

# Departmental Disclosure Statement

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Immigration Amendment Bill (No 2)
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2013 No 156
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The departmental disclosure statement for a government Bill seeks to bring together in one place a range of information to support and enhance the Parliamentary and public scrutiny of that Bill.

It identifies:

- the general policy intent of the Bill and other background policy material;
- some of the key quality assurance products and processes used to develop and test the content of the Bill;
- the presence of certain significant powers or features in the Bill that might be of particular Parliamentary or public interest and warrant an explanation.

This disclosure statement was prepared by the Ministry of Business, Innovation and Employment.

The Ministry of Business, Innovation and Employment certifies that, to the best of its knowledge and understanding, the information provided is complete and accurate at the date of finalisation below.

23 September 2013

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## Part One: General Policy Statement

The Immigration Act 2009 (the **principal Act**) was passed in order to establish a stronger, more flexible and enduring legislative foundation for New Zealand's immigration system. The principal Act modernised and simplified the immigration system, ensured New Zealand's interests were better protected and advanced, ensured compliance with New Zealand's international obligations in a more transparent way, and established fair, firm and fast decision-making processes.

### **Purpose of the Bill**

The amendments in this Bill will further ensure that New Zealand's immigration system is robust, support the security of our borders and ensure the integrity of the immigration system. The Bill will ensure the immigration system operates more effectively by:

- addressing gaps identified in the compliance regime
- responding to opportunities provided by new technology
- introducing measures to address the exploitation of migrant workers
- clarifying provisions in the principal Act, and
- addressing minor drafting issues.

### **Summary of substantive provisions**

#### ***Enhanced search powers for immigration officers***

The Bill extends the powers of immigration officers so they have the powers they need to effectively enforce the principal Act. The Bill will enable immigration officers to:

- undertake a personal search at the border
- search a property or place for identity documents in order to facilitate a deportation or turnaround
- enter and search an employer's premises in order to search for unlawful workers, check documents and interview employees to ascertain whether the employees and employer are complying with the Act, and
- apply for and execute a search warrant.

#### ***Biometric information***

The Bill makes changes to the way biometric information is collected to address gaps in identity management capability, enable faster identification of individuals and improve the Government's ability to manage risk. The amendments will:

- enable biometric information to be collected from persons already known to be liable for deportation or turnaround
- where a person is liable for deportation, enable a compulsion order to be sought to require that person to allow their biometric information to be taken
- where a compulsion order is made, enable Police to use reasonable force to take the biometric information, and
- enable biometric information to be collected from non-citizens arriving in New Zealand, either before or after they have been granted entry permission, while they are still within an Immigration Control Area.

### ***Further measures to address the exploitation of migrant workers***

The Bill makes the exploitation of migrants on temporary entry class visas with work conditions an offence, and makes employers who hold residence class visas liable for deportation if they exploit migrant workers or knowingly employ migrant workers without work rights. These amendments will provide greater protection for migrant workers.

### ***Electronic notifications***

The Bill will help ensure the principal Act can support the increased use of technology when the new immigration service delivery model is in place. Amendments will expressly allow the Ministry of Business, Innovation and Employment to serve notices electronically and allow the use of electronic communications in Immigration and Protection Tribunal proceedings.

### ***Border security***

The Bill makes changes to the way information on passenger name records is provided, in order to improve the identification of travellers who may pose a risk or require further intervention, and to improve airline compliance.

### ***Immigration system funding***

The Bill makes changes to the way in which the immigration system is funded so that the funding is sustainable into the future. It will broaden the scope and funding base of the migrant levy (renamed the immigration levy).

### ***Decisions made using absolute discretion***

The Bill clarifies that the ability to request personal information under the Privacy Act 1993 does not apply to reasons for decisions made using absolute discretion (as defined in section 11 of the principal Act).

## Part Two: Background Material and Policy Information

### Published reviews or evaluations

<b>2.1. Are there any publicly available inquiry, review or evaluation reports that have informed, or are relevant to, the policy to be given effect by this Bill?</b>	<b>NO</b>

### Relevant international treaties

<b>2.2. Does this Bill seek to give effect to New Zealand action in relation to an international treaty?</b>	<b>NO</b>

<b>2.2.1. If so, was a National Interest Analysis report prepared to inform a Parliamentary examination of the proposed New Zealand action in relation to the treaty?</b>	<b>N/A</b>

### Regulatory impact analysis

<b>2.3. Were any regulatory impact statements provided to inform the policy decisions that led to this Bill?</b>	<b>YES</b>
<p>Protecting Migrant Workers from Exploitation, Ministry of Business, Innovation and Employment, 27 May 2013, available at <a href="http://www.mbie.govt.nz/about-us/publications/ris/protecting-migrant-workers-from-exploitation.pdf">http://www.mbie.govt.nz/about-us/publications/ris/protecting-migrant-workers-from-exploitation.pdf</a>. Certain information has been withheld from this RIS under section 9(2)(g)(i) of the Official Information Act – to maintain the effective conduct of public affairs through the free and frank expression of opinions.</p> <p>Immigration Funding Review, Ministry of Business, Innovation and Employment, 02 July 2013, available at <a href="http://www.mbie.govt.nz/about-us/publications/ris/immigration-funding-review.pdf">http://www.mbie.govt.nz/about-us/publications/ris/immigration-funding-review.pdf</a>.</p>	

<b>2.3.1. If so, did the RIA Team in the Treasury provide an independent opinion on the quality of any of these regulatory impact statements?</b>	<b>NO</b>
<p>The regulatory impact statements were monitored and reviewed by the Regulatory Impact Statement Panel at the Ministry of Business, Innovation and Employment and independently assessed by Castalia. Both regulatory impact statements were considered to meet criteria.</p>	

<b>2.3.2. Are there aspects of the policy to be given effect by this Bill that were not addressed by, or that now vary materially from, the policy options analysed in these regulatory impact statements?</b>	<b>YES</b>
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The regulatory impact statements identified above apply to a selection of the amendments in the Immigration Amendment Bill (No 2). The other amendments are exempt from the Cabinet requirement to provide a regulatory impact statement, because the amendments are:

- technical revisions that substantially re-enact the current law in order to improve legislative clarity and navigability, or
- have either no impact or only minor impacts on businesses, individuals or not-for-profit entities.

Treasury confirmed this.

### Extent of impact analysis available

<b>2.4. Has further impact analysis become available for any aspects of the policy to be given effect by this Bill?</b>	<b>NO</b>

<b>2.5. For the policy to be given effect by this Bill, is there analysis available on:</b>	
<b>(a) the size of the potential costs and benefits?</b>	<b>NO</b>
<b>(b) the potential for any group of persons to suffer a substantial unavoidable loss of income or wealth?</b>	<b>NO</b>

<b>2.6. For the policy to be given effect by this Bill, are the potential costs or benefits likely to be impacted by:</b>	
<b>(a) the level of effective compliance or non-compliance with applicable obligations or standards?</b>	<b>NO</b>
<b>(b) the nature and level of regulator effort put into encouraging or securing compliance?</b>	<b>NO</b>

## Part Three: Testing of Legislative Content

### Consistency with New Zealand's international obligations

#### 3.1. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with New Zealand's international obligations?

New Zealand is a signatory to a number of international instruments that impose obligations on New Zealand for refugees and protected persons. The principal Act sets out these obligations in relation to determining refugee and protection claims. The amendments in this Bill do not contravene any of these international obligations.

The Ministry of Foreign Affairs and Trade was consulted on the proposals contained within the Bill.

### Consistency with the government's Treaty of Waitangi obligations

#### 3.2. What steps have been taken to determine whether the policy to be given effect by this Bill is consistent with the principles of the Treaty of Waitangi?

The provisions in the Bill were not considered to have implications for Māori as individuals, communities or tribal groupings.

### Consistency with the New Zealand Bill of Rights Act 1990

#### 3.3. Has advice been provided to the Attorney-General on whether any provisions of this Bill appear to limit any of the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990?

YES

The advice provided to the Attorney-General on whether the Bill is consistent with the New Zealand Bill of Rights Act will be available on the Ministry of Justice website when the Bill is introduced. It can be accessed here:

<http://www.justice.govt.nz/policy/constitutional-law-and-human-rights/human-rights/bill-of-rights>

### Offences, penalties and court jurisdictions

#### 3.4. Does this Bill create, amend, or remove:

##### (a) offences or penalties (including infringement offences or penalties and civil pecuniary penalty regimes)?

YES

##### (b) the jurisdiction of a court or tribunal (including rights to judicial review or rights of appeal)?

NO

The Bill will amend the 2009 Act to include the exploitation of migrants on temporary entry class visas with work conditions as an offence against the 2009 Act.

The Bill will amend the 2009 Act to reinstate the provision in the Immigration Act 1987 (the 1987 Act), so that residence class visa holders who knowingly employ unlawful workers or exploit migrant workers within ten years of being granted a residence class visa are liable for deportation.

The Bill will reinstate the offence in the 1987 Act for those who fail to comply with the requirement without reasonable excuse for third parties (when requested by an immigration officer) to surrender any passport or certificate of identity held on or behalf of someone who is, or may be, liable for deportation.

<b>3.4.1. Was the Ministry of Justice consulted about these provisions?</b>	<b>YES</b>
Officials from the Ministry of Business, Innovation and Employment (the Ministry) consulted with officials from the Ministry of Justice during the development of the proposals in the Bill.	

## Privacy issues

<b>3.5. Does this Bill create, amend or remove any provisions relating to the collection, storage, access to, correction of, use or disclosure of personal information?</b>	<b>YES</b>
<p>The Bill includes the following amendments:</p> <ul style="list-style-type: none"> <li>• To clarify that the ability to request personal information under the Privacy Act 1993 does not apply to reasons for decisions made using absolute discretion (amended section 11)</li> <li>• To accommodate the changes to the process for providing passenger name record (PNR) information, including: <ul style="list-style-type: none"> <li>• to enable the Ministry to require airlines to provide PNR information at specified times and in a specified format</li> <li>• to require airlines to provide PNR information without the Ministry having to make a special request each time</li> <li>• to allow the Ministry to access PNR information for longer than the current 14 day period before and after the arrival of a craft (amended section 102).</li> </ul> </li> <li>• To require non-citizens arriving in New Zealand to allow biometric information to be collected from him or her while they are within the Immigration Control Area (amended section 111).</li> <li>• To give immigration officers entry and search powers in relation to a person who is liable for deportation or turnaround and has refused to produce or surrender a passport or identity document. Any documents found can be seized by the immigration officer (new section 281B)</li> <li>• To enable biometric information to be collected from a person known to be liable for deportation or turnaround (amended section 288).</li> </ul>	

<b>3.5.1. Was the Privacy Commissioner consulted about these provisions?</b>	<b>YES</b>
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Yes, the Office of the Privacy Commissioner (OPC) was consulted on the above proposals concerning the use of personal information. Feedback was sought on the proposals via email, and follow-up phone calls and meetings were held between Ministry and OPC officials. Ministry officials worked with OPC to ensure that any concerns OPC had regarding the use and collection of personal information were taken into account.

The key issues that the OPC raised (*and the actions taken to address these concerns*) included:

- The amendment to clarify that the ability to request personal information under the Privacy Act 1993 (amended section 11) does not apply to reasons for decisions made using absolute discretion limits a person's right to access the personal information used by a government agency to make significant decisions about them. *The proposal was amended to make clear the amendment was a clarification of the ability to exclude absolute discretion decisions rather than a new proposal.*
- Concern that the Passenger Name Records information amendment (amended section 102) lacked justification. The proposal was amended to make it clearer what the change was and included more justification for the change. *The provision that border agencies will consult with the OPC to ensure the provision complies with the Privacy Act was maintained.*
- Concern that automated decision making raises privacy concerns, in relation to the amendment to clarify that automated electronic systems can be used to confirm citizenship and confirm identity of New Zealand citizens (new section 29A). *The amendment was changed to provide that where an automated system is used to confirm and establish the identity of New Zealand citizens, an alternative method of making this decision, involving a person, should be available.*

## External consultation

<b>3.6. Has there been any external consultation on the policy to be given effect by this Bill, or on a draft of this Bill?</b>	<b>YES</b>
The Office of the Privacy Commissioner, the Crown Law Office, the Human Rights Commission, the Office of the Ombudsman and the Chair of the Immigration and Protection Tribunal were consulted on aspects of the Bill.	

## Other testing of proposals

<b>3.7. Have the policy details to be given effect by this Bill been otherwise tested or assessed in any way to ensure the Bill's provisions are workable and complete?</b>	<b>YES</b>
The proposals in the Bill were developed with comprehensive input from the operational people responsible for the administration of the legislation. The proposals in the Bill have been tested with operational staff to ensure they are workable and complete.	

## Part Four: Significant Legislative Features

### Compulsory acquisition of private property

<b>4.1. Does this Bill contain any provisions that could result in the compulsory acquisition of private property?</b>	<b>NO</b>

### Charges in the nature of a tax

<b>4.2. Does this Bill create or amend a power to impose a fee, levy or charge in the nature of a tax?</b>	<b>YES</b>
<p>The Bill includes a provision to expand the scope and coverage of the migrant levy (renamed the immigration levy). Expansion of the migrant levy allows research and settlement services, and some other costs of running the immigration system, to be recovered from the larger population that benefits from, or generates a need for, these services.</p> <p>The Bill includes a provision to require audits of third parties who are suspected of breaching their immigration and/or employment relations obligations, paid for by third parties. The audit provision allows Immigration New Zealand to more readily detect, and respond to, significant instances of non-compliance with immigration obligations.</p> <p>These provisions will be underpinned by regulations, which will further prescribe the nature of and limitations on the provisions (for example, who pays the levy and at what rate, the extent and scope of the audits and limits on charging). These regulations will require Ministerial agreement, and be open to review by the Regulations Review Committee.</p>	

### Retrospective effect

<b>4.3. Does this Bill affect rights, freedoms, or impose obligations, retrospectively?</b>	<b>YES</b>
<p>Section 11 clarifies that the ability to request personal information under the Privacy Act 1993 does not apply to reasons for decisions made using absolute discretion.</p> <p>This provision applies to any decision made using absolute discretion regardless of whether the decision was made prior to the commencement of the amendment. This is because this amendment <u>clarifies</u> the position rather than being a new provision.</p>	

### Strict liability or reversal of the usual burden of proof for offences

<b>4.4. Does this Bill:</b>	
<b>(a) create or amend a strict or absolute liability offence?</b>	<b>NO</b>
<b>(b) reverse or modify the usual burden of proof for an offence or a civil pecuniary penalty proceeding?</b>	<b>NO</b>

### Civil or criminal immunity

<b>4.5. Does this Bill create or amend a civil or criminal immunity for any person?</b>	<b>YES</b>
<p>New section 281A ensures that a third party who, in complying with a requirement of an immigration officer, surrenders documents held on behalf of a person who is, or is suspected of being, liable for deportation is immune from criminal or civil action.</p>	

## Significant decision-making powers affecting individuals

<b>4.6. Does this Bill create or amend a decision-making power to make a determination about a person's rights, obligations, or interests protected or recognised by law, and that could have a significant impact on those rights, obligations, or interests?</b>	<b>NO</b>

## Powers to make delegated legislation

<b>4.7. Does this Bill create or amend a power to make delegated legislation that could amend an Act, define the meaning of a term in an Act, or grant an exemption from an Act or delegated legislation?</b>	<b>NO</b>

<b>4.8. Does this Bill create or amend any other powers to make delegated legislation?</b>	<b>YES</b>
<p>The Bill will enable regulations to be made to:</p> <ul style="list-style-type: none"><li>• Clause 92 amends section 393 of the principal Act, which sets out details about how and when fees can be prescribed by regulations made under section 400. Clause 92 adds a further example of the kind of fee that can be prescribed (fees payable by a third party).</li><li>• Clause 96, which sets out that regulations made under section 400 may prescribe the period for which a person may be in New Zealand as a transit passenger.</li><li>• Clause 64, new section 281A, reinstates the requirement for third parties to surrender any passport or certificate of identity held on behalf of someone who is, or may be, liable for deportation. Regulations will set out the 'prescribed form' that requires person to surrender the identity document</li><li>• Clause 95 amends the regulation-making powers to allow regulations to identify visa applications that must be made electronically, and requiring a list of those to be maintained and made publicly available</li><li>• Clause 95 also amends the regulation-making powers to allow regulations to modify or replace the default rules regarding electronic communication and addresses.</li></ul>	

## Any other unusual provisions or features

<b>4.9. Does this Bill contain any provisions (other than those noted above) that are unusual or call for special comment?</b>	<b>NO</b>

