

Chair
Cabinet Policy Committee

IMMIGRATION BILL: RECOMMENDATIONS FOR THE REFUGEE AND PROTECTION SYSTEM

PURPOSE

- 1 This Cabinet paper makes recommendations for the refugee and protection system in the Immigration Bill (the Bill).

EXECUTIVE SUMMARY

- 2 The Bill creates a new integrated refugee and protection determination procedure. In addition to the Convention Relating to the Status of Refugees (the Refugee Convention), the Bill seeks to codify New Zealand's non-return obligations under the Convention Against Torture (the CAT), and the International Covenant on Civil and Political Rights (the ICCPR).
- 3 This paper recommends that Article 3 of the CAT is incorporated into the Bill and that a person cannot be returned to another state where there are substantial grounds for believing that person would be in danger of being subjected to torture. It recommends that the non-return obligation under the ICCPR is drafted in a similar way. The paper also recommends that certain aspects relating to refugee and protection status are clarified in the Bill, including that:
 - whether a claimant is a refugee or protected person in another country is a matter to be determined as part of a claim, rather than a basis to refuse to consider the claim
 - protected person status offers the holder protection only from return to a country where they would be in danger
 - if a claimant can access meaningful state protection in the country of their nationality or usual habitual residence, they cannot be recognised as a refugee or protected person in New Zealand
 - the refugee or protection status of a citizen can be cancelled by a determination officer (without that person becoming liable for deportation), and a person can appeal that cancellation to the Immigration and Protection Tribunal (the Tribunal)
 - the name "determination officer" is changed to "refugee and protection officer", and

- consistent with the above proposals, that certain Cabinet Business Committee (CBC) decisions on the Immigration Act review made in November 2006 be rescinded [CBC (06) 20/14].

BACKGROUND

- 4 CBC made decisions on the Immigration Act review in November 2006, including to ensure that “a single procedure for determining protection needs according to New Zealand's core immigration-related international obligations” was incorporated into the Bill [CBC (06) 20/14]. The intent was to carry over the replication of the Refugee Convention (as a schedule to the Bill) and codify New Zealand’s non-return obligations under the CAT, and the ICCPR; in particular, the level of risk or danger a claimant must face to be a protected person in New Zealand.
- 5 In June 2007, the Department of Labour (the Department) indicated to Cabinet that “national and international jurisprudence needs to be further reviewed and closely considered” and that advice on the appropriate codification of the non-return obligations of the CAT and the ICCPR would be provided to the Transport and Industrial Relations Committee (the Committee) [CAB Min (07) 21/5]. This was because there was some concern about whether the specific wording in the Bill was consistent with New Zealand’s non-return obligations. Crown Law has since undertaken a comprehensive review of the codification of the non-return obligation of the CAT internationally. This is discussed below.
- 6 It is noted that, following introduction of the Bill, concern about the codification of the CAT and the ICCPR has also been expressed in written and oral submissions to the Committee.

CODIFICATION OF THE CAT AND ICCPR IN THE BILL

- 7 As noted above, part of the intent in codifying the non-return obligations of the CAT and the ICCPR in the Bill was to prescribe the level of risk or danger a claimant must face to be a protected person. [Withheld under section 9(2)(h) of the Official Information Act 1982]. Prescribing a standard that has been expressed in practice in a variety of ways internationally represents a risk that the standard will not be consistent with New Zealand’s non-return obligations under the CAT and the ICCPR. This would result in the Bill be subject to national and international criticism, and it being challenged in the courts. It is recommended, therefore, that the Bill remain silent on the level of risk or danger a claimant must face to be a protected person in New Zealand.
- 8 Remaining silent would result in the level of risk or danger being set through refugee and protection decision making process considering New Zealand’s non-return obligations under the CAT and the ICCPR, and taking account of the full range of international jurisprudence available at the time a decision was made. A decline decision could be challenged in the Tribunal and contested in the courts. This process is contrary to the initial policy intent,

however, in the long run, remaining silent in the Bill represents a lower risk than setting an incorrect level of risk or danger in the Bill.

- 9 To codify the CAT appropriately, it is recommended that Article 3 of the CAT be incorporated into the Bill and that a person cannot be returned to another state where there are substantial grounds for believing that person would be in danger of being subjected to torture. It is also recommended that the non-return obligation under the ICCPR be drafted in a similar manner. The non-return obligations in the CAT and the ICCPR are attached in Appendix One for reference.

OTHER REFUGEE AND PROTECTION ISSUES IN THE BILL

Matters to be determined in considering a claim

- 10 Currently, the Bill enables determination officers to refuse to consider a claim if the claimant has been recognised as a refugee or given protection in another country. To be consistent with the Refugee Convention, which is incorporated as a schedule to the Bill, it is recommended this be a matter to be determined as part of a claim, not as a reason to refuse consideration of a claim.

Protected person status

- 11 While the Refugee Convention sets out rights afforded to those granted refugee status, neither the CAT nor the ICCPR have similar provisions for those granted protection status, as the provision of such status is only one aim of the instruments which cover a broad range of other rights. Our principal immigration-related obligation, as party to the CAT and the ICCPR is not to return a person to a place where they would be at risk of torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment.
- 12 It is recommended that the Bill clarify that protected person status offers the holder protection only from return to a country where they would be in danger of torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment. This would retain the option for New Zealand to deport certain protected persons to a safe third country where they were admissible, would not face danger, and would not be threatened with further removal to another country where they would be endangered.

Meaningful state protection

- 13 New Zealand's non-return obligations under the Refugee Convention, the CAT and the ICCPR do not extend to those who are able to access meaningful state protection elsewhere, for example, in the country of their nationality or usual habitual residence. This is established refugee law. It is logical that if a claimant is protected by their country, they should not be entitled to the protection of another country. It is important, however, that the protection is meaningful and offered by the state. It is therefore recommended that the Bill clarify that, if a claimant can access meaningful state protection in the country of their nationality or usual habitual

residence, they cannot be recognised as a refugee or protected person in New Zealand.

Cancellation appeal for citizens who are refugees or protected person

- 14 There is an unintended consequence in the Bill in the appeal process for refugees and protected persons who are deprived of citizenship. This is a matter that has been raised with the Department of Labour (the Department) by the Refugee Status Appeals Authority (the RSAA). While this circumstance is not a frequent occurrence, it needs to be addressed.
- 15 Currently under the Bill, where a person is deprived of citizenship, they become a resident visa holder. Where the deprivation occurred because of fraud in procuring the immigration status that enabled the person to meet the criteria for grant of citizenship, the person becomes liable for deportation. In this circumstance, the person has access to a humanitarian appeal against deportation to the Tribunal. There is currently no link to the refugee or protection cancellation process. This link should be clear and transparent to be consistent with New Zealand's obligations under the Refugee Convention, the CAT and the ICCPR, as refugees and protected persons cannot be deported.
- 16 It is recommended that the Bill enable the refugee or protection status of citizens to be cancelled by a determination officer (without becoming liable for deportation) and to allow them to appeal that cancellation to the Tribunal as it is the specialist body established to determine such matters. Arguably, it should occur prior to citizenship deprivation process. If the appeal process found that fraud had occurred, the citizenship deprivation could proceed based on the findings of the Tribunal (which is the status quo). If the citizenship deprivation was appealed, the High Court could consider it knowing that the refugee and protection fraud had already been determined.
- 17 Officials consider that enabling an appeal for the cancellation of refugee or protection status for citizens is more appropriate than requiring refugee and protection fraud issues to be dealt with during the citizenship deprivation process.

Determination officer title

- 18 In November 2006, Cabinet agreed that those who make refugee and protection decisions would be known as "determination officers". Officials consider that the intent of providing clarity to roles is potentially undermined by this title. A clear role description enhances communication within the Department and externally, as well as impacting on matters such as recruitment. As immigration officers also determine applications, the term "determination officer" does not distinguish the refugee and protection decision making role. It is recommended, therefore, that those who undertake these functions be known as "refugee and protection officers".

Previous Cabinet decisions

- 19 To provide consistency with the recommendations above, some of the specific wording that CBC previously agreed to and that was incorporated into the Bill requires change. It is therefore recommended that Cabinet agree to rescind (and not replace) the November 2006 decisions that a person is in need of protection if:
- as a result of deportation it is more likely than not that the person would personally be subjected to torture within the meaning of the CAT, or
 - as a result of deportation it is more likely than not that the person would personally be subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if:
 - the person is unable or, because of the risk, unwilling to avail themselves of the protection of their country of nationality or former habitual residence
 - the risk would be faced by the person in every part of their country and is not faced generally by other individuals in or from that country [CBC Min (06) 20/14].
- 20 It is also recommended that Cabinet rescind the decision that departmental protection decision-makers be called "determination officers", and instead, that those who undertake these functions be known as "refugee and protection officers".

CONSULTATION

- 21 The Department of Prime Minister and Cabinet and the Ministries of Justice, Foreign Affairs and Trade, and the Crown Law Office have been consulted on this Cabinet paper along with the New Zealand Security Intelligence Service. The views of the agencies consulted are reflected in this paper under the discussion of particular issues. The United Nations High Commissioner for Refugees (the UNHCR) and the RSAA, along with the Office of the Ombudsmen and the Privacy Commissioner have also been consulted on the refugee and protection system in the Bill.
- 22 The Treasury, Government Communications Security Bureau and Legal Services Agency, along with the Ministries of Social Development and Health and Departments of Corrections and Internal Affairs (including the Office of Ethnic Affairs) and the New Zealand Customs and Police Services have been informed.
- 23 In particular, the submissions by the UNHCR and the RSAA were considered in developing the recommendations in this paper. These agencies will continue to be consulted on the development of the Bill as appropriate.

FINANCIAL IMPLICATIONS

- 24 While there are no direct financial implications associated with this Cabinet paper, it should be noted that funding for implementing the Act review, including establishing the Tribunal, was sought through Budget 2007 and has been agreed [CAB Min (07) 12/1 (27), CAB Min (07) 12/1 (14), CAB Min (07) 12/1 (29), CAB Min (08) 6/3].
- 25 The financial assumptions for the Tribunal projected 20 refugee and protection cancellation appeals per annum in the first two years of the new legislation's operation, with 30 appeals per annum for the two years following that. The assumption predicted reduction back to 20 appeals per annum in out years. As such, the financial implications of this type of appeal have already been considered and funding agreed by Cabinet when agreeing to the location of the Tribunal in December 2007 [CAB Min (07) 44/22].

HUMAN RIGHTS IMPLICATIONS

- 26 There are no human right implications in the recommendations made in this paper.

LEGISLATIVE IMPLICATIONS

- 27 Legislation is required to implement the proposals. Should Cabinet agree to the proposals in this paper, I would direct officials to recommend the agreed changes to the Committee in the departmental report on the Bill.
- 28 The Bill will be binding on the Crown in keeping with the general principle that the Crown should be bound by Acts unless the application of a particular Act to the Crown would impair the efficient functioning of Government.

REGULATORY IMPACT ANALYSIS

- 29 A Regulatory Impact Statement (RIS) has not been prepared for this paper as the recommendations will not substantially alter impact on any earlier Cabinet decisions on the Bill. The intent of the refugee and protection system remains the same and any impacts are in an earlier RIS relevant to the Bill [CBC Min (06) 20/14, CAB Min (07) 14/1A, CAB Min (07) 20/1, CAB Min 25/1A and CAB Min (08) 6/3].

PUBLICITY

- 30 As the Bill is currently before the Committee, no publicity is recommended in conjunction with this Cabinet paper.

RECOMMENDATIONS

- 31 It is recommended that Cabinet:
1. **note** the contents of this paper;

2. **note** that the Department of Labour will incorporate the decisions below into its advice to the Transport and Industrial Relations Committee;
3. **agree** that the Immigration Bill be redrafted so that the protection obligation under the Article 3 of the Convention Against Torture is incorporated and a person cannot be returned to another state where there are substantial grounds for believing that person would be in danger of being subjected to torture;
4. **agree** that the Immigration Bill be redrafted so that the protection obligation under the International Covenant of Civil and Political Rights is drafted in a similar manner to that of the Convention Against Torture;
5. **agree** that consideration of whether claimant has been recognised as a refugee or given protection in another country be a matter to be determined as part of a claim, not a reason to refuse consideration of a claim;
6. **agree** that the Immigration Bill clarify that a protected person is protected only from return to a country where they would be in danger of torture, arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment;
7. **agree** that the Immigration Bill clarify that if a claimant can access meaningful state protection in the country of their nationality or usual habitual residence, they cannot be recognised as a refugee or protected person in New Zealand;
8. **agree** that the Bill enable the refugee or protection status of citizens to be cancelled by a determination officer (without becoming liable for deportation) and to allow them to appeal that cancellation to the Immigration and Protection Tribunal as it is the specialist body established to determine such matters;
9. **note** that in November 2006 Cabinet Business Committee agreed that a person is in need of protection if:
 - 9.1 as a result of deportation it is more likely than not that the person would personally be subjected to torture within the meaning of the Convention Against Torture and Cruel Inhuman or Degrading Treatment or Punishment (CAT), or
 - 9.2 as a result of deportation it is more likely than not that the person would personally be subjected to arbitrary deprivation of life or cruel, inhuman or degrading treatment or punishment if:
 - 9.2.1 the person is unable or, because of the risk, unwilling to avail themselves of the protection of their country of nationality or former habitual residence

9.2.2 the risk would be faced by the person in every part of their country and is not faced generally by other individuals in or from that country [CBC Min (06) 20/14];

10. **agree** to rescind the decisions referred to in paragraph 9 as they are inconsistent with the agreements sought in this paper;
11. **note** that in November 2006 Cabinet Business Committee agreed that departmental protection decision-makers would be called "determination officers" [CBC Min (06) 20/14];
12. **rescind** the decision referred to in paragraph 11 as the title "determination officer" does not provide a clear enough description of the role; and instead
13. **agree** that people who undertake refugee and protection decision making functions be known as "refugee and protection officers";
14. **note** that as the Immigration Bill is currently before the Transport and Industrial Relations Committee, no publicity is recommended in conjunction with this Cabinet paper.

Hon Clayton Cosgrove
Minister of Immigration

Appendix One: Relevant Conventions and Legislation CAT and ICCPR

ARTICLE 3 CONVENTION AGAINST TORTURE	ARTICLES 6 AND 7 OF THE ICCPR
<p>1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.</p> <p>2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.</p>	<p><u>Article 6</u></p> <p>1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.</p> <p>2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.</p> <p>3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.</p> <p>4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.</p> <p>5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.</p> <p>6. Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.</p> <p><u>Article 7</u></p> <p>No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation..</p>