maintain its integrity; and cases involving false or inaccurate disclosure erode that integrity (even if it is not the false information that leads to a visa being granted). The change is also expected to provide a strong incentive to migrants to tell the truth in residence class visa applications (and, presumably, make sure anyone else supplying information is doing so).

20. However, it is possible that some visa holders will be unreasonably tainted with someone else's fraud, or that other person's (possibly innocent or inadvertent) falsification of some peripheral information. This suggests some migrants with little or no fault may still lose residence or citizenship or be deported. "Innocent" migrants will have rights of appeal on matters of fact. But it is not clear, given the wording, whether a defence such as having taken all reasonable steps to avoid submitting anything false, or absence of fault, will be available. We consider such a defence should be expressly available, as is consistent with normal policy for strict liability offences, even if the defence is treated as "reverse onus" defence.[3] We note that an appropriate defence would still tend to affirm and require truthful and diligent disclosure of all matters relating to visa applications.

21. We propose that s 158(1A) be amended by including a suitable, limited defence for affected migrants who can demonstrate a complete absence of fault. The defence could be included by adding a proviso to s 158(1A)(a), for example:

> "except that subsection (1) does not apply where the visa holder can show that he or she:
>
> a. Did not themselves provide fraudulent etc. information or conceal information; and
> b. did not know of, request, encourage or solicit another person to provide fraudulent or misleading information or to conceal any information; and
> c. took all steps reasonably available to ensure that their application was complete, accurate and not misleading.

Conclusion

22. Thank you for taking the time to consider the Committee's submission. The Committee wishes to be heard on this submission.

Yours sincerely

Hon Sir Grant Hammond
Chair

---

[3] Where the defendant has to prove that the defence applies to them, rather than the Crown having to prove that the defence is inapplicable.