

Regulatory Impact Statement: Clarify deportation liability is a consequence of criminal offending

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet policy decisions
Proposal	To amend the Immigration Act 2009 (the Act) to clarify that people who have pleaded guilty to, or are found guilty of, a criminal offence are liable for deportation if they would otherwise have met existing thresholds set out in section 161
Advising agencies:	The Ministry of Business, Innovation and Employment (MBIE)
Proposing Ministers:	Minister of Immigration
Date finalised:	4 September 2024
Problem Definition	
<p>Deportation liability is intended to be the purview of the immigration system, with right of appeal through the Immigration and Protection Tribunal (IPT). The Act sets out a graduated framework for deportation liability for residence class visa-holders who receive a criminal conviction.</p> <p>However, the deportation liability provisions are not triggered if a residence class visa-holder is discharged without conviction, even if a person has been found or plead guilty. Furthermore, a recent Supreme Court judgment means that judges must take into account the likelihood of a conviction triggering deportation liability when considering whether to discharge an offender without conviction.</p> <p>There is an opportunity to close this legislative gap and clarify the seat of decision making for deportation liability.</p>	
Executive Summary	
<p>MBIE has identified an opportunity to strengthen the integrity of the immigration system by amending the Act to clarify that residence-class visa-holders who are guilty of criminal offending are liable for deportation, subject to existing legislative thresholds, irrespective of whether they are discharged without conviction or not.</p> <p>This clarification is needed to address an unintended consequence of current legislative design whereby residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts.</p> <p>The overarching objective of this suite of proposals is to enhance the integrity of the immigration system. A sub-objective for this proposal is to clarify the statutory “good behaviour bond” intended by s161 whereby residence-class visa-holders may jeopardise their immigration status due to criminal offending.</p>	

We have analysed two options:

- Option One: status quo.
- Option Two: amend the Act to clarify that deportation liability is a consequence of criminal offending rather than criminal conviction **(preferred)**.

The preferred option will clarify the policy intent by ensuring that residence-class visa-holders are unable to avoid deportation liability at the discretion of sentencing decisions in the Criminal Courts. This supports the objectives of our deportation provisions and also ensures regulatory coherence with the established avenue to appeal to the IPT against deportation liability on the basis of exceptional humanitarian circumstances.

Limitations and Constraints on Analysis

The Minister of Immigration's expectation is that the Bill and subsequent amendments to the Immigration (Visa, Entry, Permission, and Related Matters) Regulations 2010 (the Visa Regulations) will be in place before the end of 2025. These timeframes mean that external consultation before Cabinet decisions has been limited to informing key stakeholders through one-on-one meetings and receiving their initial feedback on the proposals. We have not undertaken significant engagement (such as through discussion documents seeking detailed comments).

Engagement on an Exposure Draft of the Bill will occur later in 2024 ahead of Cabinet Legislative Committee decisions.

We informed the following stakeholders of the proposals between 29 July and 9 August 2024:

- BusinessNZ
- the Employers and Manufacturers Association
- the New Zealand Council of Trade Unions
- the New Zealand Law Society
- the Office of the Ombudsman
- Immigration New Zealand's (INZ) Immigration Focus Group.

Responsible Manager(s) (completed by relevant manager)

Stacey O'Dowd

Manager, Immigration (Border and Funding) Policy, Labour, Science and Enterprise, MBIE



4 September 2024*

*Information in Annex One was updated in November 2024.

Quality Assurance (completed by QA panel)

Reviewing Agency:	MBIE
Panel Assessment & Comment:	A Quality Assurance panel with representatives from MBIE has reviewed the RIS <i>Immigration Amendment Bill (System Integrity proposals)</i> . The panel has determined that each RIS provided meets the quality assurance criteria.

Section 1: Diagnosing the policy problem

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

The Act provides a graduated framework for determining deportation liability of residence class visa-holders with criminal convictions

- 1 The immigration system regulates the flow of people into New Zealand. The purpose of the Act is to “manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals”.
- 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.
- 3 Part 6 of the Act sets out the broad framework for deportation liability of non-citizens and associated procedures within the immigration system. The purpose of Part 6 is to support the integrity of New Zealand’s immigration system and the security of New Zealand, by prescribing the system for the deportation of people who are not New Zealand citizens and who fail to comply with immigration requirements, commit criminal offences, or are considered to pose a threat or risk to security.
- 4 Section 161 of the Act sets out a graduated framework by which residence-class visa-holders are liable for deportation for criminal offending. Liability depends on a combination of factors, including when the person first held a residence-class visa and its relation to the date of the offending, and the sentence received, or potential sentence the Court could impose.
- 5 There are three main tiers when determining deportation liability under s161:
 - i. First – when a residence-class visa-holder is convicted of an offence and that offending occurred while they were unlawfully in New Zealand, held a temporary visa, or not later than two years after first holding a residence-class visa. The offence must be one which the Court has the power to impose imprisonment for a term of three months or more; they do not have to actually be sentenced to three months’ (or longer) imprisonment.
 - ii. Second – when a residence-class visa-holder is convicted of an offence, and that offending occurred not later than five years after first holding a residence-class visa, and the Court has the power to impose imprisonment for a term of two years or more. Again, they do not have to be sentenced to two years’ imprisonment, but they must be convicted, and the Court must have the power to impose two years’ imprisonment or more.
 - iii. Third – when a residence-class visa-holder is convicted of an offence and that offending occurred not later than 10 years after first holding a residence-class visa. The Court must have the power to impose imprisonment for a term of five years or more for a person to be liable under this tier.

The graduated framework takes into consideration connection to New Zealand and level of offending

- 6 The graduated framework intends to balance the national interest with the rights of individuals. It establishes a lower bar for deportation liability for people who offended while in New Zealand on a temporary basis (if they now hold a residence-class visa) or have a less established connection to New Zealand, relative to people who have lived in New Zealand as residence-class visa-holders for a longer period.
- 7 The framework effectively creates a statutory 'good behaviour bond' for new residence-class visa-holders, where even minor offending may put their immigration status in jeopardy. For example, traffic offences may lead to liability for deportation for new residence-class visa-holders, but not for longer-term residence-class visa-holders.
- 8 This 'good behaviour bond' takes into consideration the length of time for which a residence-class visa-holder has been in New Zealand. This is important because residence-class visa-holders who have been in New Zealand for some time are likely to have close community connections and family in New Zealand, may have spent formative years in New Zealand (i.e. came here as children), and may have contributed to New Zealand through their employment.
- 9 The s161 provisions, therefore, are intended to give a clear, statutory direction on when compliance action can be taken against residence-class visa-holders on account of criminal offending and enable immigration risks to New Zealand to be managed.
- 10 If a residence-class visa-holder is liable for deportation under s161, the Minister of Immigration (or their delegate), may, in their absolute discretion, make a decision to cancel or suspend their deportation liability. If the Minister determines that the residence-class visa-holder should be deported, the visa-holder will have a right of appeal to the IPT on humanitarian grounds.
- 11 Section 207 of the Act provides that the IPT must allow an appeal against liability for deportation on humanitarian grounds where it is satisfied that:
 - i. there are there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
 - ii. it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand.

Section 161 does not capture people who have been discharged without conviction

- 12 The specific wording of s161 means that deportation liability is determined first and foremost by a criminal conviction.
- 13 Because criminal deportation liability provision relies on a conviction, in instances where a person is discharged without conviction under s106 of the Sentencing Act 2002, s161 of the Act is not triggered and they are not automatically liable for deportation. Section 106(1) of the Sentencing Act 2002 requires a person to be found guilty or plead guilty before a discharge can be considered.
- 14 MBIE is aware of a number of instances in which residence-class visa-holders have been discharged without conviction for criminal offending for which they would otherwise have been liable for deportation.

- 15 This undermines the intention of s161 and means that residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts.

Scale of the issue

- 16 Unfortunately, neither MBIE nor the Ministry of Justice (MOJ) hold reportable data on the number of discharges without conviction that specifically relate to the immigration system.
- 17 What we can glean is that in 2023, there were 4,403 charges that resulted in an outcome of discharge without conviction (this is the entire discharge without conviction cohort, rather than the residence class visa-holding subset).¹ Of those, the most common offence type was traffic and vehicle regulatory offences (33 per cent of discharges without conviction), but 20 per cent of charges with a discharge without conviction outcome were for assault (acts intended to cause injury) offences. A further 12 per cent of discharges without conviction related to dangerous or negligent acts endangering persons.

Decisions to discharge without conviction must weigh the consequences of a conviction with the gravity of offending

- 18 Section 107 of the Sentencing Act 2002 sets out that, when determining whether an offender can be discharged without conviction, the court must determine whether the consequences of a conviction would be out of all proportion compared to the gravity of the offence. This means that decisions to discharge without conviction are at the discretion of the courts, subject to consideration of the consequences of a criminal conviction against the offending.
- 19 A recent Supreme Court decision (*Bolea v R* [2024] NZSC 46) has determined that, if credible evidence shows that a deportation liability notice will typically be issued on conviction, both the risk of deportation liability and the subsequent risk of deportation should be treated as consequences of a conviction.
- 20 This means that if credible evidence suggests that deportation liability would be triggered by a conviction, this outcome must be considered when determining whether the consequence of conviction (i.e. deportation liability) would be out of all proportion compared to the gravity of the offence. Given deportation is generally considered to be a serious consequence, the proportionality limb of s107 of the Sentencing Act is likely to be weighted in cases involving residence-class visa-holders.
- 21 In effect, this means that:
- i. potential deportation liability for criminal offending, as set out in the Act, can be treated as a factor in sentencing, which undermines the objective of the s161 provisions to support the integrity of New Zealand's immigration system and the security of New Zealand,
 - ii. the statutory 'good behaviour bond' is undermined if a residence-class visa-holder can avoid deportation liability through a discharge without conviction, and

¹ Offence and charge outcomes. *Ministry of Justice*. [Data tables | New Zealand Ministry of Justice](#).

- iii. residence-class visa-holders have grounds to obtain a discharge without conviction that isn't available to New Zealand citizens.

What is the policy problem or opportunity?

- 22 There is a government regulatory failure with the design of s161 settings, which means that outcomes can be misaligned with the original policy intent. This has been made more apparent through the recent Supreme Court decision.
- 23 There is nothing to indicate that deportation liability for criminal offending was intended to exclude people who have pleaded guilty or been found guilty of criminal offending but discharged without conviction. The Act already provides avenue for people liable for deportation to appeal on humanitarian grounds and sets out the considerations that must be made for such a decision. As noted above, the IPT must consider whether there are exceptional humanitarian circumstances that would make it unduly harsh on unjust to deport a criminal offender from New Zealand when considered against the public interest.
- 24 There is an opportunity to strengthen the integrity of the immigration system by amending the Act to clarify that residence-class visa-holders who are guilty of criminal offending are liable for deportation, irrespective of whether they are discharged without conviction or not. Residence-class visa-holders will therefore not be able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts but will continue to be able to appeal to the IPT on the basis of exceptional humanitarian circumstances.
- 25 There is precedent for this sort of provision: under s383(1)(b) of the Companies Act 1993; discharge without conviction can disqualify a New Zealander from being a company director.

Stakeholders impacted by the problem

- 26 We have identified the following affected groups and the nature of their interest:
 - i. **Regulated group:**
 - Residence-class visa-holders who commit criminal offences.
 - ii. **Regulators:**
 - MBIE's Resolutions team, which supports decision-making on deportation liability for residence-class visa-holders and requests for Ministerial intervention
 - MBIE's Immigration Compliance and Investigations (ICI) team, which undertakes investigation and compliance activities for instances of non-compliance with the Act
 - the IPT, which considers humanitarian appeals on deportation liability
 - the Criminal Courts, which consider requests for discharge without conviction under s106 of the Sentencing Act 2002.
- 27 The population group mostly impacted are migrants. We consulted with the Ministry for Ethnic Communities, Ministry of Justice, and Ministry for Pacific Peoples, who had no adverse reactions to the proposal.

- 28 We also held initial discussions with key stakeholders (BusinessNZ, the Employers and Manufacturers Association, the New Zealand Law Society, the Office of the Ombudsman, and INZ's Immigration Focus Group) on the proposals and no significant concerns were raised. We will undertake more substantive engagement with stakeholders on an exposure draft following Cabinet policy decisions.

What objectives are sought in relation to the policy problem?

- 29 The overarching objective across the suite of proposals is to enhance the integrity of the immigration system. A sub-objective specific to this proposal is to close a legislative gap by clarifying the statutory 'good behaviour bond' intended by s161 whereby residence-class visa-holders may jeopardise their immigration status due to criminal offending.
- 30 These objectives align with the Government's commitment to ensure that regulatory systems remain fit for purpose and work well.

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

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

- 31 The following criteria, which support the objectives identified for this proposal, have been developed to guide the analysis:
- i. **Supports the integrity of the immigration system:** Option ensures that residence-class visa-holders who are guilty of criminal offending are liable for deportation and are subject to the existing statutory appeals framework, by clarifying the rules around deportation liability as set out in the Act rather than being determined through sentencing decisions, and
 - ii. **Ease of implementation:** Option supports a seamless implementation process and is feasible operationally, with limited additional costs for government.

What scope will options be considered within?

- 32 As part of the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill, the Minister of Immigration has agreed to address a gap in Part 6 of the Act specific to residence-class visa-holders who are guilty of criminal offending and should be liable for deportation, irrespective of whether they are discharged without conviction or not.
- 33 Options have been considered within the parameters set out in the purpose section of the Act.

What options are being considered?

- 34 Two options are being considered:
- i. **Option One:** Status quo – Continue with current provisions and no change to s161 of the Act. This means residence-class visa-holders are able to avoid deportation liability through the discretion of sentencing decisions of judges in the Criminal Courts (**not recommended**).
 - ii. **Option Two:** Amend s161 of the Act to clarify that deportation liability for criminal offending applies where a residence-class visa-holder is "found guilty or pleaded guilty" of an offence as set out in s 161(1)(a) - (d) (**preferred**).

- 35 There are no non-regulatory options being considered as the problem identified is due to a regulatory failure identified with current legislation.

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

- 36 **Table Two** sets out analysis of the two options against the criteria established under paragraph 31.

Table Two: Analysis of options against key criteria

	Option One: Status Quo – Continue with current provisions and no change to s161 of the Act.	Option Two: Amend s161 of the Act to clarify that deportation liability is a consequence of criminal offending
Supports the integrity of the immigration system	<p>-1</p> <p>Option One maintains existing settings, which contain a known gap that allows residence-class visa-holders to circumvent intended policy. This undermines the objective of the s161 provisions to support the integrity of New Zealand's immigration system and the security of New Zealand by limiting the ability for New Zealand to deport a non-citizen for criminal offending.</p>	<p>3</p> <p>Option Two supports the integrity of the immigration system by ensuring that:</p> <ul style="list-style-type: none"> • residence-class visa-holders can be liable for deportation for criminal offending, even if they are discharged without conviction, and • humanitarian considerations are considered through the established statutory appeals framework, rather than sentencing decisions.
Ease of implementation	<p>0</p> <p>Option One requires no additional implementation effort as maintains status quo.</p>	<p>1</p> <p>Option Two will have low costs to implement. A Memorandum of Understanding will need to be developed between MBIE and MoJ to enable data-matching on discharges without conviction for residence-class visa-holders.</p> <p>There may be a small increase in the numbers of people liable for deportation, which may have a small impact on MBIE's Resolutions team and IPT resourcing.</p>
Overall assessment	-1	4

Scoring scheme against criteria

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

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

- 37 MBIE recommends Option Two as it clearly meets the two criteria.
- 38 This option will address a government regulatory failure, which has allowed for unintended consequences due to the design of the legislative provisions for deportation liability for criminal offending. It will support the integrity of the immigration system by ensuring that deportation liability decisions remain the purview of the immigration system and the IPT rather than the Criminal Courts.

What are the marginal costs and benefits of the option?

- 39 This section focuses on the costs and benefits of the preferred option (Option Two).
- 40 Given that most of the costs and benefits associated with Option Two relate to intangible factors such as strengthened immigration system coherence and the security of New Zealand, MBIE has not attempted to accurately describe the non-monetised costs and benefits of this option.
- 41 We have identified the following affected groups:
- i. **Regulated groups:** residence-class visa-holders who have committed criminal offences.
 - ii. **Regulators:**
 - MBIE's Resolutions team, which supports decision-making on deportation liability for residence-class visa-holders and requests for Ministerial intervention
 - MBIE's ICI team, which undertakes investigation and compliance activities for instances of non-compliance with the Act
 - the IPT, which considers humanitarian appeals on deportation liability
 - the Criminal Courts, which consider requests for discharge without conviction under s 106 of the sentencing Act.
 - iii. **The public:** will have confidence that the immigration system is working as intended.
- 42 **Annex One** sets out the non-monetised costs and benefits of the preferred option: amending s161 of the Act to clarify that deportation liability for criminal offending applies where a residence-class visa-holder is "found guilty or pleaded guilty" of an offence as set out in s161(1)(a), in comparison to the status quo.

Section 3: Delivering an option

How will the new arrangements be implemented?

- 43 Implementation arrangements will come into effect when the Bill is passed in late 2025. MBIE's Resolutions and ICI teams will be responsible for its implementation and operation. A communications strategy will be developed to ensure residence-class visa-holders and immigration legal professionals are informed of the change.
- 44 A Memorandum of Understanding will need to be developed between MBIE and MoJ for information-sharing in relation to discharge without conviction decisions.
- 45 Residence class visa-holders who are discharged without conviction and issued a deportation liability notice will still have recourse to appeal their deportation liability. However, this will now be through the single established channel (the IPT).

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

- 46 MBIE intends to conduct an implementation review a year after the proposal takes effect. This would monitor the progress and effectiveness of the proposal, scale of investigations and prosecutions captured, the proportion that resulted in deportation, and any issues and unintended consequences associated with its enforcement.
- 47 The implementation review will also consider the degree to which the proposal has impacted IPT workload.

Annex One: Costs and benefits of preferred option (Option Two)

Affected groups	Comment	Impact	Evidence Certainty
Additional costs of the preferred option compared to taking no action (status quo)			
Regulated groups <i>Residence-class visa-holders who commit criminal offences</i>	Nature of cost: Increased risk of deportation liability for criminal offending Type: ongoing Comment: This risk already exists as the decision to discharge without conviction is at the discretion of judges in their sentencing decisions and offenders do not have certainty about the outcome.	Low	High. MBIE is aware that residence-class visa-holders are already at risk of becoming liable for deportation due to criminal offending.
	Nature of cost: Cost to making a humanitarian appeal if there is the ability for the judge to consider Type: one-off Comment: Currently people going through the Criminal Courts have access to legal aid, whereas legal aid is not available in all cases for the IPT.	Low	High. From consultation with MOJ, MBIE is aware that legal aid could potentially be available for s161 deportation liability claims in the IPT and those made under s162 of the Act.
Regulators <i>MBIE Resolutions & ICI IPT Criminal Courts</i>	Nature of cost: Increased Resolutions and IPT workload Type: ongoing Comment: This change will mean that there may be a small increase in the number of people liable for deportation on the basis of criminal offending.	Low	High. MBIE considers that the proposal has a low impact on IPT and Resolutions. MOJ noted the expectation of a small increase in the work for the IPT given that, as a result of the proposal, the humanitarian appeal process in ss206 and 207 of the Act would be the only remaining avenue for challenging deportation liability.
	Nature of cost: Costs to regulators (MoJ and MBIE) for increased monitoring and reporting on decisions to discharge Type: ongoing Comment: This could place additional resourcing burden on agencies and, without an established process, there is a risk that residence-class visa-holders discharged without conviction are not identified.	Low–Medium	Medium. MBIE is aware that there is an established data-sharing system between MBIE and Corrections to identify visa-holders that have been given a custodial sentence for the purpose of enforcement of the Act. However, there are no formal mechanisms for identifying when visa-holders have been discharged without conviction.
Others <i>Public</i>	No additional cost.	N/A	High. MBIE knows that the public will not face costs in relation to the preferred option.
Total monetised costs	N/A		
Non-monetised costs	Low		
Additional benefits of the preferred option compared to taking no action (status quo)			
Regulated groups <i>Residence-class visa-holders who commit criminal offences</i>	Nature of benefit: Greater clarity in respect of deportation liability outcomes Type: ongoing Comment: Visa-holders will have greater transparency about when criminal offending will put their immigration status in jeopardy, as well as their responsibilities under the Act and consequences on non-compliance.	Low	High. MBIE knows that Option Two will clarify the deportation liability settings, including responsibilities and consequences for non-compliance.
Regulators <i>MBIE Resolutions & ICI IPT Criminal Courts</i>	Nature of benefit: Strengthens system integrity Type: ongoing Comment: Supports wider system integrity and regulatory coherence, by enabling MBIE ICI to manage immigration risk to New Zealand within an existing set of legislative guidelines, and deportation settings to work in concert with our immigration appeals framework.	High	High. MBIE knows that Option Two will strengthen the integrity and coherence of the immigration regulatory system.
	Nature of benefit: Clarifies the policy intent for s161 of the Act Type: ongoing Comment: Enables MBIE ICI to take compliance action against people who have committed criminal offences as intended.	High	High. As part of the proposal, MBIE knows that Option Two will clarify the intent of s161 of the Act. If no action is taken, outcomes can be misaligned with the original policy intent. Deportation liability for criminal offending was not intended to exclude people who have pleaded guilty or have been found guilty of criminal offending but discharged without conviction.
Others <i>Public</i>	Nature of benefit: Enhanced confidence in regulatory system Type: ongoing Comment: The public will have confidence that immigration regulatory settings are working as intended.	Medium	High. MBIE knows that an amendment will support the integrity of the immigration system and will provide the public the confidence that people who commit offences are liable for deportation.
Total monetised benefits	N/A		
Non-monetised benefits	Medium		