# Regulatory Impact Statement: Providing a more flexible response to managing individuals under the Immigration Act 2009

## Coversheet

| Purpose of Document | |
|---|---|
| Decision sought: | Analysis produced for the purpose of informing Cabinet policy decisions |
| Advising agencies: | Ministry of Business, Innovation and Employment |
| Proposing Ministers: | Minister of Immigration |
| Date finalised: | 20 February 2023 |

**Problem Definition**

The immigration system regulates the flow of people into New Zealand. The purpose of the Immigration Act 2009 (the Act) is to "manage immigration in a way that balances the national interest".

Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act. The current approach in the Act to manage these risks is to refuse visas or deport people. Detention is currently possible where deportation is being pursued and where a claim for asylum (also known as a refugee and protection claim) has been lodged and the individual poses a risk.

There are limitations in the current settings when it comes to possible deportation of those who pose a risk where they have (or are likely to have) protected person status (discussed further below). In addition, aspects of this approach, particularly the detention of asylum claimants have garnered criticism as they may not be fully compliant with our international obligations and may have impacts on the wellbeing of non-citizens who are/were detained in corrections facilities.

This Regulatory Impact Statement (RIS) analyses two proposals to provide a more flexible responsible to managing individuals under the Act:

- ***Proposal A****- Cancellation of residence class visa status (to facilitate eventual deportation)*
- ***Proposal B*** *- A community management framework for asylum seekers and others liable to detention under the Immigration Act 2009*

**Why Government intervention is required**

*Proposal A: Cancellation of residence class visa status*

Recent cases have identified potential gaps within the immigration system to manage individuals subject to the Act who present a national security risk to New Zealand. In

particular, there are limited tools to manage the risk of individuals who are protected persons as they are at risk of torture or ill treatment if deported.

Confidential advice to Government will be considered as part of the Ministry of Justice review of the Terrorism Suppression (Control Orders) Act 2019 (the Control Orders review). However, a new "cancellation of residence class visa status power" could **facilitate the future deportation of an individual subject to the Act who poses a threat or risk to security** (for example if there is a change in circumstances which means they are no longer deemed to be a protected person).

*Proposal B: A community management framework*

Immigration New Zealand (INZ) commissioned an independent review into the processes and procedures relating to restriction of the liberty of claimants for refugee and protection status (asylum claimants). Victoria Casey (KC) produced a report (the Casey Report[1]) which was highly critical of the practice of detaining asylum claimants who are considered a risk in remand at Mount Eden Corrections Facility. She recommended community-based options are established and used as quickly as possible to **avoid ongoing human rights breaches**.

In addition, the national security work on options to expand avenues to detain or deport persons of national security concerns (discussed in this RIS in relation to Proposal A) highlighted the **need for more robust community management measures in the immigration system, as an alternative and more proportionate response to managing those who are currently liable for detention** under the Act.

## Executive Summary

### Diagnosing the policy problem

The proposals in this RIS have arisen from two pieces of work:

*Proposal A: Cancellation of residence class visa status*

Following recent terror attacks, Ministers commissioned work on **legislative options to expand the avenues within the immigration system for the detention and/or deportation of persons for whom national security concerns have been identified** (the national security work).

This work has highlighted:

- the difficulties with managing individuals who are not citizens and are a known risk to public safety, who would otherwise be deported but cannot be due to their status as a protected person
- there are additional challenges to the deportation of individuals subject to the Act who present a security risk where they have residency status in New Zealand, due to greater rights and protections provided by that visa.

*Proposal B: A community management framework*

INZ commissioned an independent **review into the processes and procedures relating to restriction on the liberty of claimants for refugee and protection status**. The subsequent Casey Report was highly critical of the practice of detaining asylum claimants

1 The report can be found at: Report to Deputy Chief Executive (Immigration) of the Ministry of Business, Innovation and Employment – Restriction of movement of asylum claimants (mbie.govt.nz)

who are considered a risk in remand at Mount Eden Corrections Facility and recommended community-based options are established and used as quickly as possible to avoid ongoing human rights breaches.

This work has highlighted:

- a need to have a broader suite of options to support the management of a range of individuals under the Act proportionate to the risk they pose in order to prevent harm while meeting our international and domestic human rights obligations.

## Deciding upon an option to address the policy problem

*Proposal A: Cancellation of residence class visa status*

Through the course of the national security work outlined above, a number of options for change were considered that have now been discounted. Specifically, these related to deportation with assurances, long-term detention and management options (in either a corrections or purpose-built INZ facility) and procedural options such as automatic name suppression. These options focused specifically on the issue of managing individuals who pose a risk or threat to security but cannot be deported due to (likely) protected person status. The options that were strongly opposed by external experts consulted and that raised significant New Zealand Bill of Rights Act 1990 issues (i.e. detention options) are not being progressed at this time.

Confidential advice to Government will be considered as part of the Ministry of Justice Control Orders Review which is scheduled to begin this year.

There is however, one bespoke immigration option being considered in the RIS - Cancellation of residence class visa status (to facilitate eventual deportation). This option would apply to those who were certified to be a threat or risk to security but could not yet be deported, for example protected persons and those who could not return home due to border closures or a lack of available flights.

*Proposal B – A community management framework*

The option outlined in this RIS responds directly to recommendations made in the Casey Report but also provides an alternative option for the management of individuals who may otherwise have been detained.

These proposals were both assessed against the status quo under the following criteria:

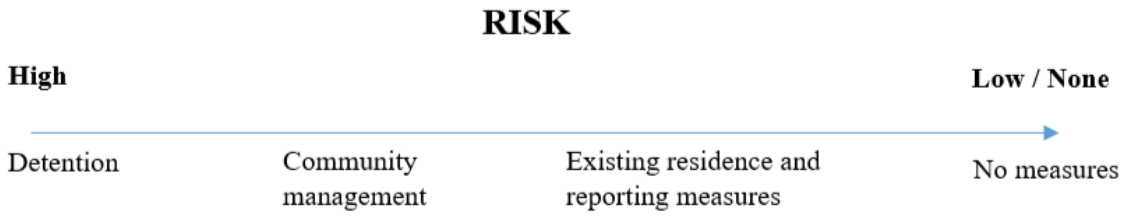
- effectiveness at preventing harm
- consistency with domestic and international law, including human rights; and
- operational feasibility and cost.

## Summary – Proposal A

- On balance, *Proposal A: Cancellation of residence class visa status* has been identified as the preferred option to increase the potential pathways available to facilitate timely future deportation.
- While this option restricts some rights associated with residence status such as being able to own a home and vote, it is only likely to apply to a small number of individuals (1-2 individuals every five years). It is consistent with existing policy settings regarding residence status for those who pose a risk and our international obligations.
- This option could facilitate timely future deportation of individuals who pose a threat or risk to security and signals that those who pose a risk or threat to security in New Zealand will not be allowed residence, which in turn could add an additional disincentive to such behaviours.

## Summary – Proposal B

- *Proposal B: A community management framework* has been identified as the preferred option to improve management of asylum seekers and other individuals subject to detention under the Act in a manner consistent with the New Zealand Bill of Rights Act 1990.
- A community management framework adds to the existing management options available under the Act (as demonstrated below) to ensure restrictions placed on individuals are proportionate to the risk posed (as deemed by the Courts), it also offers a more rights compliant option to manage asylum claimants who pose a risk, compared to detention.




## Delivering an option

These proposals would both require legislative changes to implement, Confidential advice to Government

A minimum of 6-12 months will be required for INZ to put into effect a new community management function (Proposal B) and to undertake procurement for services. This could not take place until appropriate funding had been approved. This may result in a delay

between when the legislation is passed, when implementation may commence, and when the proposals may come into effect. There is also a risk that any new powers provided through legislation would not be able to be used if additional funding is not secured.

## Limitations and Constraints on Analysis

### The scope of this analysis has been narrowed by previous Cabinet and Ministerial decisions

Following recent terror attacks, Ministers commissioned work on legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of non-New Zealand citizens for whom national security concerns have been identified. Following targeted consultation on options, a range of options for change were considered Confidential advice to Government specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and raised New Zealand Bill of Rights Act 1990 (NZBORA) issues[2]. Ministers have agreed not to progress these options at this time.

Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

This RIS focuses instead on two targeted immigration options which arose from the work detailed above and from the ongoing response to the Victoria Casey report on the detention of asylum claimants.

### The scope of Proposal B is limited to a community management option which in part responds to the Victoria Casey report but does not include other recommendations made

In early 2021 Amnesty International released a report about asylum claimants' treatment in prison. In June 2021, INZ commissioned an independent review to assess its operational practices relating to the potential detention of asylum seekers.

The final report from Victoria Casey KC was issued on 23 March 2022. It highlighted areas of concern and made 11 recommendations to address those, both at an operational and policy level. Three of the recommendations require legislative change.

A community management framework would address some of the concerns raised in the Casey Report. In particular, it would go some way towards implementing the recommendation to allow for electronic monitoring as a more proportionate option where the Court considers it necessary to address well-founded and serious risks of absconding, or to public safety or national security but does not consider detention to be warranted. It would also partly implement recommendations relating to ensuring alternatives to detention are available and that INZ takes responsibility for claimants subject to restrictions on their freedom.

The Casey Report's broader legislative recommendations, particularly around amending the detention regime for asylum seekers as a whole, will not be addressed by the proposed changes. Addressing these recommendations involves a broader piece of policy

2 Detention which was no longer linked to deportation was highlighted as likely to be considered as discrimination based on nationality as the detention would not relate to an immigration purpose, and therefore it was hard to justify why the threshold for detention would be lower for a non-citizen than a citizen. Similarly, detention options had been highlighted as unlikely to be justifiable under NZBORA as they may or would be likely to constitute arbitrary detention.

work that would require expert consultation. The Minister of Immigration instructed officials to progress work on a community management framework first so that legislation could be introduced this Parliamentary term. The work on broader legislative changes can be done as part of a wider Immigration Act review scheduled to begin in late 2023.

**The scope of Proposal B does not encompass new support services at this time**

For the purpose of this RIS, Proposal B extends only to the establishment of a community management framework and not the additional provision of new wraparound support services which could support more positive outcomes for those managed.

It has been recommended that if Proposal B is progressed Cabinet agree to INZ working with community representatives in the design of any wraparound services available under the community management measures.

In the interim, the proposal will rely on existing services and support (e.g.. Mental health support through NGOs such as Refugees as Survivors New Zealand (RASNZ)).

**External consultation has been limited to subject matter experts and was mostly focused on other options which have now been discounted**

For the national security work, the Minister of Immigration agreed to officials undertaking confidential targeted consultation with external experts and stakeholders. As this work related to the national security system it was sensitive and therefore consultation was limited rather than undergoing a full public consultation process. This consultation took place between February and May 2022.

We note that the proposals at the time of consultation related solely to the issue of managing individuals who pose a security risk or threat but cannot be deported due to protected person status. *Proposal A: cancellation of residence class visa status* was consulted on at a high level. *Proposal B: A community management framework* was consulted on as a longer-term (ongoing) regime for the management of individuals who pose a security risk or threat, rather than for asylum seekers and other individuals liable for detention under the Act.

Proposals that were strongly opposed by experts, in particular relating to deportation with assurances and ongoing detention and management are not being progressed at this time.

We also note that consultation with subject matter experts focussed on those groups likely to experience a direct or indirect impact of these proposals. Public consultation through the Parliamentary process will invite a broader range of perspectives, including focus on preventing harm to New Zealand communities.

**There are wider limitations on available data for the estimated size of the problem**

There are limitations in intelligence and surveillance information to accurately quantify the number of individuals who may be directly impacted by the proposed options.

The number of people who pose security risks and who cannot be deported is difficult to quantify, as it will be so rare and well below any meaningful sample size – approximately 1-2 people every five years.

It is difficult to estimate the number of individuals who would be managed under Proposal B. This is because of the challenges of predicting how many individuals currently in detention or managed by existing mechanisms would be better suited to management under the proposed orders. In addition, the length of time an individual can require detention or management can vary greatly. For example, periods of detention for the majority of individuals have historically been less than 30 days, whereas periods of management under

existing Residence and Reporting Agreements for the majority of individuals have been less than one year.

**Detailed costings of proposed options are limited at this time**

Officials have estimated the annual cost of Proposal B based on a range of assumptions on both the costs of and need for different services (e.g. electronic monitoring), and the number of people that could be subject to the orders and the length of time any individual would be subject to them.

These estimates are largely based on the current experience of Ara Poutama (Corrections) in managing individuals in the community and providing services through contracted providers. This has limitations due to the existing expertise and economies of scale in Corrections settings (which INZ would not have in standing up a new function, and in managing a very small cohort of people).

There may also be costs to other agencies depending on the responsibilities of each agency which are yet to be determined.

| **Responsible Manager(s) (completed by relevant manager)** |
|---|
| Sam Foley<br>*Manager*<br>*Immigration (International and Humanitarian) Policy*<br>*Ministry of Business, Innovation and Employment*<br>  <br>20/02/2023*<br>*Cost estimates for Proposal B were updated in September 2024[3] |

| **Quality Assurance (completed by QA panel)** | |
|---|---|
| Reviewing Agency: | Ministry of Business, Innovation and Employment |
| Panel Assessment & Comment: | MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Impact Statement prepared by MBIE. The panel considers that the information and analysis summarised in the Impact Statement **meets** the criteria necessary for Ministers to make informed decisions on the proposals in this paper. |

3 Cost estimates are set out in Section 2 from paragraph 81.

# Section 1: Diagnosing the policy problem

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

### The purpose of the immigration system

1. The immigration system regulates the flow of people into New Zealand. The purpose of the Immigration Act 2009 (the Act) is to "manage immigration in a way that balances the national interest".

2. Achieving this balance requires careful consideration of multiple factors – including humanitarian, social and economic objectives, and New Zealand's international obligations and commitments. A key objective is to ensure that the regulatory settings appropriately respond to threats to New Zealand's safety and security posed by individuals subject to the Act. The current approach in the Act to manage these risks is to refuse visas or deport people. Detention is currently possible where deportation is being pursued.

### Previous Cabinet decisions

3. In response to recent terror activities in New Zealand, specifically the New Lynn terror attack on 3 September 2021 (referred to as the *Samsudeen* case), the Prime Minister and the Minister of Immigration sought advice from officials regarding policy and legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of persons for whom national security[4] concerns have been identified.

4. International relations, Confidential information entrusted to the Government

5. Officials provided advice to Cabinet in December 2021 Confidential advice to Government and were directed to provide further developed policy options following targeted consultation with external experts[5].

4 Security as defined under section 4 of the Immigration Act 2009.

5 Stakeholders included: Kāpuia, NZ Human Rights Commission, Amnesty International, Refugee Council of New Zealand, NZ Red Cross, Immigration Reference Group, and the Refugee and Protection Status Determination Cross-sector Joint Working Group.

6. Following targeted consultation, a range of options for change were considered Confidential advice specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and detention options raised NZBORA issues, specifically discrimination based on nationality (where detention was no longer linked to an immigration purpose) and arbitrary detention. Ministers have agreed not to progress these options at this time.

7. Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

8. This RIS focuses instead on two targeted immigration options which arose from the work detailed above and from the ongoing response to the Victoria Casey report on the detention of asylum claimants.

9. The status quo from which the options considered in this RIS would build on is outlined below.

## Status quo

*Proposal A: Cancellation of residence class visa status*

10. Deportation is the ultimate tool available to the New Zealand government under the Act, providing the ability to deport people who pose a security risk. Where an individual under the Act poses a threat or risk to security, deportation is the best option for removing the risk from our shores.

Deportation of refugees/protected persons

11. The Act provides for the deportation of those who pose a security risk to New Zealand. However, those mechanisms are constrained if the individual is, or is likely to be, considered a protected person. Currently:

    - refugees may only be subject to deportation where Article 32.1 or 33 of the Refugee Convention allows deportation of a refugee (essentially for national security or public order grounds); and
    - an individual cannot be deported if they are a protected person – that is, there are substantial grounds for believing that the person would be in danger of torture or ill-treatment in the receiving country.

Residence class visa status

12. A holder of a resident visa is entitled to stay in New Zealand indefinitely, unless they breach their visa conditions (for example, if they commit a crime, or they obtained their resident visa through fraud with false or fraudulent information). By comparison, the holder of a temporary visa is entitled to work or study in New Zealand for a specific period of time and will need to depart New Zealand upon the expiration of that visa (or if it is not renewed).

13. The Act currently enables a person claiming asylum who is of sufficiently bad character not to be granted residence in the first instance, but instead to be placed on long-term work visas. Protected person status gives access to employment, and income support if necessary, but long-term work visas (as opposed to a residence-class visa) mean that the individual cannot become a citizen.

14. There is currently no power for residence status to be revoked once it has been granted for those who pose a risk or threat to security (i.e. those whose risk was not identified until after a residence visa was granted).

*Proposal B: A community management framework*

Detention provisions

15. The Act currently provides powers for detention and monitoring as a tool to enable deportation. These powers can only be used pending the making of a deportation order, or if the individual is already subject to a deportation order. They may also be used where an individual has lodged a claim for asylum and poses some kind of risk.

16. Section 309 sets out specifically who can be liable to arrest and detention under the Act including:

    - persons who are liable for turnaround:
    - persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4))[6]:
    - persons who are suspected by an immigration officer or a constable to be liable for deportation or turnaround and who fail to supply satisfactory evidence of their identity when requested under section 280:
    - persons who are, on reasonable grounds, suspected by an immigration officer or a constable of constituting a threat or risk to security.

17. Detention in a corrections facility is subject to the decision of a District Court judge to grant a Warrant of Commitment (WoC). Section 317 of the Act outlines the decisions and considerations a Judge must make on application for a WoC. Section 318 outlines the decisions to be made where the WoC applies to someone who is a threat or risk to security. Notably that, unless the release of the person would not be contrary to the public interest, the Judge must issue a WoC authorising the person's detention for a period of up to 28 days.

18. Outside of custodial detention arrangements (and if a WoC is not granted), Section 315 of the Act provides for a person[7] to reside in the community with reporting requirements (Residence and Reporting Requirements Agreement (RRRA)) if agreed by the person liable for detention and an immigration officer. While a breach of RRRA conditions is not an offence, an individual could be detained under a WoC if they did not meet the requirements. Section 320 also allows the Court to release a person on conditions and specifies which conditions can be imposed should the Judge see fit, including that they must reside at a specified place and report to a specified place at a specified time among others.

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6 This section outlines that:

- A refugee or a claimant for recognition as a refugee may be deported but only if Article 32.1 or 33 of the Refugee Convention allows the deportation of the person.
- A protected person may be deported to any place other than a place in respect of which there are substantial grounds for believing that the person would be in danger of being subjected to torture or arbitrary deprivation of life or cruel treatment.

7 Persons who are liable for deportation (including persons recognised as refugees or protected persons but whose deportation is not prohibited under section 164(3) or (4)) of the Act).

19. Detention and monitoring can be warranted in certain circumstances. The United Nations High Commissioner for Refugees (UNHCR) Guidelines outline the obligations of parties to the Convention[8] in relation to the detention of asylum seekers. The Convention does not categorically prohibit detention, and it is generally accepted that there are circumstances where detention may be justified, particularly for short periods of time. Under existing New Zealand law, any detention must be linked to future deportation. International best practice[9] also maintains that migrants should not be detained with the general prison population.

Review into the detention and treatment of asylum seekers

20. In early 2021 Amnesty International released a report about asylum claimants' treatment in prison. In June 2021, INZ commissioned an independent review to assess its operational practices relating to the potential detention of asylum seekers.

21. The final report from Victoria Casey KC was issued on 23 March 2022. The report was highly critical of the practice of detaining asylum claimants who are considered a risk in remand at Mount Eden Corrections Facility. The report outlined that the vast majority of asylum claimants do not end up in detention: of the approximately 2,500 people who made claims between 2015 – 2020, only around 100 were detained.

22. However, the report noted that:

*"For the small number who are declined visas at the border or who are facing imminent deportation at the time of their claim... Detention in a Corrections facility is in practice essentially the default position, and can extend for a long time: over the 2015 – 2020 period 60% were detained in prison for more than 3 months, and 12% for over a year. One person was held for over three years."*

23. The report, among other things recommended community-based options be established and used as quickly as possible to avoid ongoing human rights breaches. We note that operational changes since the Casey Report have meant that there are currently no asylum claimants in detention.

Wider Government tools for community management/detention

24. There are wider detention and management tools across government to manage risk. The relevant law includes:

- Crimes Act 1961 offences and attempts to commit those offences;
- the Control Orders regime (if convicted previously of a terrorism related offence);
- offences in the Terrorism Suppression Act 2002, including the offence of planning and preparing to commit a terrorist act; and
- objectionable publication offences (Films, Videos and Publications Classifications Act 1993).

25. The status quo also includes operational Police tools and activities, for example the 24/7 surveillance and monitoring in the *Samsudeen* case.

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8 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

9 For example, the UN International Organisation for Migration: *Global Compact for Safe, Orderly and Regular Migration* (Link: https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/73/195)

## What is the policy problem or opportunity?

26. There is an opportunity to increase the tools available to support the management of and facilitate the eventual deportation of individuals subject to the Act who pose a risk.

*Proposal A: Cancellation of residence class visa status*

27. New Zealand has experienced two terror events in the last few years where the perpetrator has not been a New Zealand citizen. These cases, and the *Samsudeen* case in particular, have highlighted the difficulties with managing individuals who are not citizens and are a known risk to public safety, who would otherwise be deported but cannot be due to their status as a protected person. As outlined above, there are legal limitations on our ability to deport an individual who has or is assumed to have protected person status.

28. There are also challenges on our ability to deport individuals who present a security risk where they have residency status in New Zealand, due to greater rights and protections provided by that visa. Although residents can be deported where they pose a security risk, meeting the threshold for Ministerial certification and the subsequent Order in Council making the individual liable for deportation under section 163 of the Act may be difficult and/or time consuming. Conversely, those on temporary entry class visas can be deported more easily, e.g. under section 157 where the Minister is able to determine there is sufficient reason to deport a temporary entry class visa holder, including matters relating to character.

29. In some circumstances, it may be appropriate to cancel a person's resident visa, and replace it with a temporary visa, for the purpose of facilitating future deportation.

*Proposal B: A community management framework*

30. As outlined above, the Act currently allows for detention and reporting requirements for individuals in certain circumstances.

31. An independent review into the detention of asylum seekers found that this practice was being essentially used as a default because no alternate options were available, and this raised "serious issues of non-compliance with New Zealand's international and domestic human rights obligations". The United Nations Human Rights Committee and the Working Group on Arbitrary Detention have also expressed concern about the use of Corrections and Police facilities, and that asylum-seekers are not separated from the rest of the detained population[10].

32. Alternative options to detention could be either, to have individuals in the community with no management in place or rely on existing RRRA provisions. There are however issues with these options. No management at all could lead to individuals absconding and INZ not being able to locate them and facilitate deportation (where possible). Conditions provided by the RRRA, however, are reasonably limited (such as residing at a specified place) and are not enforceable. The individual would have to agree to the reporting requirements. If they did not, this would leave no alternative ability to monitor the individuals. Electronic monitoring is also not an available measure under RRRA's and is not a restriction that would be appropriate to impose without a court order (so could not be built into the existing RRRA framework).

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10 https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2Fsites%2Fdefault%2Ffiles%2FHRBodies%2FHRC%2FRegularSessions%2FSession30%2FDocuments%2FA_HRC_30_36_Add_2_ENG.DOCX&wdOrigin=BROWSELINK

33. A community management framework would build on existing detention and reporting requirements in the Act to ensure the management of the individuals as outlined below could be proportionate to the risk posed and reduce human rights breaches currently found in the detention of asylum seekers.

34. A community management framework as analysed in this RIS would, where appropriate, cover:

- Asylum seekers who would otherwise be liable for deportation or turnaround, that is people who claim to be recognised as refugees either at the border (including in a mass arrivals case), or where they are already in New Zealand and then make a claim.
- Individuals who are unable to be immediately deported or turned around due to non-cooperation with attempts to secure travel documents, or due to external factors such as lack of flights, transit and border restrictions, or natural disasters in the deportee's country of origin.
- Individuals who are certified to be a security risk or threat and are pending deportation (although depending on the level of risk, detention may continue to be the appropriate mechanism).

**The size of the problem**

35. A limitation of this analysis is that the size of problem cannot be accurately known. The proposals themselves will only directly affect those who:

- *Proposal A:* constitute a security risk or threat and cannot be deported, for example, protected persons or those unable to be deported due to border closures or lack of available flights.

  *Officials have estimated this is likely to be 1-2 individuals every five years*.

- *Proposal B:* meet the existing thresholds for detention under the Act:

  From 2015 to 2022 there have been 1,176 individuals who have been in immigration detention[11] (including those detained and then later released on existing Residence and Reporting Agreements or on court-imposed conditions). This is an average[12] of 147 individuals who have been in immigration detention each year.

  In addition, there are 849 individuals who have been manged by INZ on existing Residence and Reporting Agreements and court-imposed conditions in the same period[13]. This is an average of 106 individuals managed on existing and Residence and Reporting Agreements each year. It is difficult to predict how many of those individuals who have previously been detained or managed under the Act would be better suited to management under Proposal B.

11 For the purposes of this data, "detained" refers to clients managed by INZ since 2015 under section 316 of the Immigration Act. It does not include clients managed by four-hour section 312 detentions.

12 Note this is a straight-line average.

13 Under sections 315 or 320 of the Immigration Act.

The length of time an individual can require detention or management can also vary greatly. The average time an individual is in detention or management is likely to be less than 12 months. Most (81.5%) of clients in detention were detained for less than 30 days, just over 90% within three months and just over 96% within six months. Residence and Reporting Agreements entail longer periods of time for compliance to manage. For example, almost 81% of RRRAs are managed within a year.

**Key stakeholders and population impacts**

36. Experts MBIE consulted advised that clearly identifiable groups and communities will likely experience secondary or indirect impacts due the mere fact that these changes are being proposed in the immigration sector, regardless of whether they would ever be subject to the changes themselves.

37. Refugees and protected persons are already vulnerable groups in New Zealand. Many have faced war, persecution and oppression in their home country, and face unique challenges integrating into New Zealand society from previous trauma[14]. These proposals may have the following secondary or indirect impacts for migrants, refugees and minority ethnic communities in New Zealand:

- increased religion-, race- or immigration-based negative commentary and actions, potentially leading to an increase in hate-based crime;
- increased anxiety amongst minority ethnic, refugee and migrant communities as to whether they are welcome in New Zealand as members of the community; and
- increased uncertainty and anxiety as to their ongoing immigration status.

*MBIE engagement*

38. As part of this work, MBIE consulted with representatives from disproportionality impacted population groups during consultation with external experts. In particular, we consulted with Kāpuia, the NZ Human Rights Commission, Amnesty International, the Refugee Council of New Zealand, NZ Red Cross, and the Refugee and Protection Status Determination Cross-sector Joint Working Group to hear their views on potential policy options.

39. Consultation with the subject matter experts above was very constructive and informed the refinement of the options considered as part of this work, proposals that were strongly opposed by experts, in particular relating to deportation with assurances and ongoing detention are not being progressed at this time.

40. A summary of feedback received through this consultation is attached as **Appendix One,** although we note this largely focuses on options no longer being progressed.

41. We note that consultation with subject matter experts focussed on those groups likely to experience direct and indirect impact from these proposals. Public consultation through the Parliamentary process would invite a broader range of perspectives, including focus on preventing harm to New Zealand communities.

14 NZ Red Cross, Migration Scoping Report (May 2021)

*Engagement to inform the Casey Report recommendations (only relevant for Proposal B)*

42. As part of the independent review into the detention of asylum seekers, Victoria Casey was asked to meet with identified civil society stakeholders, including representatives of:

- The United Nations High Commission for Refugees (Canberra),
- The Immigration and 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
- The Auckland District Law Society

43. She also spoke with:

- New Zealand Red Cross
- Other MBIE officials (including a member of the legal team that conducts the warrant of commitment court processes for INZ, and the current refugee claimant welfare advisor);
- A representative of Te Āhuru Mōwai o Aotearoa, the Māngere Refugee Resettlement Centre.

### What objectives are sought in relation to the policy problem?

44. The overall objective of these changes is to prevent harm to New Zealand communities by ensuring that the immigration system has the appropriate tools available to deport or manage individuals under the Act while ensuring that any measures are consistent with domestic law and New Zealand's international obligations, specifically human rights.

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

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

45. When the Minister of Immigration and Cabinet considered initial advice on the national security work, the following criteria were applied:

- effectiveness at preventing harm to the New Zealand public;
- compatibility with domestic and international law;
- reputational risk, and impacts on bilateral relationships and foreign policy objectives; and
- operational feasibility and cost [ERS-21-MIN-0054 refers].

46. As the options have subsequently been narrowed significantly and no longer involve proposals that raise questions involving reputational risk, the options in this RIS have been assessed against three of the four above criteria, only excluding reputational risk, and impacts on bilateral relationships and foreign policy objectives.

## What scope will options be considered within?

*The options have been narrowed over the course of Ministerial and Cabinet discussions*

47. Following recent terror attacks, Ministers commissioned work on legislative options that could be pursued to expand the avenues within the immigration system for the detention and/or deportation of non-New Zealand citizens for whom national security concerns have been identified. Following targeted consultation, a range of options for change were considered Confidential advice to Government ], specifically deportation with assurances and long-term detention (in either a corrections or purpose-built INZ facility) and management. These options were not supported by external experts and raised NZBORA issues. Ministers have agreed not to progress these options at this time. Confidential advice to Government would be considered as part of the Control Orders Review which is scheduled to begin this year.

48. Separately, an independent review was commissioned in June 2021 to assess INZ's operational practices relating to the detention of asylum seekers. The final report from Victoria Casey KC highlighted areas of concern and made 11 recommendations to address those, both at an operational and policy level. Three of the recommendations require legislative change. *Proposal B* in this RIS responds in part to a recommendation made in the Casey report. Following Ministerial direction, wider work on responding to the Casey recommendations is to progress separately.

*Non-regulatory options have recently been implemented relating to Proposal B*

49. Following the findings from the Casey report, INZ established the *Decision-making Panel on Restriction of Freedom of Movement of Asylum Claimants* which makes decisions consistent with the UN 2012 Detention Guidelines. The Panel was established to ensure integrity of the regulatory system, the welfare of asylum claimants and mitigation of risks to New Zealand when determining whether an asylum claimant should be detained.

50. When determining whether the freedom of movement of an individual liable for deportation should be restricted through detention or a Residence and Reporting Requirements, Agreement (RRRA) the following are considered:

- Which option will produce the most good, and do the least harm?
- Which option treats people fairly and without bias?
- An assessment of all the circumstances of the case, including humanitarian factors.
- Whether all appeal periods have expired (refer to s175A – when a deportation order may be served)
- Are they in some way a risk e.g. safety, health?
- Are they a flight risk (i.e. likelihood of them disappearing)?
- Whether previous contact with the individual has resulted in non-compliance.
- What the likelihood is that the individual will depart by themselves.
- Whether the individual can be relied upon to meet the reporting requirements of a RRRA.
- Whether custody is necessary and appropriate in all the circumstances.
- Whether non-custodial deportation and issue of a RRRA is more suitable.

51. As outlined below, while this has prevented claimants from being detained (particularly as a default) this does not provide an intermediary step (between RRRAs and detention) to manage risk and in particular does not provide for electronic monitoring. For the purpose of consideration of Proposal B, the process and risk management levers outlined above should be considered as the status quo.

*We have identified an additional non-regulatory option which would supplement both proposals*

52. These proposals focus on what to do after someone becomes a risk. There is also an opportunity to do more to prevent individuals reaching that state in the first place. Specifically, there is the ability to provide more support and services for refugees and refugee claimants to assist them with integration into the community, having a positive effect on preventing radicalisation due to isolation and stigmatisation.

53. This could be considered through the Refugee Resettlement Strategy Refresh (RRSR) and Migrant Settlement Strategy (MSS) Refresh. The RRSR is already considering how quota refugees are supported when they arrive in New Zealand and beyond. A cross-agency operational policy workstream may then be set up to deliver any programmes of work needed to achieve those outcomes, including any necessary future Budget bids.

54. Changes in this area will not in themselves solve the problem of extremism and risk to New Zealand from security threats, but it would complement current workstreams being delivered by other agencies also addressing these issues. These include the social cohesion work being progressed by the Ministry of Social Development and the multiple workstreams delivering the changes based on the recommendations from the Royal Commission of Inquiry into the terrorist attack on Christchurch masjidain.

55. This non-regulatory option would not solve the problem of managing individuals under the Act who present a risk or threat to security now. However, over time it may have a positive impact in reducing the number of people who present with these risk factors in the future. MBIE is leading a cross-agency refresh of the strategies to progress this option further.

### What options are being considered?

## Proposal A: Cancellation of residence status

56. As discussed above, following Ministerial discussions cancellation of residence status is now the only option being considered against the status quo for Proposal A.

**How cancellation of residence status would work in practice to facilitate deportation**

57. It is proposed that this option would apply to individuals who had been certified by the Minister of Immigration as constituting a threat or risk to security (in line with the existing mechanism in section 163 of the Act) who cannot at that stage be deported because they have or are assumed to have protected person status or there is another barrier to their deportation such as a lack of access to flights or border closures.

58. “Security” is broadly defined in the Act to include the defence of New Zealand, protection from acts such as espionage, the prevention of any terrorist act (not defined in the Act) and the prevention of organised crime.

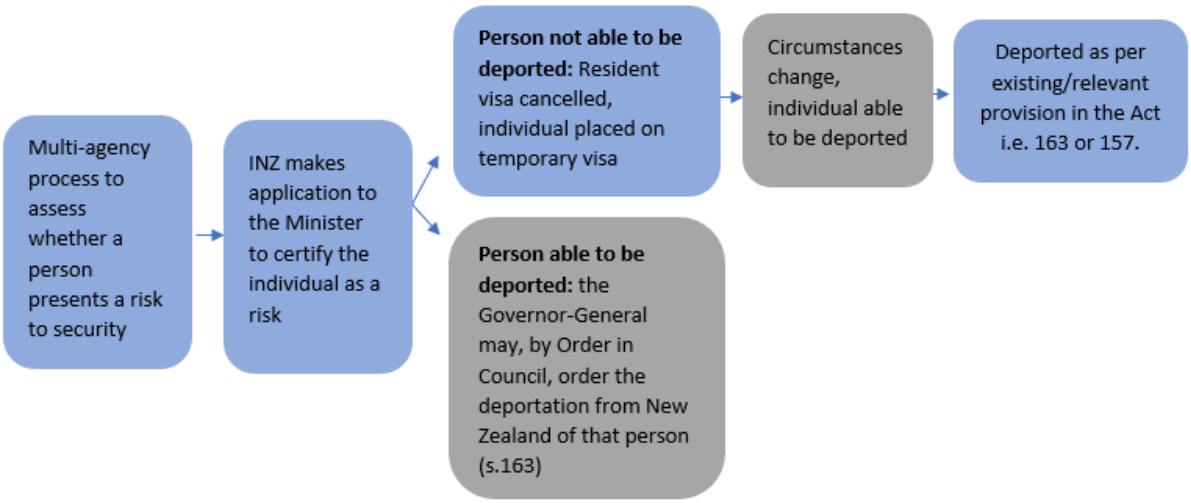
59. INZ, in coordination with partner agencies, would make an assessment of whether a person constituted a threat or risk to security. This multi-agency process would draw on relevant information relating to a person's security risk. Information that may be considered as part of an assessment may include:

- National security or defence
- [redacted]
- [redacted]
  - [redacted]
  - [redacted]
  - [redacted]

60. INZ would then recommend that the Minister of Immigration certify that the individual is a threat or risk to the security of New Zealand. The factors that may be considered in this assessment would not be prescribed in legislation as they may vary depending on the nature of the case.

61. This Ministerial certification would trigger the cancellation of the individuals resident visa.

62. An overview of how this process would work is illustrated below:



63. This option would mean that rather than waiting for someone to be able to be deported to begin the process of certification for the purpose of deportation (as under the status quo s.163), it could begin as soon as the threat had been identified. This would:

    a. facilitate timely deportation once the circumstances meaning the individual could not be deported had changed, specifically as deportation could be facilitated under a different section of the Act which would have a lower threshold:

        > Currently under section 163 of the Act, following the Ministers certification, the Governor-General may, by Order in Council, order the deportation from New Zealand of that person. Whereas should the Minister have already certified that the person was a threat or risk to security and residence status had been revoked, the individual could be deported under a different section of the Act e.g. section 157 which allows for the deportation of a temporary class visa holder if the Minister determines that there is sufficient reason[15], but would not require an Order in Council.

    b. mean that the threshold for certification would only need to be met once and the time involved in doing this could be front-loaded into the process, ultimately reducing the length of time a risk may be in the community.

*A) Effectiveness at preventing harm*

<u>Preventing harm to the community</u>

64. This option would better enable future deportation in certain circumstances. For example, it could ensure that if the individual is no longer a protected person, perhaps due to regime change in the receiving State, they can be deported from New Zealand more easily i.e. under section 157 of the Act as opposed to section 163 as noted above .

65. This would also increase the timeliness of deportation, ultimately reducing the length of time that a risk is in the community. This could confer significant benefits if time saved could have otherwise enabled the individual to commit an attack of some sort.

66. Confidential advice to Government – which will be considered further as part of the upcoming Control Orders Review and also addressed in part by Proposal B. Confidential advice to Government

67. Maintenance of the law

15 Sufficient reason includes, but is not limited to concerns around character and criminal offending.

Preventing harm to the individual

68. Refugees and protected persons who have their residence status cancelled and replaced with a temporary work visa would be able to access employment, benefits and income support if necessary while they remained in New Zealand. However, they would not have access to other rights associated with being a resident, such as the right to vote; the right to travel to, enter and remain in New Zealand at any time; and to sponsor any family member for a visa.

69. We note that while refugees and protected persons would continue to have access to social welfare, those whose deportation is prevented by other means i.e. border closures or the lack of access to flights, who did not hold refugee or protected persons status may not be eligible for welfare from the Ministry of Social Development as this relies on either residence status and/or refugee/protected person status (or those who have claimed who are also lawfully in New Zealand).

70. Agencies and subject matter experts we consulted raised fewer concerns with this option, though multiple subject matter experts as well as the Ministry of Justice have noted that the use of a temporary work visa over a long period of time could have a negative impact on social cohesion if individuals do not feel secure about their immigration status. Maintenance of the law

*B) Consistency with domestic and international law*

71. Free and frank opinions but, as those claimants would continue to be protected in New Zealand (and have access to the same services and supports), it would be compliant with our international human rights obligations.

72. This option is consistent with current policy settings reflected in the Act that enable a person who is recognised as a refugee or protected person seeking asylum or protection who is of sufficiently bad character not to be granted residence in the first instance, but instead to be placed on long term work visas.

*C) Operational feasibility and cost*

73. This option would be more complex and slightly more costly to administer than the status quo, as INZ would need to continually grant temporary visas. However, no additional funding would be required.

## Table One: Proposal A – Summary of analysis against criteria

| Criteria | *Status quo* | Proposal A: Cancellation of residence status |
|---|---|---|
| **Effectiveness at preventing harm** | 0 | + <br>• May be effective in facilitating timely future deportation if circumstances preventing deportation change. This would reduce the length of time a security risk is in the community and therefore the potential time where they could commit an attack. <br>• Reinforces the message that security threats will not have access to the rights and privileges of residence which could have a deterrent effect. <br>• Maintenance of the law [redacted] <br>• Cancellation of residence status will also reduce the rights of individuals, including in certain circumstances the ability to access welfare support which could be harmful to the individual. |
| **Consistency with domestic and international law** | 0 | 0 <br>• Free and frank opinions [redacted] <br>• Would not impact protected person status. |
| **Feasibility and cost** | 0 | 0 <br>• Relatively easy to implement. |
| **Overall assessment** | 0 | + |

### Summary – Proposal A

- On balance, *Proposal A: Cancellation of residence class visa status* has been identified as the preferred option to increase the potential pathways available to facilitate timely future deportation.
- While this option restricts some rights associated with residence status such as being able to own a home and vote, it is only likely to apply to a small number of individuals (1-2 individuals every five years), it is consistent with existing policy settings regarding residence status for those who pose a risk and our international obligations.
- This option could facilitate timely future deportation of individuals who pose a threat or risk to security and signals that those who pose a risk to threat or security in New Zealand will not be allowed residence, which in turn could add an additional disincentive to such behaviours.

## Proposal B: A community management framework

74. As outlined above, the option being considered in Proposal B is limited to establishing a community management framework available for individuals currently liable to detention under the Act.

**How the community management framework would work in practice**

75. The design features (outlined in the table below) of the community management framework as proposed have been designed to mirror the existing detention provisions in the Act.

| Design feature | Description of proposal |
|---|---|
| Triggering mechanism | Same trigger as in section 316 of the Immigration Act, which allows INZ to apply to the District Court for a warrant for detention for an individual who cannot be deported or turned around within a reasonable timeframe (i.e. because there are no available flights, the person's identity is unknown, a decision as to security risk or threat is pending, or for any other reason (including that an asylum claim has been lodged preventing deportation). |
| Range of available management measures | A non-exhaustive list of measures, with some standard/minimum conditions. A District Court judge can apply any additional conditions as they see fit.<br>Minimum/standard conditions:<br>• A person must report to a specified place at a specified time.<br>• If the person is a claimant, they must attend any required interview with a refugee and protection officer or hearing with the Tribunal.<br>Additional/special conditions can include, but are not limited to:<br>• A person must provide a guarantor responsible for ensuring compliance with conditions/reporting and any failure to comply with conditions. |

| Design feature | Description of proposal |
|---|---|
| | • A person must reside at a specified place. “Reside” should be defined in the Immigration Act and cannot amount to imposing a curfew of more than 12 hours per day.<br>• Non-association requirements.<br>• Electronic monitoring.<br>• Any other conditions that are relevant to the management of the individual, for example, requirement to attend rehabilitation programmes. |
| Responsibility for determining measures imposed | District Court on application from an INZ officer (as per existing section 316). |
| Discretion to refuse an order | As per existing section 318, where the person has been certified a risk or threat to security, or where an INZ officer suspects the person may be a risk or threat to security, the District Court must grant an order for management (except where the application is for the wrong person, or where not granting an order would be contrary to the public interest).<br>For all other individuals, as per section 317, the District Court may refuse to grant an order as it sees fit. |
| Term and review of orders | Orders have a maximum term of up to three months where they relate to imposing the special conditions of the proposed community management framework, namely the requirements of non-association and electronic monitoring. Orders imposing other conditions may be reviewed at any time on the application of INZ or the individual. |
| Appeal rights | There are no appeal rights proposed.<br>Judicial review will be available, and orders can be reviewed regularly. |
| Consequences of non-compliance | Where an individual fails to comply with the terms of an order, INZ would be able to apply to the District Court for the imposition of further management measures, or where necessary, detention as per the existing mechanisms in the Immigration Act. |

*A) Effectiveness at preventing harm*

76. This option would be more effective in preventing harm than the status quo in response to lower levels of risk where more restrictive measures may not be warranted. It would effectively expand and enhance the existing RRRA regime limitations by making a wider range of management tools available to the immigration officer (such as curfews and electronic monitoring). However, we note that this option may not be effective at managing high risk, and in those cases detention may still be warranted.

77. Community management may be more likely than imprisonment to reduce an individual’s risk long-term (both to themselves and others), particularly if wraparound support services are provided by appropriate government agencies. This would be particularly relevant for asylum claimants who are eventually granted refugee or protected person status (and therefore would no longer be liable to detention or management under the Act).

*B) Consistency with domestic and international law, including human rights*

78. This framework has been designed to respond to human rights concerns raised in the Casey Report. Because the proposals will only apply to asylum seekers while their claim for asylum is being considered, and other individuals while the process of deportation is underway, discrimination is likely to be justified. This would change when an individual no longer has an active asylum claim i.e. it has been approved or the person is no longer actively in the process of being deported. At this point an order for community management would no longer be available.

79. A community management framework will also impact on rights to freedom of association, movement and expression. The right to be free from arbitrary detention may also be engaged as the concept of detention is based only on the freedom to leave and can be fleeting. The ability to impose residence restrictions will limit any curfew imposed to less than 12 hours per day in order to reduce the likelihood of measures constituting detention.

80. A key safeguard that will help ensure infringement on the above rights is justifiable will be that the legislation requires that any management measures imposed on an individual must be proportionate to the level of risk that individual poses, and that these measures are imposed by the District Court. The availability of support services that may provide a pathway out of management and the fact that the need for and reasonableness of community management measures will be regularly reviewed (through a maximum three-month term for orders imposing the more invasive restrictions) are also important.

*C) Operational feasibility and cost*

81. Currently the Department of Corrections (Corrections) is the only government agency delivering electronic monitoring, and as such there would be potential efficiencies in Corrections delivering parts of this function in the future for MBIE. Confidential advice to Government

82. Confidential advice to Government

83. Confidential advice to Government

84. The annual cost estimate is based on the following assumptions:

    a. Electronic monitoring would be required for an estimated 135 individuals per year (of which up to 5 could be asylum claimants). [16]

    b. Approximately 20 individuals would be monitored at any one time.

    c. The small number of asylum claimants, may, in addition to electronic monitoring, require support comparable to the type provided in Ara Poutama Aotearoa supported accommodation.[17] For example, this could include providing furnished accommodation, depending on the particular risk of the individual.

    d. Most individuals would be subject to monitoring for 30 days or less. [18]

85. This option would impose a new function for INZ and would require approximately 6-12 months to establish (including potentially recruitment, procurement for services, staff training etc.). INZ staff who would be responsible for managing individuals in the community would require specific training as the scope of their role would change in light of having greater powers under the Act.

86. An internal implementation workstream will need to be established, with a working group comprising MBIE and INZ representatives being tasked with developing terms of reference and key milestones. Further information on that work programme will be provided in the Cabinet Legislation paper prior to the introduction of the Bill.

87. Issues relating to suitable accommodation and support are likely to arise when electronic monitoring is imposed. These are difficult to predict and will depend on the individual case. For example, there may be issues relating to finding an appropriate address for an individual subject to monitoring to reside. This may lead to a need for further support services in the future.

88. There are unlikely to be significant savings from individuals no longer in detention. This is because a large proportion of Ara Poutama costs are fixed costs that are unaffected by a reducing prison population.

89. There is also a piece of work required to determine the responsibilities of and costs to New Zealand Police.

90. Should Cabinet agree to Proposal B, more accurate costings will be available as officials work through implementation and the legislation is developed.

16 Based on the numbers of individuals detained in prison under the Immigration Act since 2015 (average of 147 each year). However, data has been updated to reflect the fact that due to operational changes since the Victoria Casey Report, there are likely to be fewer asylum claimants in detention going forward (officials estimate 0-5 per year, previously 16 per year).

17 Ara Poutama Aotearoa supported accommodation provides housing and other support for offenders with complex needs to help ease their transition back into the community.

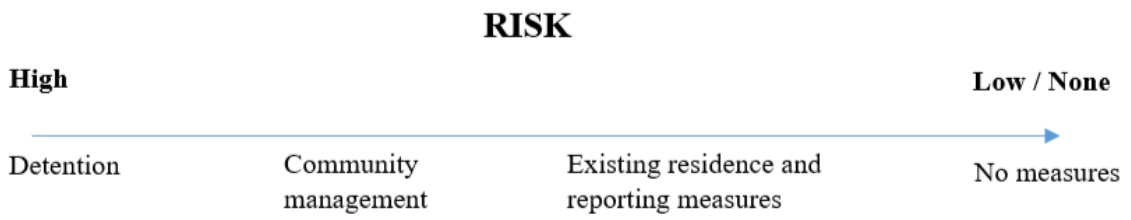
18 Since 2015, 81% of individuals were detained for up to 30 days, just over 90% for less than three months and just over 96% for less than six months . Asylum claimants are typically detained for much longer periods.

## Table Two: Proposal B – Summary of analysis against criteria

| Criteria | *Status quo* | Proposal B: Community management |
|---|---|---|
| **Effectiveness at preventing harm** | 0 | + Likely effective (lower risk)<br>• May not be effective at managing substantial or extreme risk (but existing detention mechanisms would be available for these cases). Would rely on tools such as electronic monitoring and curfews and existing provisions.<br>• Could reduce an individual's risk long-term if there is access to services and support, providing a potential pathway out of management.<br>• May create a safety risk for INZ staff or contractors in cases where they are dealing with higher risk individuals. |
| **Consistency with domestic and international law, including human rights** | 0 | + Moderate<br>• Restrictions could be designed to be proportionate to the level of risk presented. Courts would tailor restrictions to ensure proportionality.<br>• Designed to respond to some of the human rights concerns raised in the Victoria Casey Report. Because the proposals will only apply to asylum seekers while their claim for asylum is being considered, and other individuals while the process of deportation is underway, any discrimination is likely to be justified. |
| **Operational feasibility and cost** | 0 | - Moderate<br>• Confidential advice to Government<br>• INZ staff do not have expertise – would need to build or buy the expertise.<br>• Would require information sharing between agencies. |
| **Overall assessment** | 0 | + |

## Summary – Proposal B

- MBIE has identified *Proposal B: A community management framework* as the preferred option as it is likely to improve the status quo under the desired policy objective of preventing harm while being considered justifiable under the New Zealand Bill of Rights Act 1990.
- A community management framework adds to the existing management tools available under the Act (as demonstrated below) to ensure restrictions placed on individuals are proportionate to the risk posed (as deemed by the Courts), it also offers a more rights compliant option to manage asylum claimants who pose a risk, compared to detention options.




## What are the marginal costs and benefits of the option?

*Proposal A: Cancellation of residence class visa status*

| Affected groups | Comment. | Impact. | Evidence Certainty |
|---|---|---|---|
| **Additional costs of the preferred option compared to taking no action** | | | |
| Immigration NZ | Additional administration costs. INZ would need to continually grant temporary visas. However, anticipated costs would be low and would not require additional funding. | Low | Medium |
| Wider government | N/A | N/A | N/A |
| Refugee and migrant communities in NZ | Could negatively impact on social cohesion. | Low | Medium |
| New Zealand communities | N/A | N/A | N/A |
| Individuals who have their residence cancelled | Impacts their rights and privileges in New Zealand including the right to vote and own a home. Those who are not protected persons, refugees or asylum claimants will | Medium - high for a small number of individuals | N/A |

| Affected groups | Comment. | Impact. | Evidence Certainty |
|---|---|---|---|
| **Additional costs of the preferred option compared to taking no action** | | | |
| | also become ineligible for welfare support. | | |
| **Total monetised costs** | Additional administrative costs for INZ. Cannot be quantified at this time but are anticipated to be low. | Low | Medium |
| **Non-monetised costs** | Low | Low -Medium | Medium |
| **Additional benefits of the preferred option compared to taking no action** | | | |
| Immigration NZ | Additional tool available to deport people more swiftly in certain circumstances. | Low-Medium | Medium |
| Wider government | N/A | N/A | N/A |
| Refugee, migrant and minority ethnic communities | N/A | N/A | N/A |
| New Zealand communities | May be effective in preventing harm to communities in the event that deportation may be facilitated. Could be significant benefit should timeliness prevent an attack taking place. | Low-Medium | Medium |
| Individuals who have their residence cancelled | N/A | N/A | N/A |
| **Total monetised benefits** | N/A | N/A | N/A |
| **Non-monetised benefits** | May achieve benefits in reducing harm to New Zealand communities. | Low-Medium | Medium |

*Proposal B: Community management*

| Affected groups | Comment. | Impact. | Evidence Certainty |
|---|---|---|---|
| **Additional costs of the preferred option compared to taking no action** | | | |
| Immigration NZ | Significant costs for organisational change to establish new function. Confidential advice to Government . | High | High |
| Wider government | May be wider costs to other agencies such Police support and investigation, prosecution costs, and Corrections in the event conditions are breached. | Medium | High |

| Affected groups | Comment. | Impact. | Evidence Certainty |
|---|---|---|---|
| **Additional costs of the preferred option compared to taking no action** | | | |
| Refugee and migrant communities in NZ | May experience heightened uncertainties, including decline in social cohesion. | Medium | Medium |
| Wider NZ community | N/A | N/A | N/A |
| Individuals subject to community management | Restricts the freedom and liberty of those affected but less so than detention in a corrections facility. | Medium | N/A |
| **Total monetised costs** | Significant costs for organisational change to establish new function. Confidential advice to Government | High | High |
| **Non-monetised costs** | Medium | Medium | Medium |
| **Additional benefits of the preferred option compared to taking no action** | | | |
| Immigration NZ | Additional tool available to INZ to effectively manage individuals in the community.<br>Provides a more rights compliant option for the management of asylum seekers who pose a risk. | Medium | High |
| Wider government | N/A | N/A | N/A |
| Refugee and migrant communities in NZ | N/A | N/A | N/A |
| Wider NZ community | May result in reduced harm to communities as risk is more effectively managed. | Medium | Medium |
| Individuals subject to community management | Provides greater liberties and freedoms than being detained in a corrections facility, however more restrictions on liberty and freedoms that a RRRA. | N/A | N/A |
| **Total monetised benefits** | N/A | N/A | N/A |
| **Non-monetised benefits** | May achieve benefits in reducing harm to New Zealand communities. | Medium | Medium-High |

# Section 3: Delivering an option

## How will the new arrangements be implemented?

### Legislative Implications

91. The proposed options which depart from the status quo would require legislative change to implement. Confidential advice to Government

## Implementation

*Proposal B: A community management framework*

92. A minimum of 6-12months will be required for INZ to put in place a new community management function and to undertake procurement for services. An internal implementation workstream will need to be established, with a working group comprising MBIE and INZ representatives being tasked with developing terms of reference and key milestones. Further information on that work programme will be provided in the Cabinet Legislation paper prior to the introduction of the Bill.

93. There is also a piece of work required to determine the responsibilities of and costs to Corrections and the New Zealand Police.

94. It has been recommended that if Proposal B is progressed Cabinet agree to INZ working with community representatives in the design of any wraparound services available under the community management measures.

Implementation risks

95. Proposal B would create a new function for INZ under the Act that would be a change in business-as-usual activities. INZ does not currently have expertise in the management of individuals in the community (in relation to the provision of accommodation, mental and other health services and pastoral support). These services (for example, the administration of an electronic monitoring regime) would likely need to be contracted out.

96. There is a risk that there is not a suitable market available to procure these services, or suppliers may not be available at the desired implementation date. This risk may be mitigated by INZ/MBIE conducting an early procurement process to identify potential providers, including early engagement with providers who currently provide similar services in the community (such as supported accommodation providers in Corrections settings). Overall, we consider that there is an available market to deliver services of this nature, as shown through existing contracted providers that deliver similar services in Corrections settings, as well as global companies that are active in Australia.

97. In addition to the capability risks above, there is a broader risk that implementation of the community management option would not be possible if additional funding is not secured (even if legislation is passed). This may result in a delay between when the legislation is passed, when implementation may commence, and when the proposals may come into effect. There is also a risk that the any new powers provided through legislation would not be able to be used if additional funding is not secured.

## Communications

98. MBIE recommends that no public announcements on the proposed changes are made until the enabling legislation is approved for Introduction.

99. MBIE has also recommended that before an announcement is made, officials are empowered to work with selected stakeholders that provide support services and information to affected communities. This engagement will take the form of confidential discussions regarding the content of those announcements, and providing collateral for the organisations to use such as fact sheets and Questions and Answers sheets. This will set the groups up to support their communities if negative impacts are felt, and be a

source of accurate information explaining what is happening and how they can be involved – countering the spread of harmful misinformation early.

100. Many of these groups are already aware of this work at a high level as representatives of their organisations are members of Kāpuia, the Immigration Reference Group, or other stakeholders and subject matter experts that have already been consulted on this workstream. With Cabinet's approval, MBIE officials will provide the Minister of Immigration with an Action Plan setting out how this proactive engagement will take place and with whom, to be activated when an announcement is forthcoming.

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

101. Any review or monitoring mechanisms will aim to ensure that the appropriate processes have been implemented and that the desired policy objectives are being achieved. We propose that monitoring and review arrangements would take place in two parts:

- **Part One:** MBIE would undertake an initial implementation review 18 months after new arrangements have gone live. This would assess the appropriateness and effectiveness of new structures and processes and identify any areas for improvement (such as agency roles and responsibilities). A report would be provided to the Minister of Immigration with any recommendations identified through the review.
- **Part Two:** a comprehensive review to assess whether the new arrangements are achieving the desired policy objectives 5 years after new arrangements have gone live. It may be appropriate for this review to be completed by a third party for independence and transparency, similar to the recent Victoria Casey KC review into the detention of asylum seekers. A report would be provided to the Minister of Immigration with any recommendations identified through the review.

102. We note that the extent of this review will be subject to funding decisions taken alongside funding decisions for Proposal B, and that should funding not be secured this could limit the ability for successful evaluation of the proposals.

*Key measures that could be assessed (subject to what options are progressed)*

103. INZ/MBIE will work with partner agencies to monitor and evaluate the impact of proposed options. Potential key performance measures are outlined in the table below:

| **Proposal A: Cancellation of residence status** |
|---|
| • Number of applications to the Minister of Immigration to certify an individual as a threat or risk to security (including those that result in an Order in Council).<br>• The length and number of temporary visas granted in place of a resident visa. |
| **Proposal B: Community management** |
| • Number of individuals subject to community management or detention measures (compared against international jurisdictions per capita).<br>• The average length of time that individuals are subject to community management measures (compared against international jurisdictions per capita).<br>• Number of breaches of conditions (and nature of breaches), including response time to any breaches.<br>• Number of individuals who demonstrate a de-escalation in risk (i.e. they are no longer considered a risk and in need of management). |

## Appendix One – Summary of feedback received through consultation with subject matter experts

Consulted groups were provided with a discussion document summarising the three categories where changes might be proposed (deportation, detention and procedural improvements). Hui were then held across March and April 2022 to discuss their comments and written submissions received. The following table summarises the key points made. In most cases, these points were made by more than one group.

| Subject area | Summary of main points in feedback received |
|---|---|
| **Problem definition** | • The risk to NZ does not just come from those subject to the Immigration Act. The focus needs to be on addressing the risk all New Zealanders pose, including citizens.<br>• Targeting refugees and other groups without citizenship would be discriminatory in nature and will in fact stigmatise those groups.<br>• Quota refugees get support, but convention (asylum) refugees do not. It comes down to funding, and the money would be more effective if it was spent on services than detention/deportation and the subsequent legal battles.<br>• A key failing for migrant communities is a lack of understanding of their rights, what support is available and where to access it etc. There's a lack of awareness and cultural understanding in the professionals and govt departments working in this space, a lack of availability of legal professionals, and therefore they see their needs and support as being unimportant and forgotten about. This exacerbates all pre-existing issues/conditions that lead to problems.<br>• The failings in the *Samsudeen* case were not ones arising from the immigration legislation/landscape, they were failings in the criminal justice system and mental health system more widely. The *Samsudeen* case, from Amnesty International's perspective, actually showed the immigration legislation worked, not that it failed.<br>• We need to be looking at proactive work being done in the white nationalist terrorism space. The policy problem definition needs to address the acknowledged danger there. |
| **Consultation process** | • Stakeholders want more time to consult with deep discussions with all communities concerned.<br>• Need to engage with communities who deliver the support services and take a whānau ora approach. |
| **MBIE's stewardship role in the immigration system** | • That there is a need for more support for migrants and refugees in particular, to address the trauma they have suffered and support integration into New Zealand communities, to prevent radicalisation and the escalation in risk. Those consulted would welcome MBIE efforts to provide more of a stewardship role in this area.<br>• Response to question of MBIE stewardship roles and where the gaps are (workshop undertaken with multiple stakeholders presented):<br>  ○ We have a skills shortage in the de-radicalisation workforce, with regard to capability, capacity and development. We have to get resources from Australia because they don't exist here. They don't exist in Corrections.<br>  ○ Need seed funding to community groups to provide mosques and libraries – places people go to learn how to interact in life as a Muslim, not as an outcast.<br>  ○ Example of RAS funding sport for kids for many years as a really positive and pro-social way to provide integration and cohesion.<br>  ○ Link to MSD social cohesion work.<br>  ○ Refugee family reunification policy could use some work. The whole point to allow family members to come to NZ is to provide the support needed for integration and rebuilding a life. But there's a low number for how many people can come in, it takes so long for that to happen and they struggle in the meantime.<br>  ○ Need funding for lawyers and professional advice for the sponsor. Practitioners are finding assessors are putting people through the wringer as a sponsor (including by needing to provide assurance of housing for a long time period), when they don't know their rights or what information/support is available.<br>  ○ Need Corrections care model to be developed and implemented. |
| **Impact on affected communities** | • Any time you make changes to address risks posed by migrants, you feed the fire of racism against ethnic minority communities.<br>• Great care needs to be taken in how this is messaged, and how support services for those communities are prepared to be able to address the backlash that will inevitably arise against our Muslim and migrant communities. |
| **Deportation** | • Any changes to residence status or potential for deportation will have a destabilising effect on refugee and migrant communities. This destabilising effect will have the opposite outcome from what you're intending as it will harm mental health and inhibit integration and a sense of belonging, which fuels isolation and radicalisation.<br>• Deportation with assurances is contrary to human rights, including those enshrined in international law and NZBORA. The practice of deportation with assurances essentially waters down the global prohibition against torture and commitment to international laws and rules to prevent torture.<br>• Any monitoring is ineffective as it always relies on any diplomatic assurances and relationships with the country. Even cases of monitoring being delivered by the Red Cross have failed as torture has happened to the detainee. This is even less effective if the individual is at large in the community and not in detention (as for extradition).<br>• With diplomatic assurances there's a logic problem. If you're found to be a refugee or a protected person then that decision necessarily acknowledges that the state has failed to provide protection to you and cannot provide protection to you. How could you trust assurances from a failed state? |

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| | • Assurances are not binding (they're diplomatic), and they fail. For example, International relations<br>• Assurances have been used for deportation and extradition internationally without success – including cases of torture being used. There was a case where an individual was deported with assurances and then months later was interviewed in the home of an Al Qaeda stronghold – so actually became far more of a security risk after deportation than before.<br>• International relations<br>• Amnesty International has indicated they would fund a public campaign against this measure, were it to be progressed.<br>• International relations<br>• International relations<br>• The same body should be able to deal with cancellation of refugee status, cancellation of residency, and cancellation of citizenship. The citizenship question shouldn't go to DIA.<br>• There is an anomaly in the Act of issues of bad faith. If someone puts themselves in harm's way in order to force the need for protected person status (i.e. making a public disclosure of Tamil tiger status) the issue is not a protected person one in effect – it's an immigration one as they're doing it for an immigration purpose. If it's in the Act that the RSU can make a determination that someone is acting in bad faith, then why isn't it open to the IPT?<br>• Need to consider ring-fencing the deportation liability. If someone is in NZ from 3 years of age, doesn't apply for citizenship, then gets radicalised at 33. Should they be sent overseas? |
| **Management / detention** | • Options to better provide for the security and monitoring of refugee claimants (colloquially known as asylum seekers) in the community who would instead (under the status quo) be held in remand cells under a Warrant of Commitment is preferable, particularly if wrap around support services are included.<br>• There is scope to look at some improvements in this space, particularly in the community management end. More community-based responses and management would be welcomed by migrant communities. Culturally appropriate faith based mental health activities should be part of the wrap around support.<br>• Detention of refugees is contrary to human rights, including those enshrined in international law and NZBORA.<br>• In the two years prior to COVID NZ detained 54 of the 500/600 people who claimed refugee status, mostly because they couldn't establish their identity. 48 were held in prison, rather than the Mangere camp.<br>• Detention could be an available option for particular cases where a risk of harm to the public is established. There's no breach of rights there if due process is respected as your right to liberty doesn't trump other people's rights to safety. If they need to be detained forever, that's a political call as to whether that's palatable.<br>• With *Samsudeen*, there were detention options that weren't covered off by the Crown. More stringent sentencing options/conditions were available in his High Court case that weren't imposed. There also wasn't a mental health referral.<br>• Any decision around detention or any other option on the basis of responding to failures from *Samsudeen* is premature until the IPCA/Inspector General/Corrections Inspectorate review is published and then the coronial inquiry after that.<br>• Zaoui case raised concerns over detention being used in a civil system when it better belongs in the criminal system. What does national security concern in this case mean? When we look at Zaoui, the Crown used quite a wide definition that didn't actually pose a physical risk to New Zealanders. Do we want to capture Zaoui and a Russian oligarch with this? If not, ring-fence to violent outcome only.<br>• Judicial orders requiring people to attend programmes, be tagged, reside at an address etc are still not required by citizens but are required by migrants. So again, this could well be considered discriminatory. At the high end, people are subjected to orders in the basis of suspicion when their counterparts are not. And it will look like people of colour are being targeted. In many countries these measures are used on people of colour from a Muslim minority placed on different conditions than the people around them which becomes extraordinarily stigmatising and therefore counter-productive. All restrictions on human rights needs to be necessary and proportionate. And what is necessary and proportionate for a migrant may be different to those on a non-migrant. For example, work restrictions. But it's hard to see how any of those measures that we're considering that are necessary and proportionate when they're not necessary in the citizenship space. |
| **Procedural improvements** | • Procedural changes work when they're based on evidence and research, not legislative requirements.<br>• Rights of appeal and procedural fairness must be maintained, but if they are then improvements to the timeliness of cases would be welcomed by all parties.<br>• *Samsudeen* timeline of IPT hearings is available on their website (case reference 900008). There were 12 teleconferences and the IPT was prioritising it because of the risk.<br>• Expedited hearings is possible – would make sense to allow any party to apply for an expedited hearing on the grounds of the safety of themselves or another individual.<br>• Legal aid is holding things up – won't give a timely answer as to whether they are covered or not. Could consider a requirement for legal aid consideration prioritisation too. |

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| | • The hold up in procedural timeliness is not the IPT. They see through a case in 6 months.4 months of that is lawyer prep time.<br>• To get to the SC takes 6 hearings due to the need to seek leave and be substantively heard if leave is granted. Consider this scenario:<br>  ○ Decision is made.<br>  ○ Application for leave to appeal to the HC is heard (declined). This is an interlocutory proceeding.<br>  ○ Leave is sought to appeal that decision not to give leave to appeal (appealing an interlocutory matter).<br>  ○ There's a hearing for application to seek leave, if it's allowed this time then it will progress on appeal with an additional two hearings in between. If it's declined, then that's an additional two hearings that weren't necessary.<br>• There used to be a bar on interlocutory appeals, which the Court of Appeal changed a few years back. Could reinstate that.<br>• No cross-over between special advocates for the use of National Security Information and immigration specialists. Need to have an immigration specialist appointed PLUS a special advocate. |