Impact Summary: Warrant of commitment

Section 1: General information

Purpose
The Ministry of Business, Innovation and Employment is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing final decisions to proceed with a policy change to be taken by or on behalf of Cabinet

Key Limitations or Constraints on Analysis
• *Describe any limitations or constraints — both those listed below and any others you have identified:* • *Scoping of the problem* • *Evidence of the problem* • *Range of options considered* • *Criteria used to assess options* • *Assumptions underpinning impact analysis* • *Quality of data used for impact analysis* • *Consultation and testing*
The key constraints on analysis are: • **Time** – the need for the proposal was identified through an inter-agency contingency and operational planning process working towards the potential for immediate situation or scenario. • **Options** –The changes considered are to improve the working of the current arrangements. Fundamental changes to the process to manage an unscheduled irregular group arrival are not in scope, immediate remedies to the current legislative settings have been prioritised. • **Evidence** – the evidence of the problem is limited by the fact that New Zealand has never had an irregular group arrival and an irregular arrival warrant has never been applied for, although the experience of other countries provides a useful counterfactual. • **Consultation and testing** – Proposals were developed closely with the agencies which would be involved in an operational response, but not more broadly with the wider community, due to time constraints and operational security concerns.
Responsible Manager (signature and date):
Kirsty Hutchison Immigration (Borders and Funding) Policy, Employment, Skills and Immigration Policy Labour Science and Enterprise Ministry of Business, Innovation and Employment Date: 3 June 2022

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

- *Describe the current situation and how it is expected to develop if no action is taken, over and above what is already intended. This is the "counterfactual" against which other options should be assessed, and your preferred option described, in section 4.*
- *Why does the current situation constitute "a problem", or why is it expected to do so if it continues?*
- *What is the underlying cause of the problem? Why does government need to act – why can't individuals or firms be expected to sort it out themselves, under existing arrangements?*
- *Why does it need to be addressed now?*
- *How much confidence is there in the evidence and assumptions for the problem definition?*

Certain provisions in the Immigration Act 2009 to manage an unscheduled irregular group arrival are unclear and give inadequate time to meet natural justice and human rights requirements under the Bill of Rights Act 1990 (BORA).

Enabling individual members of the group to have access to legal representation and to oppose the application and appear in the Court to be heard (ie an on-notice application) is an important part of delivering on our commitments to human rights and natural justice, under both domestic and international law.

In the absence of due process, there is a likelihood of a warrant application being refused, or, if granted, overturned on appeal. Either of these would mean members of the irregular arrival group would be released with or without conditions by the Courts into communities in the early stages of the response, reducing our ability to provide them with timely medical care and ensure safe accommodation, and before security concerns can be investigated and eliminated,

The release gives rise to significant risks to the effective management of the response, to public health and security, and to the proper functioning of New Zealand's immigration and court systems.

- In the event of a large scale unscheduled arrival of irregular migrants to New Zealand, it is important that government can manage the response in an orderly and safe manner; and that, in doing, so we protect the rights of those involved and hold the perpetrators of people smuggling and trafficking to account.
- A potential maritime arrival of an unscheduled group of irregular migrants to New Zealand also poses significant risks to our national security and the wider public, including to public health, security and the integrity and efficient running of our court and immigration systems. Responding to such an arrival would be complex and costly to manage and would involve a large number of agencies and resources.
- Unique and complex circumstances are involved in managing the arrival of an unscheduled irregular group, compared to responding to irregular migrants arriving through regular controlled routes (e.g. at an airport). For example, issues include the volume of individuals, likely complex and immediate health needs, [redacted] National security or defence, Maintenance of the law [redacted]

2.1 What is the policy problem or opportunity?

- As a result, current provisions in the Immigration Act 2009 already provide for detention of members of an irregular arrival group for up to 96 hours without warrant. Recognising this timeframe is unlikely to be adequate to manage an arrival, the Act also provides for continued detention to be sought, if an irregular arrival warrant of commitment is obtained from the Court before the initial 96 hour period expires. If a warrant of commitment is not granted within the 96 hours, the power to detain members of the group expires and the migrants must be released without conditions.
- However, the current provisions in the Act for seeking a warrant of commitment provide inadequate time for a Court to meet natural justice and human rights protections under the BORA. The processes required to meet natural justice principles include the right to seek legal representation and to a fair hearing. These would require longer than 96 hours to complete for a large group where multiple warrant applications would be needed. Although the legislation defines an irregular arrival group as more than 30 people, this is a minimum level, and other countries have seen large boats arrive with hundreds of passengers.
- If warrants were sought on an ex parte basis (without representation or hearing), a District Court Judge is unlikely to hear or grant the warrant application. If the Judge did grant the warrant ex parte, it is highly likely an appeal would be successful on the grounds the warrant would be inconsistent with the BORA (because the members of the irregular arrival group did not have the opportunity for legal representation or individual oral hearings). In both circumstances, this means the migrants would be released, with or without conditions.
- If the current legal provisions remain un-amended, this situation gives rise to risks to New Zealand to our national security and the wider public, including to public health, security and the integrity and efficient running of our court and immigration systems.
- Immigration detention must be minimised for each individual. This means that, as the Act and the BORA already establish, it must be for the least possible time and in the least restrictive facility which is commensurate with achieving the lawful purposes for which people are detained. Other options available, which must be regularly considered for each individual, include accommodation in a low or no security facility and release into the community on conditions (such as reporting conditions) or without conditions.
- It is critical that members of an irregular arrival group are detained appropriately in order to manage risks to the public and national security and to investigate criminal migrant smuggling activity. It will take time and resources to establish the identity of members of the irregular arrival group, National security or defence, Maintenance of the law, and conduct national security checks.
- Appropriate and proportionate detention also supports the safe and orderly processing of the irregular arrival group. Well-managed housing and detention of migrants is important for the efficient processing of the irregular arrival group. It means that refugee claims, visa applications, and (where appropriate) deportation processing or settlement can be managed efficiently. As above, this is important not only to manage the cost to government, but also to minimise the time that members of an irregular arrival group are left in an uncertain position. Detention also enables the efficient provision of services to the migrants, such as adequate accommodation, health services, and education for minors, in a manner that ensures that their human rights are met.

2.2 Who is affected and how?

- *Whose behaviour do we seek to change, how is it to change and to what purpose?*
- *Who wants this to happen? Who does not?*

These provisions impact on members of the irregular arrival group, both passengers and crew, which may include potential refugees or protected persons, economic migrants, National security or defence, Maintenance of the law and crew.

The provisions also impact on government agencies and organisations supporting the response, and the wider New Zealand public, due to the potential impacts on security, public health and the functioning of our immigration and courts systems.

We wish to ensure the safe and orderly processing of the irregular arrival group, while managing these impacts and protecting the rights of those involved, and holding to account those perpetrating the criminal offence of people smuggling or human trafficking.

The early release of members of an irregular arrival group could result in dispersal of the group. New Zealand agencies would like to be able to manage the movement of the members of the irregular arrival group, National security or defence, Maintenance of the law It is important that migrants are accessible to agencies, to ensure that processing (particularly of asylum and protection claims) runs smoothly.

National security or defence, Maintenance of the law

Many low risk members of an irregular arrival group would likely rather have no restrictions to their movement. However, National security or defence, Maintenance of the law access to the accommodation and services that can be provided efficiently and humanely under the proposed detention arrangements National security or defence, Maintenance of the law

There are constraints on being able to accommodate people on different conditions (eg some people invited to reside, others in detention) National security or defence, Maintenance of the law

This proposal will restore natural justice to those people for whom a warrant of commitment is being sought. Rather than the ex parte process necessary to meet the current 96-hour deadline, the proposal enables an on-notice process and time for legal representations to be heard.

Some human rights advocates have in the past argued against the need for an irregular arrival warrant of commitment. However, they would likely support the objective of restoring natural justice with regard to legal representation to ensure consistency with the Bill of Rights Act.

However, this proposal raises the risk of applicants being subject to arbitrary detention, which is also a denial of human rights. To reduce this risk, it is also proposed that the Court be required to explicitly prioritise consideration of the application or applications.

2.3 Are there any constraints on the scope for decision making?
• *What constraints are there on the scope, or what is out of scope? For example, ministers may already have ruled out certain approaches.* • *What interdependencies or connections are there to other existing issues or ongoing work?*
• The changes considered are to improve the working of the current arrangements. • Fundamental changes to the irregular arrival arrangements are out of scope. The introduction of a mandatory detention regime for example, has not been considered as part of this process. • These changes do not have any connections to other ongoing work at this stage.

Section 3: Options identification

3.1 What options have been considered?

- *List the options and the criteria you used to assess them. Briefly describe their pros and cons.*

The following options were considered:

No change to legislation (with non-legislative mitigations)

- **Pros:** Ex-parte applications are quicker and require less resourcing than on-notice applications in the first instance. This process would shorten the period of detention without warrant, which is a positive aspect for the irregular migrants. If the 96 hours was reached without warrants being approved, it would likely lead to most or all of the irregular migrants being released without conditions. If successfully challenged (on natural justice grounds) it would likely lead to most or all of the irregular migrants being released with conditions. Both outcomes would be positive in terms of release for many of the irregular migrants, National security or defence, Maintenance of the law
- **Cons:** From the Crown and community perspective the status quo option has a high likelihood that irregular migrants National security or defence, Maintenance of the law could otherwise find it difficult to access accommodation and services such as medical care.

Make ex-parte application explicit for irregular arrival warrants. This would likely require applying for a short term (eg 28 days) and undertaking to apply for any extension on-notice after that.

- **Pros:** As for the first option (as ex parte applications are the only option).
- **Cons:** It could be more expensive for the Crown than option 1 (a second application would be required after 28 days, or whatever term was decided, and the costs of a likely appeal). A warrant of commitment granted on an ex-parte basis would breach natural justice principles and would have a high risk of being invalidated through legal challenge. This would result in the release of the group, which would mean risks to the public and to the management of the group. As for option 1, some group members released National security or defence, Maintenance of the law and could otherwise find it difficult to access accommodation and services.

Require the application to be made within 96 hours but allow for continued detention beyond 96 hours where an application for an irregular arrival warrant is before the courts. This could enable an application for a period up to 6 months. [Recommended option]

- **Pros:** This reduces or eliminates the risk that irregular migrants are released into the community without any conditions early in the irregular arrival response due to a failure to obtain an irregular arrival warrant of commitment. Compared with the ex parte process of the first two options, it would also be more consistent with the Bill of Rights and less subject to a risk of legal challenge on the grounds on natural justice, through enabling the irregular migrants to have legal representation. This option means that

risks to the public are managed on an ongoing basis, and that members of an irregular arrival group are accessible for the efficient delivery of housing, health and education services and the processing of refugee claims and visas, and are able to access those services.

- **Cons:** The warrant of commitment process requires more time and resourcing for the Crown initially than an ex-parte process. However, it would be more efficient than option 2, as there would be no need to apply again after a short ex-parte period (eg 28 days). The proposal also means that members of an irregular arrival group would be detained for a longer period without a warrant, noting that officials consider that the risk of arbitrary detention would be low, as it would be supervised by the Court.

  The objective of ensuring as brief a timeframe as possible would be supported by explicitly requiring the Court to prioritise consideration of warrant of commitment applications (this is already the case for certain Immigration cases – see s s 250 of the Immigration Act 2009). This objective could also be supported by streamlining processes and increasing legal aid resources.

3.2 Which of these options is the proposed approach?

- *Which is the best option? Why is it the best option?*
- *How will the proposed approach address the problem or opportunity identified?*
- *Identify and explain any areas of incompatibility with the Government's 'Expectations for the design of regulatory systems'.*
  See http://www.treasury.govt.nz/regulation/expectations

On balance, the best option is to allow for continued detention beyond 96 hours where an application for an irregular arrival warrant is before the courts. This is the best option because it would:

- ensure consistency with BORA from a natural justice perspective
- National security or defence, Maintenance of the law
- enable all members of an irregular arrival group to be appropriately housed and provided with medical care (and education, if minors)
- be efficient (by enabling the first application to cover the full period of detention).

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits
Summarise the expected costs and the benefits in the form below. Add more rows if necessary. *Give monetised values where possible. Note that only the **marginal** costs and benefits of the option should be counted, ie costs or benefits additional to what would happen if no actions were taken. Note that "wider government" may include local government as well as other agencies and non-departmental Crown entities.* *See http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis/x/x-guide-oct15.pdf and http://www.treasury.govt.nz/publications/guidance/planning/costbenefitanalysis for further guidance*

Affected parties *(identify)*	**Comment**: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*
Additional costs of proposed approach, compared to taking no action		
Regulated parties	Members of an irregular arrival group would lose freedom of movement that would have if detention powers were to expire. Longer period of detention without a warrant.	Low
Regulators	Higher initial costs for INZ to service an on-notice application (offset by longer detention period)	Low
Wider government	Higher initial costs for Court to service an on-notice application (offset by longer detention period)	Low
Other parties		
Total Monetised Cost		
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		
Regulated parties	Faster processing of refugee claims and less time in limbo (as a result of more efficient irregular group arrival response)	Medium
Regulators	Ensure integrity of immigration system More efficient visa, refugee and deportation processing, due to effective management of the group.	High
Wider government	Efficient delivery of services (Health, Education) or investigations (Police, NZSIS).	High
Other parties	The wider public benefits from more effective management of risks	Medium
Total Monetised Benefit		
Non-monetised benefits		High

4.2 What other impacts is this approach likely to have?

- *Other likely impacts which cannot be included in the table above, eg because they cannot readily be assigned to a specific stakeholder group, or they cannot clearly be described as costs or benefits, eg equity impacts*
- *Potential risks and uncertainties*

There may be risk to New Zealand's international reputation, on the basis that this proposal enables detention without warrant of an undetermined duration (although timeframes are established in the proposed amendments). The irregular arrival group warrant of commitment was criticised by human rights organisations when it was put in place in 2013.

However, this risk can be managed by emphasising that the proposal will ensure natural justice in terms of legal representation for members of an irregular arrival group, and that the risk of arbitrary detention is low because consideration of applications will be prioritised and detention will be supervised by the Court.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?
• *Who has been, or will be, consulted, and at what stage(s)? Has consultation with iwi/hapū occurred, or should it?* • *What is the nature of their interest?* • *Do they agree with your analysis of the problem and its causes?* • *Do they agree with your proposed approach?* • *Has your proposed approach been modified as a result of stakeholder feedback?*
Only government agencies have been consulted. All agencies support the proposals. The initial introduction of the irregular arrival warrant of commitment (through the Immigration Amendment Act 2013 – at that point called a mass arrival warrant of commitment) went through the standard legislative process and committee review. Stakeholder groups objected to the warrant of commitment arrangements, saying they amounted to mandatory or arbitrary detention. This proposal does not fundamentally change the irregular arrival warrant of commitment regime – it just enables more time for the Court to follow due process and ensure natural justice rights. The groups would have concerns about prolonged detention without a warrant, but would likely prefer it to making an ex-parte process explicit.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

• *How is the proposed approach to be given effect? Eg,*
  ○ legislative vehicle
  ○ communications
  ○ transitional arrangements
• *Once implemented, who will be responsible for ongoing operation and enforcement of the new arrangements? Have they expressed any concern about their ability to do so?*
• *When will the new arrangements come into effect? Does this allow sufficient preparation time for regulated parties?*
• *How will implementation risks be managed or mitigated?*

• The proposed approach will require legislative change to the Immigration Act 2009. • The Ministry of Business, Innovation and Employment (MBIE) administers the Act. MBIE will be responsible for submitting one or more warrants of commitment within the 96 hour period. • The District Court has time to consider the application or applications in a manner consistent with BORA. • The changes will come into effect immediately. There is no need to provide preparation time.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

• *How will you know whether the impacts anticipated actually materialise?*
• *System-level monitoring and evaluation*
  ○ Are there already monitoring and evaluation provisions in place for the system as a whole (ie, the broader legislation within which this arrangement sits)? If so, what are they?
  ○ Are data on system-level impacts already being collected?
  ○ Are data on implementation and operational issues, including enforcement, already being collected?
• *New data collection*
  ○ Will you need to collect extra data that is not already being collected? Please specify.

We will know that our arrangements are successful if: • members of an irregular arrival group are effectively detained while an application is with the Courts. • once in place, detention arrangements are not successfully legally challenged This data will be collected in the event of an irregular group arrival by Immigration New Zealand.

7.2 When and how will the new arrangements be reviewed?
• *How will the arrangements be reviewed? How often will this happen and by whom will it be done? If there are no plans for review, state so and explain why.* • *What sort of results (that may become apparent from the monitoring or feedback) might prompt an earlier review of this legislation?* • *What opportunities will stakeholders have to raise concerns?*
The Irregular Arrival Control and Processing Plan, and agency readiness to deliver it, is regularly reviewed. The next opportunity to review the legislation would likely be either: • the next comprehensive review of the Immigration Act • after New Zealand's first irregular arrival group.

RIARP Quality Assurance Statement
Overall Opinion on Quality of Analysis

Title of Paper: Warrant of commitment

Date: Tuesday 11 November 2019

RIARP Recommendation:

RIARP confirms that its feedback is reflected in the Regulatory Impact Summary. The Regulatory Impact Summary has undergone minor changes as a result of the RIARP process.

The RIARP reviewer recommends that you authorise the inclusion of the following paragraph in the Cabinet Paper under the heading *Impact Analysis*:

> MBIE's Regulatory Impact Analysis Review Panel has reviewed the attached Regulatory Impact Summary prepared by MBIE. Limited consultation means that the Regulatory Impact Summary does not fully meet the Regulatory Impact Analysis criteria. However the Panel notes the urgency of the proposed changes in order to ensure consistency with BORA from a natural justice perspective, enable all members of a mass arrival group to be appropriately housed and provided with medical care, and prevent the release of potentially high risk members of a mass arrival group.
>
> On this basis, the Panel considers that the information and analysis summarised in the Regulatory Impact Summary partially meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper.

Kate Challis
RIARP Chair

Director of Regulatory Systems Statement:

I approve the inclusion of the recommended statement in the Cabinet Paper under the heading *Impact Analysis*.

Mark Steel
Director, Regulatory Systems
Strategic Policy and Programmes
Ministry of Business, Innovation and Employment