Regulatory Impact Statement: Additional safeguards for people who are liable for arrest and detention in order to strengthen the integrity of the immigration system

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	4 September 2024

Problem Definition

Two independent reviews of the immigration system have identified that there are inadequate safeguards for people who are liable for arrest and deportation under the Immigration Act 2009 (the Act). The lack of protections results in disparate and disproportionate outcomes for liable groups, which is undermining the integrity of the immigration system.

Executive Summary

There are inadequate safeguards for people who are liable for arrest and detention under the Act

The lack of protections have the potential to result in disparate and disproportionate outcomes for liable groups, which could undermine the integrity of the immigration system. These issues were highlighted in two independent reviews by KC Heron (2023) and KC Casey (2022), both of which made a range of recommendations for improvement.

There is an opportunity to strengthen the integrity of the immigration system by…

- Updating requirements for applications for individual warrants of commitment (WOCs) for refugee and protection claimants.
- Enabling judges to vary detention conditions for a person who has claimed asylum (currently an individual is subject to an automatic deportation liability notice if they claim asylum post-detention, when there may be valid reasons for this).
- Limiting compliance activities outside of normal hours to specific situations where judicial warrants have been obtained.

A variety of options have been considered, and tested against a set of criteria to see which will best achieve the objectives

The overarching objective is to maintain and enhance the integrity of the immigration system through ensuring the risk mitigation provisions are balanced, transparent and consistent. Underneath this broad objective, others are:

1. ensure that the human rights of those subject to immigration compliance activity are upheld and appropriately balanced against the national interest as determined by the Crown;
2. ensure that protections for human rights of the individual do not unduly limit MBIE's ability to maintain good regulatory outcomes; and
3. ensure that MBIE's social licence to operate is upheld by addressing recommendations from the Casey and Heron reviews.

Based on our analysis we recommend the following suite of amendments:

- **Proposal A:** Create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for claimants for refugee and protected person status.
- **Proposal B:** Repeal section 317(5)(d) of the Act to give a judge the power to not order detention of an individual who is liable for arrest and detention and has claimed asylum after being served with a deportation liability notice or deportation order or after being arrested and detained under the Act.
- **Proposal C:** Amend section 286 of the Act to limit residential compliance activity conducted out of reasonable hours (out-of-hours-activity) to where judicial warrants have been obtained.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Amendment Bill is in place by October 2025. These timeframes have meant that stakeholder consultation before Cabinet decisions has been limited to informing key stakeholders of the proposals, rather than significant engagement. However, feedback received has been incorporated into the proposals, and we know that they support proposals B and C. Between 29 July and 9 August we met with the below stakeholders to discuss the proposals:

i. BusinessNZ
ii. the Employers and Manufacturers Association
iii. the Council of Trade Unions
iv. the Casey Review Focus Group
v. the New Zealand Law Society
vi. the Office of the Ombudsman
vii. Immigration New Zealand's (INZ) Immigration Focus Group.

The risks of not undertaking a more fulsome consultation ahead of Cabinet decisions are somewhat mitigated, however, by the fact that the proposals have been informed by feedback provided during the select committee process for the Immigration (Mass Arrivals Amendment) Bill, as well as information provided by stakeholders for both the Heron and Casey reviews.

Responsible Manager(s) (completed by relevant manager)	
Stacey O'Dowd *Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE*  4 September 2024	
Quality Assurance (completed by QA panel)	
Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS *Immigration Amendment Bill (System Integrity proposals).* The panel has determined that each RIS provided meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

Freedom of movement is a fundamental human right

1. Freedom of movement is enshrined in the Universal Declaration of Human Rights[1], the International Covenant on Civil and Political Rights[2] and the New Zealand Bill of Rights[3]. The United Nations High Commission Detention guidelines note that these rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker, or other status.[4] Article 31 of the 1951 Convention Relating to the Status of Refugees (the 1951 Convention) specifically provides for the non-penalisation of refugees (and asylum-seekers) having entered or stayed irregularly.

2. These rights taken together – to seek asylum, the non-penalisation for irregular entry or stay and the rights to liberty and security of person and freedom of movement – mean that the detention of asylum-seekers should be a measure of last resort, with liberty being the default position.[5] This right to freedom and liberty is a fundamental value in New Zealand. Our apparatus of criminal law, procedure, rules of evidence, and the presumption of innocence ensure that in the circumstances where it is determined to be necessary for the public interest or national security, the decision to detain is made by an impartial party, that has accounted for all factors and has the discretion to determine a level of restrictiveness that is proportionate to the risk.

The Act prescribes situations where people liable may be detained

3. The Act establishes a tiered detention and monitoring regime to ensure the integrity of the immigration system by providing for the management of the persons liable for deportation and for the safety and security of New Zealand where people may pose a threat (Part 9).

4. Sections 316 - 324A of the Act deals with warrants of commitment (WOCs) to detain an individual, with sections 317A - 317E specific to groups of multiple individuals.

    i. **Section 316** outlines that an immigration officer may apply to a judge for a WOC if there will not be a craft available for deportation, the person has not supplied identity information, there is a risk to security or the public order, or for any other reason the person is unable to leave New Zealand.

[1] United Nations Universal Declaration of Human Rights, Article 13 (1).

[2] International Covenant on Civil and Political Rights, 1996, Article 12 (1). Noting that this is limited to persons lawfully within the territory of a State.

[3] New Zealand Bill of Rights Act 1990, Section 18 (1). Noting that this is limited to persons lawfully in New Zealand.

[4] United Nations High Commission for Refugees Guidelines on Detention 2012, Guideline 2 (para 12).

[5] Ibid (para 13 and 14).

5. The Immigration (Mass Arrivals) Amendment Bill introduced a new section that sets out a range of considerations immigration officers must take into account when processing mass arrivals and seeking a group WOC:

    i. **Section 317A** outlines that in making a group WOC application, an immigration officer must also provide a statement of why the warrant is necessary, how the proposed detention is the least restrictive and for the least amount of time necessary, and considerations of the government's domestic and international human rights obligations. It also allows a judge to order a variation of the location of a warrant.

Judicial warrants are a tool to ensure equity before the law

6. Judicial warrants are required to provide a practicable and timely period within which any threat or risk to public order/integrity of the system[6] can be properly assessed by an independent party (a judge). This helps to ensure that natural justice procedures are followed, and that the restriction of movement is justified.

7. Judges make their decisions by considering precedent (lower courts are bound by decisions made in higher courts) and the concept that like-cases be treated alike. Requiring a judge to consider an application for a judicial warrant ensures equity, impartiality, and consistency in decision-making about compliance or detention activities.

8. Ensuring judges are presented with the relevant information to inform their decisions is a crucial part of enabling this process to work (and ensure any form of restriction on individual rights are proportionate and justified).

The Casey review into the restriction of movement of asylum-seekers made a number of recommendations for the immigration system

9. In 2021 Victoria Casey KC conducted a review into the restriction of movement of asylum claimants (the Casey review[7]) and into MBIE practices that led to the detention of a number of asylum-seekers on WOCs.[8]

10. The review found that the roughly 100 detained asylum-seekers had generally:

    i. been held for significantly longer than was necessary (with 60% being held for more than three months),

    ii. been held in a location of detention that was not appropriate (generally being the Mount Eden Remand Facility), and

    iii. not been detained as a measure of absolute last resort.

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[6] In an individual sense – i.e. detaining for the purpose of mitigating the risk of absconding. There are special WOC provisions that deal with risk or threats to security (see section 318).

[7] Victoria Casey KC (New Zealand): *Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment on the restriction of movement of asylum claimants*, 2022. www.mbie.govt.nz/dmsdocument/20130-report-to-deputy-chief-executive-immigration-of-the-ministry-of-business-innovation-and-employment-restriction-of-movement-of-asylum-claimants.

[8] The asylum-seekers who were detained were generally detained on the basis that: they may have constituted a threat to security or the public order, their identity could not be adequately established, or that they were at risk of absconding if released.

11. The review also found that judges often did not have the discretion that they would have preferred when dealing with such cases.[9]

12. The review also found that New Zealand's immigration detention regime failed to meet the government's obligations under the United Nations High Commission for Refugees (UNHCR) Detention Guidelines.

    i. The review noted that legislative amendments were required to set up a system that was compliant with these obligations, and that any restrictions on the freedom of asylum-seekers pending resolution of their claim must be affirmatively justified by the state as necessary and proportionate.

    ii. The review went further to note that justification must be relatively easily shown for detaining new arrivals for a short period where there are identity concerns and it is necessary to check biometric data. To avoid the detention becoming arbitrary, the purpose for it needs to be clearly stated and the detention must not extend longer than is necessary to meet that purpose.

13. These UNHCR requirements are now reflected in section 317A of the Act.

14. KC Casey found that legislative amendment was crucial, as the status quo of relying on the INZ operations manual to act as a safeguard for these considerations and provisions was ineffective.

15. The review led to 11 recommendations to change MBIE internal policy, including nine operational recommendations (which have been addressed), and three legislative recommendations. The operational recommendations were implemented almost immediately, demonstrating a commitment to responding to the review. A table in **Annex Two** sets out the current status of all of the recommendations.

16. The legislative recommendations of these proposals are set out in the table below:

Review recommendation	Relation to Act and required action
Recommendation one: Part 9 of the Act should be amended to separate the regime for detention and lesser restrictions on freedom of movement for refugee claimants from the regime for immigration detention for turnarounds and people in the process of being deported.	Amend section 316 and 317A This was partially addressed through the Mass Arrivals Amendment Bill (2024).
Recommendation two: Introduce provisions to allow for electronic monitoring as an alternative to detention.	Amend section 317(5)(d) ** note this proposal is included within the scope of the Amendment Bill but is addressed in a separate Regulatory Impact Statement.

17. The absence of explicit additional safeguards for the detention of asylum-seekers and the restriction of judicial discretion means that there is a risk (albeit low) that a repeat of inappropriate use of detention provisions could occur.

[9] In practice, discretion is limited and the only option, even where a judge does not feel it is appropriate, is to detain a person who is liable for deportation and subsequently claims asylum.

The Act confers powers on immigration officers to assist in locating persons who are or may be liable for deportation (Part 9 of the Act)

18. The current settings for out-of-hours compliance activities are:

    i. Section 286 of the Act outlines that an immigration officer may enter and search at any reasonable time, by day or night, any building which an officer believes to be the location of an individual who is subject to a deportation order.

    ii. The Standard Operating Procedures (SOPs) define 'out-of-hours' as compliance activity between the hours of 1900 and 0800, Monday–Friday, public holidays, and weekends.

19. While the legislation requires out-of-hours activities to be reasonable, there is limited judicial input on this discretion.

20. There are strong practical reasons for undertaking visits at these times:[10]

    i. It may be the only 'realistic' option for contacting a person subject to deportation.

    ii. Often people subject to compliance activities deliberately avoid INZ.

    iii. An individual may be detained for up to 96 hours (before a judge must be involved) and officers are required to put the person on the "first available craft". Detaining someone in the early morning means officers still have the rest of the day to find flights, undertake risk assessments, and carry out a deportation interview.

    iv. In Auckland (and other cities), operating in the early hours of the day is sensible just to avoid traffic and related difficulties. This has been reported by compliance officers as a significant impediment to productivity.

The Heron review into immigration out-of-hours compliance activity made a number of recommendations

21. In 2023, Michael Heron KC conducted a review[11] following an instance of compliance activity taking place outside of reasonable operating hours that gained media attention due to its similarity in practice to the Dawn Raids of the 1970s[12]. The review found that the law relating to out-of-hours compliance activity had been implemented discriminatorily, unfairly, and disproportionately by INZ officials and police officers.

22. The review found that, on balance, though the Dawn Raids apology made in 2021 did not make a specific commitment to restrain the use of out-of-hours compliance activity, the apology nonetheless created a reasonable expectation within the Pasifika

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[10] Michael Heron KC (New Zealand): *A review of processes and procedures around out of hours immigration compliance activity, and to identify and recommend potential changes to the process where required*, 2023: www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023

[11] Ibid.

[12] In 2021 the Government officially apologised to the Pasifika community for the practice of the Dawn Raids in the 1970s, whereby Pasifika communities were subject to police and immigration compliance raids, often in the early hours of the morning[12].For more information regarding the Dawn Raids, New Zealand History online has a number of resources available: The dawn raids: causes, impacts and legacy | NZ History.

community that “dawn” intrusions would cease, or at least would be a very last resort option to achieve compliance.

23. The Heron review provided five recommendations, four operational and one legislative.[13]

24. The legislative recommendation was that the Government should consider amending the Act to specify the criteria for out-of-hours compliance visits and whether those involving residential addresses be stopped entirely or limited to specific situations.

25. If the status quo of conducting out-of-hours compliance activities without impartial scrutiny continues, and without taking a clearly stated position, there is a risk that MBIE could loses the confidence and trust of the public in undertaking compliance activity. Continuing to conduct out-of-hours compliance activity under the current legislative settings poses a risk to the integrity and social licence of the immigration system. This in turn could weaken MBIE’s social licence for immigration compliance activities and jeopardise its ability detain individuals who could pose a genuine risk to security or the public order, resulting in immigration system regulatory failure.

26. We note that although legislative settings have not [yet] been changed, the INZ SOPs have been significantly strengthened following the recommendations from the review.

What is the policy problem or opportunity?

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

27. There are a number of international obligations that New Zealand has signed up to which confer protections on people who claim refugee or protected status, in recognition of their legally (having arrived irregularly) and physically (having fled conflict and persecution) vulnerable position.

28. The introductory comment of the 1951 Convention explains that the instrument is “underpinned by a number of fundamental principles”[14], most notably non-penalisation[15] and non-refoulment[16]. It further extends the protection of the international community assuring the “widest possible exercise … of fundamental rights and freedoms”.

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[13] The recommendations are: amend the Act to specify the criteria for out-of-hours compliance visits; update the SOPs and guidelines for compliance officers to reinforce that out-of-hours compliance visits are a matter of last resort and reasonable alternatives should have been considered beforehand; ensure that any assessment of out-of-hours visits should consider the impact on anyone else who may be present, and relevant cultural factors; ensure any decision to undertake an out-of-hours compliance visit should also include an assessment of reasonableness, proportionality, and public interest; and ensure any out-of-hours compliance activity should be authorised by the relevant compliance manager and the national manager.

[14] Such as: the right not to be expelled, except under certain, strictly-defined circumstances (Article 32), the right not to be punished for illegal entry into the territory of a contracting State (Article 31 of the 1951 Convention), and the right to freedom of movement within the territory (Article 26 of the 1951 Convention).

[15] 1951 Convention on the Status of Refugees (Article 31). This ensures that Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who present themselves without delay to authorities and show good cause for their illegal entry or presence. The Contacting States are also prohibited from restricting the freedom of movement of such people.

[16] 1951 Convention on the Status of Refugees (Article 33). The principle of non-refoulement forms an essential protection under international human rights, refugee, humanitarian, and customary law. It prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-

29. Restrictions on the rights conferred in the Convention can be placed on people, but only until their status is regularised or where the person is reasonably regarded as a danger to the security of the country or having been convicted of a particularly serious crime and are considered a danger to the community. In practice, this runs against the natural justice presumption of innocence. The burden is shifted to the person seeking protection to establish that their immigration status should be regularised (either through refugee or protected person status) and that they are not a danger to the security of the country.

30. The protections are fleshed out in the UNHCR Detention Guidelines[17] as:

- **1. The right to seek asylum must be respected** – "every person has the right to seek and enjoy in other countries asylum from persecution, serious human rights violations and other serious harm. Seeking asylum is not, therefore an unlawful act".
- **3. Detention must be in accordance with and authorised by law** – "although national legislation is the primary consideration for determining the lawfulness of detention, it is not always the decisive element in assessing the justification of deprivation of liberty".
- **4.1. There are three purposes where detention may be necessary in an individual case** – "which are generally in line with international law, namely public order, public health or national security".
- **4.1. Detention must not be arbitrary, and any decision to detain must be based on an assessment of the individual's particular circumstances** – "detention in the migration context is neither prohibited under international law … nor is the right to liberty absolute. However international law provides substantive safeguards against unlawful and arbitrary detention. 'Arbitrariness' is to be interpreted to broadly include not only unlawfulness, but also elements of inappropriateness, injustice and lack of predictability. To guard against arbitrariness, and detention needs to be necessary in the individual case, reasonable in all circumstances and proportionate to a legitimate purpose. Further, failure to consider less coercive or intrusive means could also render detention arbitrary.
- **4.1. Asylum-seekers often have justifiable reasons for illegal entry or irregular movement including travelling without identity documentation –** "this means, that the default position should not automatically be detention until identity is established. The inability to produce documentation should not be interpreted as an unwillingness to cooperate or lead to an adverse assessment. Rather what needs to be assessed, is whether the asylum-seeker has a plausible explanation for the absence or destruction of documentation, or the possession of false documentation, whether he or she

treatment, or other serious human rights violations. Under international human rights law the prohibition of refoulement is explicitly included in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). It should be noted that this protection may not be claimed by refugees.

[17] United Nations High Commission for Refugees (2012), Guidelines on the Applicable Criteria and Standards relation to the Detention of Asylum-Seekers and Alternatives to Detention.

had an intention to mislead authorities, or whether he or she refuses to cooperate with the identity verification process."

- **7. Decisions to detain or to extend detention must be subject to minimum procedural safeguards** – including "to be brought promptly before a judicial or other independent authority to have the detention decision reviewed. This review should ideally be automatic and take place within the first 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent to the initial detaining authority, and possess the power to order release or vary conditions of release.

31. There is an opportunity to strengthen protections for asylum claimants by explicitly codifying some of these considerations in the Act.

32. Since the Casey review MBIE has established a panel of senior staff members (the Casey Panel) to consider any impingement on the liberty of refugee or protected person status claimants before a WOC application is submitted to the District Court.

33. Since 2022, Confidential advice to Gove have been recommended to the panel by both border and compliance staff. The panel has not upheld any of the WOC recommendations, and has requested that all claimants be released on conditions pending suitable addresses for their stay while their applications are considered. Although the panel recommended release on conditions, Confidential advice to Government, Maintenance of the law A part of the panel's assessment is to weigh up whether the claimant has a suitable address to be released to, to help mitigate the risk to public order.

34. The above demonstrates an operational safeguard that is operating well to ensure that detention is a measure of last resort. However, it is not entrenched, and is vulnerable to staffing changes (both in Senior Leadership positions at MBIE, or the Casey Panel membership), changes in Government priorities, and funding.

Problem B: Judges' discretion is limited, and the only option is to detain a person who is liable for deportation and claims refugee or protection status

35. Under section 317(5)(d) of the Act, if a person claims asylum following detention or the issuing of a deportation order, then they are subject to an automatic deportation liability notice. There is currently no discretion to allow a judge to refuse a WOC. This blanket provision is problematic as it does not account for individual circumstances; it may be entirely valid to claim asylum at the point of detention or deportation. Casey noted that judges felt they were "hamstrung" in approving warrants for extended periods of time to keep individuals in remand facilities.

36. Binding judicial discretion, particularly in relation to the restriction of movement of individuals, is inconsistent with the spirit and general interpretation of fundamental international documents and principles. The gravity of the consequences of detaining someone and removing their rights to liberty should be met with a proportionate judicial measure. Section 317(1)(b)(ii) affords a judge the authority to discharge decisions to vary the conditions for other people liable to detention in recognition of the gravity of the measure. Maintaining 317(5)(d), as it is, is also inconsistent with the proposals to introduce additional safeguards for asylum-seekers in proposal A, and the principle that detention be a last resort. This change, to repeal section 317(5)(d), is contained within recommendation 1 of the Casey review.

37. Although section 315(5) technically provides a judge with powers to apply discretion for exceptional circumstances, the legal threshold for this in the immigration context is very high. The Supreme Court has stated that "exceptional circumstances must be truly exceptional, and well outside of the normal run of circumstances". By definition, as section 317(5)(d) currently stands, all refugee and asylum-seekers who have submitted a claim for protection after being served with a deportation order or arrested and detained under the Act are the general run of cases subject to the default rule. They would need to meet a high bar, well beyond simply being a claimant, to be considered ton have "exceptional circumstances". In cases where a warrant is applied for, it is default that asylum-seekers will be detained.

Problem C: Immigration out-of-hours compliance activity does not have appropriate safeguards in place which could undermine the social licence of the system

38. The Act does not currently put any limitations on out-of-hours-activity by immigration officers. Per the findings of the Heron review, out-of-hours compliance activities have historically been implemented discriminatorily, unfairly, and disproportionately by INZ officials and police officers with little independent scrutiny. The Heron review found that the Dawn Raids apology of 2021 created an expectation that the out-of-hours activities would either cease, or be used only exceptional circumstances. However, section 286 of the Act explicitly allows an immigration officer to search and enter a property at any time if it relates to deportation. This mis-match in expectations, and lack of transparency, has the potential to undermine the social license of the immigration system.

39. For the financial year ended 30 June 2023, there were 20 after-hours visits and 22 after-hours deportations, compared to 318 in-hours visits. The percentage of people deported as a result of an out-of-hours visit was 3.36 per cent of all deportations that year.[18]

40. New Zealand's current approach appears to be out-of-step with other like-minded or M5 countries – all of whom require a warrant to be issued for the arrest or search of a premise, even if it is suspected that someone in the premises identified is liable for deportation. In addition, other like-minded countries do not have the same history of trauma or injustice in relation to compliance activities like the Dawn Raids in the 1970s.

41. **Annex One** provides further information on how New Zealand's approach to out-of-hours compliance activity and WOCs compares to that of other jurisdictions.

Who are the stakeholders affected? What are their views?

42. Key stakeholders impacted by these problems are migrants who are subject to WOCs and migrants who are unlawfully in New Zealand and subject to out-of-hours compliance activity.

43. We have significant insight into how these problems are perceived by stakeholders through the consultation undertaken as part of the Heron and Casey reviews, and feedback received during Select Committee on the Mass Arrivals Amendment Bill. These viewpoints are summarised in the sections below.

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[18] https://www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023.

The Heron review included consultation with a wide group of stakeholders on out-of-hours compliance activity

44. During the Heron review, a wide range of people were interviewed, including INZ compliance officers, Senior INZ and MBIE officials, leaders and members of Pasifika, Indian, and Chinese communities, members of the Immigration Reference Group, immigration lawyers, and representatives of the Ministry for Pacific Peoples. KC Heron also received approximately 100 responses to the public survey questions commissioned.

45. The main themes were:

Greater cultural consideration is required for immigration compliance activity

The disproportionate effect on the Pasifika community by the Dawn Raids in the 1970s, and the expectation that out-of-hours compliance activities would cease following the government's Dawn Raids apology, informs the need for greater cultural considerations in decision-making with regards to immigration compliance activity. Particular care must be given to activity with respect to Pasifika communities.

Affected communities hold diverse views

The Heron review highlighted that affected communities (primarily Pasifika, Chinese, and Indian communities who make up the majority of deportations) hold a diverse range of views on the status quo for out-of-hours compliance activities. Many view that the government has an obligation to open pathways to residence for the Pasifika community, given the history of the Dawn Raids. Others expressed that compliance activity should continue as it reinforces the regular immigration status of many in these communities (those against whom compliance activity is not taking place), and could be considered to aid the social licence these communities have in their regular immigration statuses.

Presence of minors, the elderly, and other vulnerable individuals during out-of-hours compliance visits ought to be avoided

There are situations where compliance activity may take place in the presence of children or the elderly, or other vulnerable individuals. Daytime compliance activity reduces the likelihood that children will be directly affected as they may be at school or in childcare.

Risk to the wider community should be considered

Heron identified in his report that immigration compliance decision-making is currently focussed on risk to the immigration system when considering conducting out-of-hours compliance activity. He suggests that consideration should be given with regard to risk to the wider community rather than just risk to immigration system.

Government agencies/regulators

There may be some additional paperwork required from immigration officers when applying for a warrant of commitment or an authority to conduct an out-of-hours compliance activity. However, in both instances, this should merely be an articulation of criteria already considered when making such decisions.

Judiciary

Were the proposed changes enacted, the workload for judges may increase. However, it would likely to be a minor change as the cohorts of people subject to these measures are minimal.

The Casey review, and feedback on the Mass Arrival Amendment Act, provides insights into stakeholder views on Warrant of Commitment provisions

46. In forming recommendations, KC Casey met with stakeholders from the UNHCR, the Immigration Protection Tribunal, Amnesty International Aotearoa, the Refugee Council of New Zealand, the Asylum Seekers Support Trust, the New Zealand Association of Immigration Professionals, the New Zealand Law Society and the Auckland District Law Society, the New Zealand Red Cross, MBIE officials, and a representative of Te Āhuru Mōwai o Aotearoa (the Māngere Refugee Resettlement Centre), members of the refugee bar, and the Royal Australian and NZ College of Psychiatrists. A theme that arose was concern with the lack of Bill of Rights Act 1990 considerations in the decisions to detain asylum-seekers.

47. During public consultation and the Select Committee process on the Immigration (Mass Arrivals) Amendment Bill, the public and civil society were not satisfied that the recently implemented operational changes were adequate protection against the failures outlined in the Casey review. Key feedback was that operational changes instituted since the review were weak protections, and could be eroded with staff changes, business changes, or loss of institutional memory. The changes were welcomed by civil society and contribute towards New Zealand's international obligations under the UNHCR to align detention practices with criteria in 2012 Guidelines on Detention.

We have consulted with a targeted group of stakeholders on the problems identified

48. In July and August 2024, MBIE informed key stakeholders (listed below) of the problems and proposals in this RIS and to prepare them for the exposure draft of the Bill later this year:

    i. BusinessNZ
    ii. the Employers and Manufacturers Association
    iii. the Council of Trade Unions
    iv. the Casey Review Focus Group
    v. the New Zealand Law Society
    vi. the Office of the Ombudsman
    vii. INZ's Immigration Focus Group.

49. Stakeholders were appreciative of the early engagement, and few significant concerns were raised. The questions raised were generally clarifying in nature, and gave a useful indication of the likely areas of interest or controversy at Select Committee, as well as indicating topics on which to focus our proactive communications.

50. Stakeholders Confidential advice to Government were uniformly supportive of the proposals to create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for a refugee or protected person status claimant and amending the Act to limit residential compliance activity conducted out of reasonable hours to where judicial warrants have been obtained. Stakeholders also acknowledged that the proposals (as a package) represent a movement in a positive direction in the human rights space.

51. Proposal A received the most comment from stakeholders. Free and frank opinions were concerned that the emphasis on the WOC proposals needed to focus more on the rights and liberty of asylum-seekers.

52. Regarding the proposal to provide judges with more discretion when a WOC is applied for, feedback from the Free and frank opinions Its view is that the entire section should be reviewed, and the onus of the section reversed, so that there is a presumption of liberty unless INZ is able to demonstrate that circumstances require detention.

53. Both WOC proposals have been designed to strike a balance between the interests of the Crown in managing risk, while being consistent with the 1951 Convention and the UNHCR Guidelines on Detention.

54. However, tight timeframes mean that substantive consultation (outside of agency consultation) ahead of Cabinet decisions is not possible. Wider consultation with the public will be included in the normal select committee process.

What objectives are sought in relation to the policy problems?

55. The broad objective is to maintain and enhance the integrity and social licence of the immigration system through ensuring the risk mitigation provisions are balanced, transparent, and consistent. Underneath this broad objective, others are:

    i. ensure that the human rights of those subject to immigration compliance activity are upheld and appropriately balanced against the national interest as determined by the Crown;

    ii. ensure that protections for human rights of the individual do not unduly limit MBIE's ability to maintain good regulatory outcomes; and

    iii. ensure that MBIE's social licence to operate is upheld by addressing the remaining legislative change, based on recommendations from the Casey and Heron reviews.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

56. The criteria below were selected to help to achieve the objectives outlined above.

    i. **Addresses gaps in immigration settings:** as indicated above, amendments should regularise best practice and ensure consistency across different pieces of immigration legislation. This should support INZ to better manage risks by clarifying the authorising environment in which they operate.

    ii. **Ease of implementation:** the option should be able to be implemented easily, with limited additional costs, for both government and the sector.

    iii. **Positive impact on social license to operate:** the option should balance the need for risk management with the rights of the individual. A component of this will be ensuring that the proposed option is proportionate to the risk posed.

What scope will options be considered within?

57. This Amendment Bill is not a first principles review of the Act. It is instead to introduce or amend a range of provisions as directed by the Minister of Immigration to address immediate issues with the fiscal sustainability and system integrity of the system. Confidential advice to Government

58. Options have been considered within the parameters set out in the purpose section of the Act, which is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.

59. As discussed, operational work has already been undertaken to respond to the reviews that the proposals.[19] We consider that all non-regulatory options have been exhausted and have not been considered any further of these options.

Warrant of commitment provisions

60. The scope for this amendment is limited to the relevant sections of the Immigration Act (section 317A and 316).

61. Other legislative changes were made in the Immigration (Mass Arrivals) Amendment Bill in relation to group WOCs, such as removing MBIE's ability to assign police cells or prisons as locations of detention prior to a warrant being issued. We do not propose to include that change as we consider it a necessary power to retain, given individuals on warrants may be a risk to the public order and the period of warrantless detention is limited to a maximum of 96 hours (as opposed to a maximum of 32 days in the group warrant provisions).

[19] Following the Casey review, and the 11 recommendations it made, the nine operational recommendations have been addressed with the implementation of the internal panel. Similarly, following the Heron review significant changes were made to INZ's SOPs. However, this does not address the key suggestions in the reviews which were that legislative change be considered.

Out-of-hours compliance activity

62. MBIE has recommended, and the Minister of Immigration has agreed, that limiting out-of-hours activity to where a judicial warrant has been obtained is, on balance, the best course of action. The Heron review highlighted key issues with how out-of-hours compliance activity is conducted. It is not apparent that in-hours compliance activity has led to similar regulatory failure. Therefore, we consider the scope to be limited to only requiring judicial warrants for out-of-hours compliance activity (rather than all compliance activity).

What options are being considered?

63. We have identified a range of options to respond to the three problems identified, as set out below.

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

- **Option A.1: Status quo** (not recommended)
- **Option A.2: Amend section 316 of the Act to align requirements for individual WOCs with group warrants**, requiring an outline of considerations made prior to detention, reference to compliance with domestic and international obligations (relating to detention), and expanding judicial discretion on the location of detention.
- **Option A.3: Create a new section to strengthen the required considerations when authorising a WOC for a refugee or protected person status claimant**, requiring that a District Court Judge must be satisfied that the application:
    a. clearly articulates the risk the individual poses[20]
    b. detention is the least restrictive measure necessary to manage the risk articulated in (a), and
    c. in cases where the identity of the person is unknown, or the person's identity has not been established to the satisfaction of the court, there should not be a presumption of detention (unless exceptional circumstances apply) in cases where the identity of the person is unknown or unable to be established due to the actions undertaken by the claimant in travelling to and entering New Zealand.[21]

[20] The risk is intended to refer to national security and risk to public order. This is to reflect the 1951 Convention (non-penalisation clause in Article 31) and UNHCR Guidelines, which are clear that "in the context of detention of asylum-seekers, there are three purposes for which detention may be necessary in an individual case, which are generally in line with international law, namely public order, public health or national security" (guideline 4.1 para 21). Framing the wording in this way helps to respond to feedback from the Casey Review Focus Group, which was that the presumptions need to be reversed – so that liberty must be the default position, with the burden of proof to sit with the detaining authority to justify why detention is necessary.

[21] It is the intent that the new provision for asylum-seekers be the opposite to that for regular individuals under 317(5)(a) and (b) of the Act. It still leaves detaining a person seeking refugee or protected person status on the grounds of not being able to establish their identity as an option. The intention of the wording used for the provision to operate is to ensure that it is not the default position (as is the case with s317(5)(a) and (b). The purpose of framing this particular provision is to also reflect the Convention and guidelines to recognise that "asylum-seekers often have justifiable reasons for illegal entry or irregular movement, including travelling without identity documentation. The inability to produce documentation should not automatically be interpreted as an unwillingness to cooperate or lead to an adverse assessment. Rather what needs to be assessed is whether the

Problem B: Limited judicial discretion in relation to detention

- **Option B.1: Status quo judge has no power to refuse detention order** (not recommended)
- **Option B.2: Repeal section 317 (5) (d) to give a judge the power to not order detention** of an individual who is liable for arrest and detention and has claimed asylum after being served with a deportation liability notice or deportation order or after being arrested and detained under the Act (recommended).

Problem C: Lack of safeguards around out of hours immigration compliance activities

- **Option C.1: Maintain status quo** no judicial warrants required (not recommended).
- **Option C.2: Require judicial warrants for residential out-of-hours compliance activity only** (recommended).
- **Option C.3: Require judicial warrants for all compliance activity** (not recommended).

asylum-seeker has a plausible explanation for the absence or destruction of documentation, or the possession of false documentation, whether he or she had an intention to mislead authorities, or whether he or she refuses to cooperate with the identity verification process." (UNHCR Guideline 4.1. paras 20 and 25).

How do the options compare to the status quo/counterfactual?

64. The following table sets out analysis of the options identified compared to the status quo using the criteria. The assessment scheme used is as follows:

-1	Negatively impacts criteria
0	Not at all or not applicable
1	Marginal positive impact
2	Partially meets or addresses
3	Meets or addresses well

	Ease of implementation	Positive impact on social licence to operate	Address identified gap or regulatory failure	Overall assessment
Problem A*: *Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants				
Option A.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Inconsistency in legislation may erode public trust in the system.	**-1** Does not align with new provisions set out in the Mass Arrivals Amendment Bill. Introduces complexity into the system and risks disparate outcomes for groups and individuals subject to a WOC.	**-2**
Option A.2 Align requirements for warrant of commitment applications with those for group warrants for all individuals	**0** This option may involve more work for compliance officers during the application for a WOC process. However, this would be minimal as it should just be an articulation of considerations made anyway. MBIE Legal would work with Compliance Officers regarding warrant application and affidavit requirements to include the additional information required. There is also a low risk that the increased consideration for WOCs may increase judges' workload.	**2** Ensures that the legislation (and decisions) are transparent, equitable and consistent across immigration legislation. The additional safeguards and considerations for group WOCs are more stringent due to the prolonged commitment period (up to six months rather than 28 days for individuals).	**1** This will ensure consistency across legislation. Lifting the requirements from s317 to align with mass arrivals WOC provisions may not always be appropriate or proportionate. The provisions were designed with a group of vulnerable people in mind. 'All individuals' encapsulates a much broader range of people in a different context. For example: - People included in a mass arrival are assumed to be more vulnerable that individuals (likelihood of claiming refugee/protected person status). Not all individuals will have this added layer of vulnerability. - Detention for group is for a longer period of time (up to 6 months rather than 28 days). The shorter commitment period before review already acts as a rights-affirming tool, balancing power.	**4**
Option A.3 Create a new section to strengthen the required considerations when authorising a WOC for refugee/protected person status claimants only	**3** This option would codify international best practice and guidance outlined in the INZ SOPs. Likely to be a very small cohort. It is unlikely to substantially increase the workload of compliance officers or judges. MBIE Legal will work with Compliance Officers regarding warrant application and affidavit requirements to include the additional information required.	**3** Extensive consultation was undertaken during the development of the Mass Arrivals Amendment Bill. This proposal draws on the spirit of provisions included in the Mass Arrivals Amendment Bill. This means introducing changes that have already been scrutinised and would mitigate consultation risks associated with the tight timeframes for this Bill.	**3** Addresses an inconsistency in the treatment of individual refugee/protected person status claimants and groups. The codification of additional safeguards takes the individual's vulnerable position into account and adheres to our international obligations outlined above by recognising that people seeking international protection are entitled to the least restrictive means of detention. Directly responds to concerns raised in the Casey review. Shifts the burden of proof to the state to justify why limitations on an individual's liberty are necessary.	**9** **Preferred option**

	Ease of implementation	Positive impact on social licence to operate	Address identified gap or regulatory failure	Overall assessment
Problem B: Limited judicial discretion in relation to detention				
Option B.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Does not account for individual circumstances; it may be entirely valid to claim asylum at the point of deportation. Judges must detain claimants, meaning there is no discretion available when they feel detention is inappropriate. Inconsistent with international best practice and the spirit of human rights obligations and the findings of the Casey review.	**-1** Does not address the restriction on judges' discretion or provide appropriate safeguards.	**-2**
Option B.2 Repeal section 317(5)(d) to allow a judge to refuse a WOC for an individual who claims asylum following a detention or deportation liability notice	**2** No additional implementation impact following legislative change other than notification of changes. Following this the implementation/application of the legislation and decision-making will rest with judges on a case-by-case basis.	**2** Provides leeway in the case of an individual who has claimed asylum after deportation proceedings have commenced. Improves integrity as it is consistent with the other safeguards that are otherwise being proposed in this Bill. Repealing this section could also demonstrate MBIE's commitment to addressing issues raised in the Casey review and ensure risk mitigation processes are balanced and proportionate. It should be noted that this may result in an increase in unmeritorious claims in attempt to avoid detention/deportation, damaging the perception of the integrity of the system. Only Confidential advice to Government, Maint have been held under WOC, and for short periods of time. Following the Casey review, in other instances where INZ staff have sought a WOC for individuals who have claimed asylum and are either liable for deportation or turnaround at the border, the panel has directed for the person to be released on conditions.	**3** Provides judges with discretion to consider if detention is appropriate in these circumstances. Addresses findings from the Casey review.	**7** **Preferred option**
Problem C: Lack of safeguards around out-of-hours compliance activity				
Option C.1 Maintain current provisions	**0** There would be no impact on implementation as the system is already in place.	**-1** Failing to implement the changes recommended in the Heron review has the potential to appear that the government has acted in bad faith, and undermine MBIE's social licence to operate. Maintaining the status quo will also fail to meet communities' expectations that out-of-hours compliance will cease or be a last resort.	**0** Maintains gap/failure.	**-1**
Option C.2 Require judicial warrants to conduct out-of-hours compliance activity	**2** There is a risk that this may add to judges' workload and add some complexity to the system. This can be mitigated by ensuring that the judiciary is made aware of the proposals ahead of time and are prepared for potential implications. Additionally, this option is 'ring-fenced' to a narrow range of activities in an uncommon period of time. MBIE Legal will work with Compliance Officers on warrant application and affidavit requirements to include the additional out-of-hours information required.	**3** Directly addresses a recommendation raised in the Heron review and would help to meet communities' expectations that out-of-hours compliance activities would be a last resort. The action is proportionate by being time-limited, with sufficient safeguards to protect the rights of individuals.	**3** Strikes a fair balance between directly addressing a recommendation made in the Heron review and the purpose of the Immigration Act, by ensuring that compliance activities remain available for MBIE.	**8** **Preferred option**
Option C.3 Require judicial warrants to conduct any compliance activity	**0** This would unnecessarily add to the judiciary workload, potentially slowing decision making timeframes and access to justice for other matters that require judicial input/decisions. It would also slow down the ability of MBIE to undertake compliance activity where it is genuinely needed.	**1** Would help to meet communities' expectations that compliance activities would be a last resort. Unnecessarily goes beyond the recommendation put forward in the Heron review.	**2** This option does address the gap. However, it risks overstepping the balance between individual rights and the ability of MBIE to conduct compliance activity.	**3**

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

65. MBIE recommends three preferred options based on our scoring against the criteria outlined above.

Problem A: Opportunity to update requirements for applications for individual WOCs for refugee and protected person status claimants

66. **Option A.3** (create a new section outlining the required considerations a judge must be satisfied of when authorising a WOC for claimants for refugee and protected person status) is preferred as it scored the highest against the criteria above and is therefore the most likely to achieve the objectives outlined.

67. The amendments would enhance the integrity and social licence of the immigration system and MBIE as a regulator by ensuring consistency across legislative provisions (aligning provisions with those for group WOCs in the Mass Arrivals Amendment Bill) and that the risk mitigation provisions are proportionate, transparent, and consistent. It would give effect to the spirit of the Casey review.

68. The requirement to show consideration of the risk the individual poses, and that detention must be the most appropriate way to manage that risk ensures that detention must be to the least restrictive, and for the shortest amount of time possible. This will aid in the determination as to whether detention is justifiable and proportionate. Ensuring that the default position is not of detention where person is a refugee or protected person claimant but their identify cannot be verified upholds the principle of non-penalisation under Article 31 of the 1951 Convention. Taken together, this package of requirements demonstrate adherence to applicable international guidelines and Conventions (relating to detention) to which New Zealand is a signatory. It also addresses concerns raised in the Casey review that INZ was acting in a manner contrary to the UNHCR guidelines by detaining asylum-seekers for extended periods of time. Incorporating New Zealand's international obligations into a judge's decision-making brings New Zealand in line with international best practice.

69. Including a provision to direct a judge towards considering these requirements further addresses issues raised in the Casey review around the consistency of detention of asylum-seekers in prison and will ensure that the human rights of those liable are upheld and consistent with how others (those who arrive in a group) are treated.

70. There is likely to be increased public trust and confidence that MBIE's compliance powers are used properly. Codifying protections in legislation balances individuals' rights with the national interest. It does this by supporting MBIE to maintain its ability to provide good regulatory outcomes that are fair, consistent, and transparent for each of the cohorts subject to WOCs.

Problem B: Limited judicial discretion in relation to detention

71. **Option B.2** (repeal section 317 (5) (d) power for judge to refuse a warrant of commitment) is preferred as it scored the highest against the criteria above and is therefore the most likely to achieve the overarching objectives.

72. Enabling a judge to genuinely scrutinise such a warrant would demonstrate MBIE's commitment to addressing issues raised in the Casey review and ensure the risk mitigation processes are balanced and proportionate. Repealing section 317(5)(d) would make the provision consistent with the safeguards that are otherwise being proposed in this Bill. It will also ensure that these safeguards are available to asylum-seekers. Additionally, in the rare instances an asylum claimant is subject to an application for a WOC, a judge would not have to grant a warrant where they do not think it is appropriate, and instead look to alternative options, better aligning our legislation with our international obligations and best practice as outlined by the UNHCR on alternatives to detention.

Problem C: Limit out of hours immigration compliance activities

73. **Option C2** (limiting out-of-hours-activity to where judicial warrants have been obtained) is the preferred option. It best meets the criteria outlined above, contributing to the overall objectives. Adding the safeguards of the judicial warrant to a time-limited period means that the implementation 'cost' is limited to a small number of cases that will require judicial consideration.

74. It will provide greater protections by ensuring that compliance powers exercised out-of-hours are justified and will require INZ to have exhausted every other avenue of gaining compliance prior to out-of-hours compliance powers being used, thereby providing people more opportunities to more fulsomely engage with INZ prior to such powers being used.

75. It will also help to build MBIE's social licence by articulating a clearly stated position on when out-of-hours compliance activity should take place, and by MBIE acting in the public interest to use the appropriate compliance powers to gain good regulatory outcomes. Giving effect to the recommendation made in the Heron review demonstrates a genuine intent to address the concerns raised by affected communities. Limiting requiring a judicial warrant to 'out-of-hours only' strikes a fair balance between addressing the regulatory failure, accounting for individual rights, and ensuring that compliance activities remain as available tools for MBIE to maintain the integrity of the immigration system, and uphold the national interest.

What are the marginal costs and benefits of the option?

76. The following table sets out the marginal costs and benefits of all preferred options (A.1, B.2 and C.2).

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of a preferred options compared to taking no action			
Regulated groups *Individuals subject to WOCs or out-of-hours compliance activity*	No additional costs, the proposals are not seeking to restrict freedom or impose costs over and above the status quo.	Low	Medium: the options have been considered in light of New Zealand's international human rights obligations, and have tried where possible align with processes of natural justice. Making the legislation clear and transparent around when a judicial warrant is required should hopefully minimise the need for an extended use of legal representation or appeal.
Regulators *MBIE Immigration Compliance and Investigations*	**WOC costs** Higher costs (in terms of time) to evidence reasons for seeking a WOC for a person seeking refugee or protected person status. This is an existing cost that may increase. Confidential advice to Government [redacted] There is a marginal risk that including additional requirements to be fleshed out in the application for a WOC may increase this cost (due to additional time spent completing the application, review by MBIE Legal, and then a longer period spent in court). However, this is mitigated by the fact that in practice these considerations are already being factored into decision-making surrounding WOCs. It is also only likely to be required for a very small number of cases Confidential advice to Government, Maintenance of the law. **Judicial warrant for out-of-hours compliance costs** Higher costs for a judicial warrant for out-of-hours compliance action. This will be a new cost as judicial warrants are not currently required for out-of-hours compliance activity. It is estimated that at a Confidential advice to Government [redacted] As above, this cost is likely to be low, given that there will be very few circumstances where out-of-hours activity is necessary (there have been no out-of-hours compliance activities undertaken since the Heron review), and the application for a judicial warrant is likely to be an articulation of factors and processes already considered as a part of the out-of-hours compliance activity decision-making.	Low–Medium	Medium: Throughout the design of both proposals an element that has been considered is that the preferred option be easily-implemented and a part of this consideration is ensuring the option is cost effective. Medium: For WOCs the figures provided are for standard rates and the average time spent on a case by a compliance officer. These will naturally vary depending on complexity. Low–Medium: For judicial warrants for out-of-hours compliance activity. This will be a new cost, and so estimates have been based off data provided for WOCs.
Others (e.g., wider government, consumers, etc.) *Wider government*	Higher costs for the Courts to consider WOCs for out of hours compliance activity.	Medium	Medium: One of the criteria and an element that has been considered throughout the design of the proposal is that the preferred option be easily implemented.
Total monetised costs	Based on an estimate of three WOCs per year: - WOC costs (this is an existing cost that may increase in line with the number of WOCs required): Confidential advice to Government [redacted] Judicial Warrant costs (this will be a new cost which will also depend on the complexity of the case and number of warrants required): Confidential advice to Government [redacted]	N/A	
Non-monetised costs		Medium	

Confidential advice to Government [redacted]

Affected groups	Comment	Impact	Evidence Certainty
Additional benefits of the preferred option compared to taking no action			
Regulated groups *Individuals subject to WOCs or out-of-hours compliance activity*	Recipients of additional safeguard of requiring judicial warrants (ensuring they are justified in general and specifically for out-of-hours compliance activity).	High	High: Casey review findings The Casey review found that INZ officials and New Zealand Police implemented the laws relating to out-of-hours compliance activity unfairly, unreasonably, and discriminatorily. Requiring an independent decision (via the WOC) that accounts for a variety of factors, including proportionality and reasonableness, adds a layer of transparency and accountability, and ensures that the decision to undertake the action is required 'as a last resort'.
Regulators *MBIE Immigration Compliance and Investigations*	Supports the integrity of the immigration system and social licence for undertaking compliance and investigation activity, including detaining individuals and undertaking out-of-hours compliance action.	High	High: Casey review findings The Casey review found that there has been "no clearly stated position from the government about out-of-hours compliance activity, which is emblematic of a wider problem – that the former Minister and MBIE management shared the view that this kind of activity should not occur other than in specific circumstances. But that this has not been passed on to compliance officers, who understand they are still expected to conduct these activities as and when required within their lawful bounds."
Others (e.g., wider govt, consumers, etc.) *Wider government*	Efficient management of immigration non-compliance with appropriate discretion.	High	High: Casey review findings The Casey review found that if the government intended (through the apology) that out-of-hours compliance activity be discontinued or only occur in circumstances, that it should change the law to do so. In lieu of these changes, there is a loss of social licence.
Wider public	Stronger safeguards in respect of the exercise of compliance powers that support the management of immigration risk.	High	High: Casey review findings The Casey review found that there are mixed opinions on the continuation of these compliance activities. Migrants who are lawfully in New Zealand felt it was important that those who are not are still subject to compliance activity.
Total monetised benefits			
Non-monetised benefits		High	

Section 3: Delivering an option

How will the new arrangements be implemented?

77. Te Whakatairanga Service Delivery within MBIE is primarily responsible for the application for warrants to either detain a migrant or to conduct out-of-hours compliance activity.

Changes to judicial warrants of commitment

78. Given the limited nature of the changes regarding the Casey review we do not consider significant implementation timelines, as the changes can be implemented immediately (once the legislation is passed) without changes to visa regulations or immigration forms.

Limiting out-of-hours compliance activities

79. Following the significant operational changes made to INZ's SOPs, we also do not consider implementation of judicial warrants for out-of-hours compliance activity will be substantial. Regulatory change will be required to create a new form that immigration officers will need to submit to the court to apply for a warrant. Many of the operational changes already made will contribute to the requirements of a warrant application, which also reduces the significance of implementation.

80. The Bill is expected to be passed in 2025 and these proposals will come into effect immediately. A communications plan will be developed to ensure that stakeholders are well aware of the changes before they come into effect.

How will the new arrangements be monitored, evaluated, and reviewed?

81. There are two key prongs for oversight of out-of-hours compliance activity and applications for warrant of commitment included in the Standard Operating Procedures[25]. They are the:

82. **Decision-making panel on restriction of freedom of movement of asylum claimants**. This provides oversight of asylum claimants who are detained as a part of the deportation process. The panel was established following the Casey review and ensures that decisions to restrict the freedom of movement of asylum claimants are consistent with the 2012 UNHCR Guidelines on Detention. INZ produces a quarterly report which is sent to the Office of the Ombudsman (in relation to the Optional Protocol to the Convention Against Torture) and this details, among other things, the number of days any person has been detained for and the outcome (deportation or release with reporting conditions).

83. **Approval panel for out-of-hours compliance activity**. The SOPs include a quality check by a technical specialist before any out-of-hours visit is considered by the panel. The panel's role is to confirm that the visit is in fact a last resort and then the National Manager for compliance makes the final decision.

84. We will explore ways of ensuring there is appropriate reporting and monitoring, including updates to the Minister of Immigration.

[25] SOPs (March 2024), page 80 and page 304.

Annex One: Comparison of New Zealand's settings with other jurisdictions

Comparison of out-of-hours compliance activity settings

Country	Are there time limits on out-of-hours compliance activities?
New Zealand (individuals)	Immigration officers may enter premises and search at any reasonable time by day or night any premises in which the officer believes on reasonable grounds that the person named in a deportation order is present.
USA	Immigration officers must obtain a warrant for either arrest, or search and seizure – one warrant does not apply to the other action.[26] There is no section in legislation that deals with out-of-hours compliance activity.
Australia	Immigration officers require a warrant to arrest someone they think may be at risk of absconding.[27] There is no section in legislation that deals with out-of-hours compliance activity.
United Kingdom	Immigration officers must obtain a warrant to enter a premise to conduct compliance activities – these warrants can be granted by a justice of the peace.[28] There is no section in legislation that deals with out-of-hours compliance activity
Canada	Immigration officers require a warrant to arrest someone they think may be at risk of absconding.[29] There is no section in legislation that deals with out-of-hours compliance activity.

Comparison of Warrant of Commitment (WOC) settings

Country	Are there time limits on detention?	Judicial review available?
New Zealand (individuals)	(on arrival) 96 hours without a WOC 28 days (renewable) with a WOC	Yes
(members of a mass arrival group)	(on arrival) 7 days without warrant (28 days if a judge cannot make a decision within 7 days) 6-month (renewable) WOC	
Australia	Unlimited	No
United Kingdom	Unlimited	Yes
Canada	(on arrival) 14 days, before initial review by non-judicial board 6 months, renewable upon further review	Yes

While these WOC comparisons offer important international context as to the environment in which New Zealand operates, they are **not comparable** to the New Zealand context, given New Zealand's small population, our geographical distance from origin and transit countries, and the dangerous waters that surround us.[30]

These factors mean that our immigration system, with regard to refugee and protection claimants, is geared towards the orderly management of a limited number of claimants. The countries outlined above operate in significantly different environments to New Zealand, and have faced unique challenges and successes with regards to asylum-seekers.

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[26] Section 1357 of United States Code Law Title 8—Aliens and Nationality.

[27] Section 251 of the Australian Migration Act 1958.

[28] Section 17 of the United Kingdom Immigration Act 1971.

[29] Section 55 of the Canadian Immigration and Refugee Protection Act 2001.

[30] The average population of the countries in this table (excluding the US, which is a significant outlier) is around 36M, more than five times the size of New Zealand. The relative size of these countries, the GDP of the Global North countries, and their experience (generally) with land-based migration, contributes to their having streamlined systems of managing arrivals of groups (sometimes large groups) of people at their border.

Annex Two: Relevant Statistics

Out-of-hours compliance activity statistics FY15/16 to FY22/23[31]

	Total deportations	After-hours (visits)	After-hours (deportations)	In-hours	Visa-required arrivals	Visa-waiver arrivals
2015/16	1,891	7	6		902,815	1,521,550
2016/17	2,162	30	22		967,878	1,758,618
2017/18	2,938	10	11		1,084,185	1,813,637
2018/19	1,142	7	5		1,117,874	1,861,983
2019/20	1,507	6	8	65[18]	769,703	1,428,516
2020/21	904	9	15	272	28,567	28,701
2021/22	517	6	12	185	79,664	85,535
2022/23 (4 May 2023)	654	20	22	318	621,309	1,093,090

Combined deportation numbers for 2015-2023

Deportation	3,841	29%
Self deportation	4,878	36%
Voluntary departure	4,756	35%
Total	13,475	

Notes on statistics

- A proportion of Chinese nationals have come to New Zealand to work in construction or hospitality These jobs, by their very nature, begin early in the morning and often, at least in the case of hospitality, end very late in the evening. It would not be possible to meet these people at their homes during INZ's normal operating hours, but their jobs would make it difficult and potentially dangerous for officers to visit them at their places of work.
- In FY20/21, INZ was granted additional budget to focus on construction as a priority sector and a large proportion of non-compliant Chinese nationals were identified through this activity.
- Following COVID-19, and even now, the Kingdom of Tonga has refused to accept deportees other than in small numbers. During the phase of acute response to COVID-19, it was not possible to deport people to certain countries (in particular in the Pacific).

[31] www.mbie.govt.nz/dmsdocument/26981-mhkc-inz-out-of-hours-final-report-29-june-2023.