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IMMIGRATION ACT 2009
10 YEAR REVIEW

PRESENTED TO THE MINISTER OF IMMIGRATION
HON IAIN LEES-GALLOWAY

SUBMISSION BY
THE IMMIGRATION AND REFUGEE LAW COMMITTEE

INTRODUCTION

8 August 2019

The Immigration Act 2009 received royal assent on 16 November 2009. It is now approaching its 10th anniversary. The Act has been subject to piecemeal amendments; however, these have largely focused on discrete areas. It is our contention that there is a need to ensure the Immigration Act and the underpinning regulations remain effective and fit for purpose. New Zealand's recent vote to adopt the Global Compact for Safe, Orderly and Regular Migration also provides a timely opportunity to review the Act, to ensure it aligns with our expressed commitments.

The Immigration and Refugee Law Committee of the Auckland District Law Society (ADLS) have undertaken a comprehensive review of the Immigration Act. Our intention is to highlight the current deficiencies in the legislation and suggest areas for improvement. The key focus of our recommendations relate to increasing access to justice in the immigration and refugee context. Again, this focus accords well with the rule of law and due process provisions contained within the Global Compact for Safe, Orderly and Regular Migration.

Yours faithfully,

Deborah Manning
Convenor
ADLS Immigration and Refugee Law Committee

EXECUTIVE SUMMARY

The key recommendations made by ADLS' Immigration and Refugee Law Committee are as follows:

Part 1: Preliminary Matters

- Restrict reasons for non-disclosure of classified information.
- Revise the meaning of absolute discretion.

Part 2: Decision making and classified matters

- Narrow exclusion provisions.
- Expand right to apply for a visa.
- Increase appeal/review rights in respect of visa lapsing and entry.
- Extend requirement to provide reasons in offshore visa applications.
- Enhance natural justice in instances of classified information.

Part 3: Visas

- Extend rights of guaranteed entry.
- Clarify visa condition notification process.
- Require mens rae for providing false etc. information.
- Reduce the impact of false etc. information when provided by unlicensed agents.
- Require reasons when declining s 61 visa requests.
- Extend use of limited visas.

Part 4: Arrivals and Departures

- Reconsider denial of entry permission/boarding provisions.
- Ensure entry permission not impacted due to false etc. information by unlicensed agent.

Part 5: Refugee and protection determinations

- Remove refugee/protection determinations from the executive.
- Require statutory minimum setting down notice periods for interview.
- Revise grounds for accepting claims and subsequent claims for consideration.
- Revise procedure on cancellation/cessation of refugee/protection status.
- Revise powers of refugee and protection officers.
- Clarify restrictions on refugee claimants applying for visas or making appeals.
- Redraft confidentiality provisions.
- Insert provision for privilege and protections at RSB for witnesses etc.

Part 6: Deportation

- Narrow triggers for deportation liability.
- Reduce period of liability for deportation of residents.
- Extend non-removal protections to persons without visas taking judicial review proceedings.

Part 7: Appeals, reviews and other proceedings

- Expand appeal, review and reconsideration rights.
- Revise Act to ensure consistency of appeal/review time limits.
- Remove need for Ministerial approval in special circumstance residence appeals.
- Ensure right of humanitarian appeal to refugee claimants on limited visas.
- Limit reasons to cancel refugee status.
- Streamline processing of permanent residence visas post-recognition of refugee status.
- Alter humanitarian appeal test.
- Remove need to obtain leave to appeal or review.
- Remove need to lodge humanitarian appeal when deportation liability suspended.
- Increase power of IPT to grant residence class visas post-humanitarian appeals.
- Revise and review powers of Immigration and Protection Tribunal (IPT).
- Revise and review provisions relating to appeals involving classified information.
- Clarify binding nature of findings of fact by the IPT.

Part 8: Compliance and information

- Separate out compliance officer roles and functions.
- Ensure access to legal counsel at border/immigration control area and meaningful facilitation.
- Clarify scope of questioning and ensure privilege against self-incrimination on entry/search.

Part 9: Detention and Monitoring

- Ensure reporting on detention.
- Provide specific complaints process related to detention.
- Clarify reasons for detention.
- Ensure access to counsel in respect of those in detention.
- Ensure adherence to international obligations in immigration detention.
- Repeal provisions related to mass arrivals and detention.

Part 10: Offences, penalties, and proceedings

- Extend exploitation offences to cover education providers.
- Increase penalties for exploitation of temporary or unlawful workers.
- Ensure right of the child to access legal advice.

Part 11: Miscellaneous

- Remove/restrict ousting of Human Rights Act.

PART 1: PRELIMINARY MATTERS

1.1 Restrict reasons for non-disclosure of classified information

Section 7 and all other sections relating to classified information within the Act should be reviewed to ensure consistency with natural justice and fairness. Specifically, s 7(2)(a) and (b) require amendment. There is concern that non-disclosed information, which is relied on by Immigration New Zealand (INZ), could be factually incorrect, misinterpreted, or otherwise incorrectly portrayed. Natural justice dictates that such information should be disclosed when it is to be relied on by the decision-maker. Otherwise, the visa applicant will be unable to adequately address or rebut the purported evidence.

1.2 Revise meaning of absolute discretion

Reasons should be provided in all cases where a request is declined so as to ensure fair decision-making. Providing reason for decisions is a matter of good administrative practice. The present s 11 provision seeks to ensure decisions are beyond scrutiny, which runs counter to the values of open government.

PART 2: CORE PROVISIONS AND MATTERS IN RELATION TO DECISION MAKING

2.1 Narrow exclusion provisions

Exclusion, as provided for in s 15, should only occur when a serious criminal conviction has occurred. Excluding persons on the basis that they have overstayed in New Zealand or elsewhere is excessive, especially as each jurisdiction has its own triggering point for exclusion. Such a change may also require ss 4 and 10 to be amended.

2.2 Expand right to apply for a visa

Section 20 is overly broad. This likely reflects the volume of s 61 and Ministerial requests made in any given year. Some flexibility in the system should be considered in specific circumstances - such as when a prospective applicant has a job offer in an area of skill shortage etc.

2.3 Increase appeal/review rights - lapsing and entry

Sections 24 and 26 should be amended to expressly provide rights of appeal or review. It is a basic tenant of democracies that administrative decisions should be subject to oversight, and where necessary, judicial scrutiny.

2.4 Extend requirement to provide reasons to offshore applications

Section 27 refers. Reasons should be required irrespective of where an application is made (including offshore). Again, this ensures good decision-making. Simply because an application is being made from outside New Zealand does not mean that basic rules of administrative practice should be relaxed. Further, as submitted elsewhere, there is a need to extend appeal and review rights across the board. Accordingly, reasons for decisions are required so as to facilitate the deliberation of such appeal/reviews.

2.5 Enhance natural justice related to classified information

Consideration should be given to consulting an independent lawyer/expert, or a responsible person with knowledge of the matter, and allowing them to brief under s 34(c). Further, pursuant to s 35, where the Chief Executive, relevant agency or Minister

refuses to provide information to the Immigration and Protection Tribunal (IPT) or courts, decision-makers should be expressly prohibited from relying on said information. Additionally, ss 40(3) and 42 should be removed for natural justice reasons.

PART 3: VISAS

3.1 Remove redundant provisions

There are references throughout the Act, including ss 49, 52, 53, 76 and 94, to "restricted temporary entry instructions" (RTEE). According to s 4, applications under these instructions must have only those instructions applied – that is, no exception to instructions (ETI) option is available. INZ's Operational Manual contains instruction E7.10, which directs consideration of an ETI in all cases but makes no reference to RTEEs. Accordingly, all references to RTEE instructions should be removed.

3.2 Extend right of guaranteed entry

Section 46(2) provides that the grant of a visa does not guarantee entry permission. One exception is for resident visas granted onshore. This should similarly apply to resident visas granted offshore given the same character checks etc. apply to both applications. This would require ss 74(1), 107 – 108 to be amended.

3.3 Clarify visa condition notification process

In accordance with s 54A, a condition imposed on a visa when the visa is issued, takes effect from the date the visa is granted. Section 56(2) provides that the condition applies whether or not the visa holder is aware of it. This could lead to injustice where someone breaches a condition of the visa before being notified of it, i.e. between the time of grant and the time of being notified of the visa. The date of effect of conditions should be amended to coincide with notification, as it already occurs in s 54(4)(b)(ii) if a subsequent notice is issued imposing further conditions.

3.4 Require mens rae for providing false etc information

Section 58(6) provides that a person can be declined a visa where the Minister or an immigration officer is satisfied that a visa applicant submitted false or misleading information or withheld relevant information that was potentially prejudicial to the grant of the visa. INZ have undertaken recent consultation indicating strict liability is to be applied to s 58. It is submitted that natural justice and fairness dictates that persons should be afforded the opportunity to comment on any potentially prejudicial information relevant to their visa status, and that persons should not be held liable for inadvertent errors. Section 58(6) should, therefore, be amended to include a mens rea element. This accords with s 342 where the mes rea of "knowing" is required, and with the character waiver assessment of INZ which also requires an intention to deceive.

3.5 Reduce impact of false etc. information provided by unlicensed agents

Section 58(6) provides that an application can be declined if a person supplies false etc. information through an agent. No distinction is made here between licensed and exempt persons, and those who give unlicensed advice. Consistent with the purpose of the Immigration Advisers Licensing Act 2007, an amendment should be inserted that false etc. information provided by an unlicensed agent will not necessarily result in a decline. This

shifts the responsibility back on INZ somewhat, to ensure that it only deals with licensed or exempt agents – which it has failed to monitor on some notorious occasions.

3.6 Require reasons for declining s 61 visa requests

As above per s 11, reasons should be provided in all cases where a request is declined so as to ensure fair decision-making. The present s 61 provision seeks to ensure decisions are beyond scrutiny, which runs counter to the values of open government.

3.7 Extend use of limited visas

Section 81A provides that a limited visa can only be held for a single express purpose while a person is within New Zealand. Such persons cannot currently obtain another limited visa for a different purpose, or a regular temporary visa, without first leaving New Zealand. This can lead to unfair outcomes where someone has been allowed to remain, for example, to pursue employment proceedings arising for exploitation etc., but then may wish to capitalise on the success of such proceedings to return to work or work for another employer.

3.8 An additional provision could be inserted to allow a person to apply for a further limited visa for a new express purpose, or for a regular temporary visa. A safeguard could be inserted preventing such applicants, if declined, from bringing a humanitarian appeal or requesting a visa under s 61, as currently provided for in s 85.

PART 4: ARRIVALS AND DEPARTURES

4.1 Reconsider denial of entry permission/boarding provisions

Section 97 allows INZ to stop people boarding a craft to travel to New Zealand, even if they hold a visa, and encompasses people who have been granted a resident visa but have not yet travelled to New Zealand on that visa. It is triggered by the provision of Advance Passenger Processing information from a carrier – that is, the decision to stop someone boarding is usually made at short notice after they have checked in and before they proceed to the departure gate. There is no right of appeal and minimal ability to review. The requirement to give reasons is very limited, and s 23 of the Official Information Act 1982 is excluded (as with absolute discretion decisions). The lack of accountability appears particularly anomalous in the case of someone who has a resident visa planning to travel to New Zealand for the first time, and whose visa can instead be cancelled per s 65. In the case of others, they should at least have the right to be notified of the reasons for refusing their entry to the craft so that they can take the matter up and (for instance) seek correction of information.

4.2 Remove redundant provisions

As with some sections in Part 3 of the Act, there is reference in s 109 to: “restricted temporary entry instructions” (RTEI). However, it does not appear that RTEIs have ever been issued, and the references here may also be redundant and should be removed.

4.3 Entry permission not impacted where unlicensed agent used

Section 112 relates to entry permission and largely mirrors the “obligation to inform of all relevant facts” at s 58. The above noted comments on s 58 apply equally to s 122.

PART 5: REFUGEE AND PROTECTION STATUS DETERMINATION

5.1 **Remove refugee/protection determinations from the executive**
It is recommended that the first stage determination process should be removed from the executive, currently, Refugee Status Branch (RSB), and vested with the IPT. Consequently, related appeals should be vested with a specialist court at District Court level.

5.2 The purpose of this recommendation is that it ensures independence and access to justice through the routine publishing of decisions (while s 151(4)(a) permits the publishing of RSB decisions in certain circumstances, this does not occur). This serves as a check on power so as to ensure first level decision-makers are determining cases consistent with the Refugee Convention and other related international obligations, as well as the rules of natural justice.

5.3 Currently, the RSB approves approximately 30% of all claims it receives. Almost all declined claimants appeal to the IPT. On average, the IPT approves 35% of all refugee and protection appeals. This essentially means that approximately 57% of all claimants are genuine refugees as decided by the RSB and IPT. Therefore, there is legitimate concern with the consistency and quality of decisions being made at first instance. While it is accepted that claimants may present further evidence in some cases at IPT, this does not, in of itself, give rise to the relatively high successful appeal rates.

5.4 Further, raising first level determinations to a Tribunal level would ensure that a more structured process is followed in-line with rules of evidence etc., and witnesses are able to provide oral evidence and be cross-examined. Again, while this is permitted under the current Act, as RSB can determine its own procedures, it does not take place in practice.

5.5 **Require statutory minimum setting-down notice periods for interview**
The Act should include minimum timescales for setting down of interviews by RSB so as to avoid RSB pressing forward, and counsel and refugee/protection claimants being given minimal preparation time. This would ensure access to justice. A suggestion of a minimum timescale would be 10 weeks from the date of acceptance of the claim for refugee/protection status.

5.6 Further statutory amendments should be made to the effect that refugee claimants are not required to submit confirmation of claim forms, attend interview, or submit evidence in support of their claim, until a reasonable period after legal aid has been approved. The current practice of the RSB is to require a confirmation of claim form be submitted within 20 days of a person indicating an intention to claim refugee status. In many cases, this is not achievable due to the need to schedule interpreters, and for counsel to seek and receive a grant of legal aid to assist. Interviews will also not be delayed by the RSB on the ground that a legal aid application remains undetermined. This effectively requires lawyers and interpreters to act on a pro bono basis until a decision to grant legal aid is received. This is not a sustainable process and runs counter to common practice within the New Zealand courts.

5.7 **Revise grounds for accepting claims and subsequent claims for consideration**
Sections 134(3) and 140(1)(b) should be amended to read the Refugee and Protection Office (RPO) “may decline” instead of “must decline”. Such legislative action is required because despite a person acting otherwise than in good faith by bringing about the

grounds for recognition as a refugee, the person may nonetheless face the real chance of persecution if deported. While this may be cured by a humanitarian appeal, non-recognition of a refugee for these reasons runs counter to the spirit of the Refugee Convention.

5.8 Revise procedure on cancellation/cessation of refugee/protection status

Sections 144(1) and 147(1) should be amended to read a RPO "must apply" to the IPT for the determination of a cessation or cancellation of refugee/protection status where the IPT (or prior body) made the original decision to recognise the person as a refugee/protected person. The current permissive nature of these provisions risks incorrect decisions and unnecessary stress for recognised refugees and their families, especially given the high number of successful refugee appeals made from the RSB per annum. Sections 145(b)(iii) and 147(2)(a)(iii) should also be amended to limit the reasons to cancel refugee status to those cases where there is actual fault on the part of the refugee.

5.9 Revise powers of refugee and protection officers

The current wide power of a RPO to regulate the procedure for determining a claim should be constrained. One alternative is to amend s 136(3) to read: *"Subject to the provisions of this Act and any regulations made under it, a refugee and protection officer must determine the procedure that will be followed on the claim in a manner that is most likely to ensure New Zealand's international obligations are given effect to, and consistent with natural justice rights."*

5.10 It is further submitted that the Act should provide set procedures and processes for the RSB, in the form of guidelines similar to sch 2 (which relate to the IPT). This would ensure that natural justice is provided for at all steps of the determination process. It would also bring forward greater accountability for RPOs, and a greater sense of Parliament's expectations.

5.11 The nature of the determination process at first instance needs to be changed when dealing with refugee claims to take a more trauma centred approach. RPOs have been known to deliberately trigger trauma in some instances as a means of assessing a claimant's credibility. This is unsafe in the absence of clear clinical advice and safeguards. To that end, the Act or underpinning regulations should be drafted in accordance with the UNHCR in its Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process

5.12 Section 149(4) should be revised to ensure that reasonable efforts on the part of a RPO are made to ascertain reasons for the non-attendance of a claimant at interview, and to provide an opportunity to substantiate reasons for non-attendance, before a RPO determines the claim based on the evidence before them. Such a revision accords with the recent Supreme Court decision of *H v Refugee Protection Officer* [2019] NZSC 13.

5.13 Express power for RPO to direct grant of permanent residence upon recognising refugee

The Act should be emended to provide an express power to RPOs to direct the grant of permanent residence to those recognised as a refugee or protected persons, and their immediate family members. This would avoid the current protracted residence process which can take over 12-24 months, and in some cases, involve subsequent residence

appeals where a family member is not an acceptable standard of health in accordance with INZ policies etc. A more streamlined process would save considerable time and resource, and free-up INZ officers to concentrate on other applications. Permanent residency will invariably be granted. Therefore, a more streamlined process is indicated.

5.14 Clarify restrictions on refugee claimants applying for visas or making appeals

Section 150(1)(b) should be redrafted to make it clear that the restrictions on applying for visas and appeals applies only after the refugee claim has been determined by the IPT, in accordance with s 128.

5.15 Redraft confidentiality provisions

Sections 151 – 152 should be redrafted to more closely mirror the UNHCR Guidelines on the Sharing of Information on Individual Cases "Confidentiality Guidelines" so as to reduce the confidentiality of refugees being breached or harmed being caused to refugees or others.

5.16 Express provision for privilege and protections at RSB for witnesses etc.

A section should be added to Part 5 of the Act to expressly grant all witnesses (including the claimant) all the privileges and protections that they would ordinarily have in a court of law (as applies to the IPT at sch 2, cl 15). While these privileges and protections also exist at common law, and are therefore already applicable at the RSB, a provision expressly stating this would seek to avoid any confusion.

PART 6: DEPORTATION

6.1 Narrow causes for deportation liability

Section 157(5(b) should be amended to make it clear that only where a person is actually convicted of criminal offending will they be potentially liable for deportation (instead of mere criminal offending). This would include those discharged without conviction. Presently, an innocent person could be encouraged to admit guilt to obtain a discharge without conviction, but for that admission of guilt to be used to bring about deportation.

6.2 Reduce period of liability for deportation of residents

Section 167 essentially imposes a ten year period from the liability for deportation arising, during which the person remains liable for deportation, not counting the person's periods of imprisonment. It is submitted that this period is excessive. For instance, a person could be convicted of a low level offence within 2 years of being granted residence, which they have received a fine for. Whereupon, s 161(1)(a) provides they could be made liable for deportation. According to s 167, this liability endures for 10 years – apparently at the discretion of the Minister – who could choose to deport the person as late as 12 years from the initial grant of residence – despite little culpability and possibly an unblemished record for 10 years from the offence. To that end, finality of status ought to be available sooner than currently provided.

6.3 Extend non-removal to judicial review proceedings involving those without valid visa

Section 175A restricts INZ from taking deportation action against persons with an appeal right until such a right is exhausted. However, this section is a silent on INZ's power to execute a deportation order against persons who have the right to bring judicial review

proceedings. It follows that INZ can technically deport a person who has a right to bring review proceedings. For these reasons, counsel would have to apply to the High Court for an interim injunction to prevent INZ from undertaking any deportation action whilst the judicial review proceedings are pending, unless an agreement can be reached. This is inconsistent with s 27 (2) of the New Zealand Bill of Rights Act 1990, which guarantees access to judicial review. Thus, a new subsection could be added to s 175A(2), mirroring s 175A(2)(c) with the necessary modifications, to ensure deportation does not occur when persons have made an application for leave to bring judicial review under s 249 of the Act.

PART 7: APPEAL, REVIEW, AND OTHER PROCEEDINGS

7.1 **Expand appeal, review and reconsideration rights**

It is recommended that appeal, review and reconsideration rights be amended as follows:

- Expand reconsideration rights to those making temporary visa applications offshore.
- Expand appeal rights to all applications for temporary visas.
- Expand judicial review rights to include offshore temporary visa applications.
- Expand judicial review or appeal rights for decisions to issue deportation liability notices.
- Expand humanitarian appeal rights to all persons liable for deportation under ss 155-161.

7.2 The above reforms to expand appeal and judicial review rights to temporary visa applicants are required because statistics issued by the IPT show that year-on-year the IPT returns 30% of residence visa appeals back to INZ (from those who appeal) because they are wrongly decided by INZ - this rose to over 50% in the last reported year. With no judicial oversight of temporary visa decisions, there is increased scope for INZ to routinely make incorrect decisions.

7.3 Further, extending humanitarian appeal rights is required because the current process of compliance officer only determinations is not subject to any adequate judicial oversight, and anecdotally (because INZ do not keep statistics), compliance rarely cancels or suspends deportation liability.

7.4 Expanding appeal/review rights to the reasons for issuing deportation liability notices (DLN), is required because the IPT cannot consider this issue as it is not within their jurisdiction. Additionally, s 249 of the Act provides that no review proceeding can be taken in respect of "the effect of the decision".....Therefore, there is potential that the High Court could refuse to hear such reviews without it first being considered on a humanitarian appeal by the IPT (which the Act currently prevents from happening); albeit, this is doubted in light of *H v Refugee Protection* Officer [2019] NZSC 13.

7.5 **Provide consistency of appeal/review time limits**

The Act should be amended to provide for a standard 42 day period in which a person must lodge an appeal or review (whether to the IPT or High Court), as opposed to the various timescales currently provided for in the Act. This ensures consistency and provides reasonable opportunity to take advice. This may in turn see a decline in meritless appeals/reviews as the affected person will have had the opportunity to take considered

advice, as opposed to pressing ahead with an appeal/review to safeguard their position. As a consequence, it would reduce the burden on Court and Crown Law resources.

7.6 Amendments should also be made to the Act to provide the IPT with the power to extend the time for lodging an appeal in all categories, where there are special circumstances.

7.7 Right of appeal for subsequent claims

Section 195(1)(b) should be amended to grant the right of appeal under this Act to those where an RPO has refused to consider their subsequent claim for refugee status. The provision limits such appeal rights to such determinations under the Immigration Act 1987. As indicated elsewhere in this submission, there is legitimate concern as to the quality of decision making at RSB, such that to deny persons the right of appeal in this instance, may be to deny them an opportunity to have their claim properly considered.

7.8 Remove Ministerial approval requirement for special circumstances appeals

It is recommended that ss 180(1)(f) and 190(5) should be amended to remove the need for the IPT to recommend the grant of a visa (residence or otherwise) to the Minister when special circumstances are established. Instead, the IPT should be given the power to grant. This shields the Minister from criticism and also ensures political expediency is not used when determining whether to grant a visa following a successful appeal.

7.9 Clarify rights relating to use of further information by IPT

Section 189 of the Act gives the IPT the power to require the Chief Executive to have a member of INZ staff interviewed about anything, and for that interview report to then form part of the evidence. The appellant has no ability to cross-examine the interviewee. The Act should be amended to give such a right in the interests of natural justice.

7.10 Ensure right of humanitarian appeal to refugee claimants on limited visas

Section 194 is clumsily worded. It needs redrafted to ensure that refugee claimants on limited visas have the right to make a humanitarian appeal as well as a refugee appeal.

7.11 The section should be further amended to remove the need for a refugee claimant to lodge a humanitarian appeal at the same time as a refugee appeal.

7.12 Expand appeal rights relating to subsequent refugee claims

The Act should be amended to expand the right of appeal to the IPT against all decisions of RSB, where RSB refuses to consider a subsequent claim to be recognised as a refugee or protected person.

7.13 Limit reason to cancel refugee status

Section 198(2) should be amended to limit the reasons to cancel refugee status to cases where there is actual fault on the part of the refugee.

7.14 Revise determination of subsequent claim refugee/protection appeals

Section 200(2)(b) should be amended to read the IPT “may dismiss the appeal” instead of “must dismiss the appeal”. Such legislative action is required because despite a person acting otherwise than in good faith by bringing about the grounds for recognition as a refugee, the person may nonetheless face the real chance of persecution if deported.

While this may be cured by a humanitarian appeal, non-recognition of a refugee for these reasons runs counter to the spirit of the Refugee Convention.

7.15 Express power of IPT to direct grant of permanent residence post refugee recognition

As discussed above in Part 5, an express power, similar to that under 210(1)(a), should be vested with the IPT to enable it to direct INZ to grant permanent residence when it determines to recognise a person as a refugee or protected person.

7.16 Alter humanitarian appeal test

The current s 207 humanitarian appeal test does not necessarily produce humanitarian results. This risks New Zealand breaching its international obligations, especially to children, because the IPT has adopted the position that the separation of parents from children is an inevitable result of deportation, and, in isolation, is not an exceptional humanitarian circumstance.

7.17 It is recommended that the humanitarian appeal test be redrafted and reconceptualised along the following lines:

The IPT must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
(a) the impacts of deportation are disproportionate to the deportation triggering event(s); and
(b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

7.18 Further, s 207 should be worded so as to be clear that the IPT must have the welfare and best interests of the child as a "paramount" consideration, as opposed to the current "primary" consideration approach. This is required because the current approach permits the IPT to deport persons despite it not being in the best interests of the child. The separation of families should be exceptional, as should the effective deportation of New Zealand citizens to facilitate family unity.

7.19 Remove the need to obtain leave to appeal or review

The Act should be amended to remove the need for appellants to first seek leave to appeal or review a decision of the IPT. The present requirement wastes time and resources for all concerned, including the courts, crown and the appellant. It can in fact delay deportation or removal in some cases.

7.20 Remove the need to lodge humanitarian appeal when deportation liability suspended

The current process of requiring those with suspended liability for deportation to lodge an appeal against deportation within the prescribed timeframe of being served with the DLN skews IPT statistics relating to appeals on hand and squanders IPT resources. The actual appeal only occurs if deportation is to proceed. Thus, it is prudent to remove the need for appeals to be lodged when a suspension notice is served. We understand this is also proposed under cl 64A of the Statutes Amendment Bill 2018 (83-2).

7.21 Increase power of IPT to grant residence class visas post-humanitarian appeals

Amend s 210(1)(a) to allow the IPT to grant residence class visas rather than the current limitation to resident visas. This would allow the IPT to grant permanent resident visas as

well, allowing appellants to have security in their future in New Zealand. This is especially relevant with regard to character issues that the IPT has already assessed as not being contrary to the public interest being reopened by INZ at the permanent resident application stage.

7.22 Increase power of IPT to delay deportation on unsuccessful appeals

The IPT should have full discretion to order the delay of deportation for any period. This is needed because new matters can arise that should prevent deportation, such as to care for a vulnerable family members who has to undertake an urgent medical procedure. Further, the current compliance led pre-deportation interview does not provide for this, nor is it subject to any adequate judicial oversight.

7.23 Alter determination process of appeals by IPT

The nature of the IPT needs to be changed when dealing with refugee claims to take a more trauma centred approach. Like the RSB, the IPT has been known to deliberately trigger trauma in some instances as a means of assessing an appellant's credibility. This is unsafe in the absence of clear clinical advice and safeguards. To that end, the Act or underpinning regulations should be drafted in accordance with the UNHCR in its Guidance Note on the Psychologically Vulnerable Applicant in the Protection Visa Assessment Process

7.24 In determining appeals generally, the IPT should also be required to have a trauma centred approach.

7.25 The power of the IPT to regulate its own procedure should be constrained. One alternative is to amend s 222(4) to read: *"Subject to the provisions of this Act and any regulations made under it, the Tribunal must exercise its jurisdiction in a manner that is most likely to ensure New Zealand's international obligations are given effect to."*

7.26 Require statutory minimum setting-down notice periods at IPT

The Act should include minimum timescales for setting down of appeals by the IPT so as to avoid the IPT pressing forward, and counsel and appellants being given minimal preparation time. It is suggested that this should be set as a minimum of 12 weeks so as to ensure access to justice.

7.27 Further statutory or regulatory amendments should be made to the effect that appellants who have a right to an oral hearing should not be required to attend a hearing or submit evidence in support of their appeal, until a reasonable period after legal aid has been approved. The current practice of the IPT (as indicated in its own Practice Notes) is that a hearing will not be delayed solely on the ground that a legal aid application remains undetermined. This effectively requires lawyers and interpreters to act on a pro bono basis until a decision to grant legal aid is received. This is not a sustainable process and runs counter to common practice within the New Zealand Court and other Tribunals.

7.28 Require different IPT members to determine successive appeals

To ensure impartiality, IPT members should not sit on appeals for appellants they have previously made a determining about. This would include humanitarian appeals following the decline of a refugee appeal; where a different IPT member should be required to

determine the humanitarian appeal than the one who determined the refugee appeal. This approach guards against unconscious bias.

7.29 Require IPT to disclose all information obtained to appellant

The Act should be amended to include an express provision that the IPT be required to disclose, to the appellant, and their representative, any comment by INZ, or any file or part thereof, provided to and accessed by the IPT, when the appellant would not normally have access to it or be aware of same.

7.30 Increase requirement of IPT to disclose prejudicial information

The IPT has adopted a practice of approaching all documents provided to it with neutrality as to its weight. The IPT has an inconsistent practice as to its assessment of documents, as well as to when (or if) it will provide an appellant the opportunity to rebut or make comment on the IPT's assessment of documents tendered. It is, therefore, recommended that s 230 should be amended to remove s 230(a) so as to ensure the principles of natural justice are applied by the IPT to all evidence before it, whether provided by the appellant or others.

7.31 Review of sections relating to classified information

A full review of the sections of the Act relating to appeals/reviews involving classified information is required so as to ensure they are fully compliant with the principles of natural justice and fairness.

7.32 Expand use of special advisors

The Act currently provides the IPT with the power to appoint special advisers in proceedings relating to classified information (s 270). This should be expanded to all proceedings before the IPT, where deemed necessary. Here, counsel representing an appellant could make submissions as to the scope and purpose of such an appointment in any particular appeal.

7.33 Clarify binding nature of findings of fact by the IPT.

The Act should be amended to provide that relevant findings of fact by the IPT as an appellate body should be binding on all parties, including appellants and INZ, in any subsequent decisions on those facts. Anecdotally, INZ does not feel itself bound by the decisions of the IPT and will often revisit or relitigate settled matters of fact.

PART 8: COMPLIANCE AND INFORMATION

8.1 Separate out compliance officer roles and functions

The creation of separate roles for compliance officers should be provided for in the Act, to distinguish between those compliance officers who undertake active compliance tasks (e.g. locating people remaining in New Zealand unlawfully), and those officers undertaking statutory-decision making (e.g. good reason appeals, pre-deportation interviews). There is an ethical and professional conflict of interest between a compliance officer's role to seek out, locate and detain an undocumented person, and the same officer being required to undertake the pre-deportation interview and to determine to cancel a deportation for said individual. Ideally, officers with adequate training would be tasked with statutory decision-making duties noted above and not engage in front-line duties.

8.2 So as to ensure complete separation of roles, the functions of a compliance officer should be designated as an administrative oversight role, while active entry, search etc. should be passed to the Police as the lead agency.

8.3 **Ensure access to legal counsel at border/immigration control area**
Concerns have been expressed for a number of years in respect of the right to access counsel for persons detained at border/immigration control areas or held for questioning or interview. So as to ensure access to counsel, s 283 should be amended to provide an explicit statutory right to instruct legal counsel and for counsel to be present during all questioning/interviews and for counsel to be granted access to border/immigration control areas where necessary.

8.4 **Clarify scope of questioning and ensure privilege against self-incrimination**
The privilege against self-incrimination has a long history. The ability to invoke such privilege should be reflected in the Act. Further, s 277A(3) should be express as to the manner and questioning of persons detained. Section 277A(3)(c)-(f) should be amended so that it specifies the matters that can be asked during questioning, and provide that the answers to any questions cannot be used in criminal proceedings against the person interviewed.

PART 9: DETENTION

9.1 **Ensure reporting on detention**
Proactive reporting on the use of the limited power of detention for immigration officers for four hours under s 312, and the initial period of detention up to 96 hours, should be required under the Act. The concern here is that these initial detention provisions, which are not reviewed by the courts, are where access to counsel is being least facilitated.

9.2 **Provide specific complaints process related to detention**
Given the wide detention powers provided to immigration officers under the Act, there is potential for wrongful detentions to occur or for non-compliant procedures to be adopted. Notwithstanding our submission above for the separation of compliance roles, it is recommended that the police-like powers currently provided to immigration officers should attach police-like complaints access. In the United Kingdom complaints about detention are subject to detailed guidance of the Home Office and Border Service. A similar approach is recommended for New Zealand.

9.3 **Clarify reasons for detention**
Concern has been expressed by our Committee and within the recent review of compliance undertaken by Mike Heron QC, as to the relative ad-hoc nature of determining when persons should be detained. This arises due to the discretionary nature of the decision-making. Accordingly, ss 309-310 should be revised to include the statutory purpose for detention, and provide clearer direction as to when detention may be appropriate.

9.4 **Ensure access to counsel for those in detention**
Meaningful access to legal representation (timely and informed) is inadequate in early detention, warrant of commitment proceedings, release agreements, pre-deportation

interviews, and for non-English speaking detainees. Accordingly, Part 9 should be revised so as to include express rights to access counsel, such as "…"*shall ensure the person advised of and given a reasonable opportunity to seek advice and representation from a lawyer".* This suggestion is required due to on-going concerns that vulnerable persons are being denied access to counsel either due to misunderstanding of natural justice rights or misapplication of policies.

9.5 In particular, s 315 should be amended to record that before requiring agreement on release conditions an immigration officer must allow a reasonable opportunity for the person who is liable for arrest and detention to seek and to obtain independent legal advice, and shall provide a copy of the proposed agreement to any nominated lawyer for the person.

9.6 Section 316 should make it expressly clear that where counsel is on record, the detention application should be provided to counsel at the same time it is submitted to the court.

9.7 Section 320 should also be amended to place an onus on the court and immigration officers to ensure persons are made aware of their right to seek independent legal advice, and to provide reasonable time for them to seek and obtain that advice.

9.8 Section 327(1) should be amended to place a duty on the detaining officer to have taken all reasonable steps to have established the identity of the person in question before detaining them.

9.9 Section 327(2)(c) should be strengthened to place a duty on detaining officers when advising of the right to access counsel, to include facilitation of said right if requested. Such a duty could read: "*to inform the person what she or he may contact a lawyer or, if appropriate, a responsible adult and to ensure that a meaningful opportunity to seek such advice is provided in any subsequent period of detention and before any interview or application or any further steps of application takes place".*

9.10 Similarly, s 333(2)(i)(a) could be amended to place a duty on detaining officers to: "*inform the detainee's right to contact a lawyer or any responsible adult nominated in respect of the detainee under section 375 (or, where the detainee is under 18 years of age, a parent or guardian of the detainee) and to ensure that the person or persons responsible for holding the period in custody provide a reasonable opportunity to seek and receive such advice including deferring any interview or application until that opportunity has been given."*

9.11 Section 335 should make it expressly clear that where counsel is on record that they are advised when a change to the basis for custody arises. Such an approach accords with the Ombudsman's opinion when police custody changes from a criminal matter to immigration. In that, it is reasonable to clearly inform or remind detainees of their right to consult and instruct a lawyer, without delay, and in private.

9.12 Ensure adherence to international obligations in immigration detention
Civil detention should be rare. Too often persons detained pursuant to this Act are being held in correctional facilities, where immigration detainees are being held with criminal detainees. Such an approach breaches New Zealand's international obligations.

9.13 The criteria for the issuing of a warrant of commitment should be revised as it is currently too heavily weighted against release.

9.14 Express provisions related to refugee claimants should also be adopted. Persons indicating an intention to claim refugee status at border are too often refused entry permission and then detained under a warrant of commitment, so as to deny that person the rights guaranteed to them by New Zealand under the Refugee Convention.

9.15 Further, s 317(4) should be made expressly clear that in determining whether to issue a warrant of commitment, or whether to order the person's release on conditions, the Judge must have regard to, among other things, the need to seek an outcome that maximises compliance with this Act "*balanced with New Zealand's international obligations."*

9.16 Repeal provisions related to mass arrivals and detention

Section 317A and related provisions concerning the detention of mass arrival asylum seekers for an initial period of 6 months with limited right of review should be repealed. The provisions have been criticised by the United Nations Committee against Torture, the United Nations Committee on the Elimination of Racial Discrimination, and the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Report. Said provisions breach s 22 of the New Zealand Bill of Rights Act 1990, Art 9 of the International Convention on Civil and Political Rights, Art 14 of the Universal Declaration of Human Rights, Art 3 of the Convention Against Torture, and Art 31 of the Refugee Convention.

9.17 Consequential amendments

In 2006 the central national preventive mechanism was added to the Crimes of Torture Act 1989, which in practice has led to regular monitoring of places of detention primarily by the Office of the Ombudsman, the Independent Police Conduct Authority and other agencies not related to immigration matters. There have been concerns that these inspections have not included inspection of the conditions in which short-term detention of persons unlawfully in New Zealand at police stations has occurred. Accordingly, amendments to the Crimes of Torture Act and/or to the Immigration Act should be expressly made so as to ensure monitoring covers all immigration detention facilities.

9.18 Amendments to the funding available to counsel under the Legal Services Act 2011 when conducting warrants of commitment should be considered, as the present funding of 3 hours is wholly inadequate. Our Committee has already lobbied the Minister of Justice on this matter. It is recommended that this matter be discussed across Ministerial portfolios.

PART 10: OFFENCES, PENALTIES, AND PROCEEDINGS

10.1 Extend exploitation offences to cover education providers

The research conducted for the Ministry of Business, Innovation and Employment, in respect of exploitation of temporary migrants and international students, indicates that due consideration should be given to creating a new offence of exploiting international students by education providers. Anecdotally, there are students undertaking courses of

education that are deliberately structured in a way whereby providing education is a non-priority or education providers incentivising non-licensed overseas agents to induce students into enrolling with certain providers by selling a largely non-existent pathway to residence.

10.2 Increase penalties for exploitation of temporary or unlawful workers

The above noted research also indicates that due consideration should be given to increasing the penalties available for those found guilty of exploiting workers/international students.

10.3 Ensure right of the child to access legal advice

There appears to be no transparent reporting back on how the responsible adult provisions under s 375 have been facilitated. There is potential for a conflict of interest arising when decision-makers are given the power of appointment of responsible adults. There is further concern that such appointees may have insufficient knowledge to make informed decisions relating to legal actions or avenues open to the child. The insertion of a new section to allow direct legal representation should be considered, such as occurs within family proceedings where a lawyer for the child can be appointed.

PART 11: MISCELLANEOUS

11.1 Remove/restrict ousting of Human Rights Act

Respect for diversity should be a cornerstone of society and reflected in immigration policy. Section 392 seeks to effectively oust complaints pursuant to the Human Rights Act 1993. While s 392(3) is acknowledged, it is submitted that New Zealand should not tolerate immigration policy that discriminates on the grounds of religious belief, ethical belief, colour, race, marital status, political opinion, family status, or sexual orientation. Further, it is highly questionable whether disability should be a barrier to a visa in New Zealand, when set against New Zealand's domestic and international obligations. Further, the purported ousting of the Human Rights Act appears to run afoul of New Zealand's commitments under the Global Compact for Safe, Orderly and Regular Migration. Accordingly, s 392 should be removed entirely or severely narrowed.