

Privacy Commissioner's submission to the Education and Workforce Committee on the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill 138–1

1. I am pleased to provide this submission to the Education and Workforce Committee (the Committee) on the Immigration (Fiscal Sustainability and System Integrity) Amendment Bill (the Bill).
2. The Privacy Act 2020 is New Zealand's main privacy statute. One of my functions under the Privacy Act is to examine proposed legislation that may affect the privacy of individuals.
3. The Bill will amend the Immigration Act 2009 to enable it to better meet its purpose by improving both the fiscal sustainability and the integrity of the immigration system.
4. My submission focuses on the proposed amendments which relate to the enablement of electronic monitoring of asylum seekers and refugees, where they are subject to deportation or turnaround, under the Immigration Act.
5. I support the intent of this proposed amendment as a means to reduce the number of asylum seekers and refugee applicants who are liable to deportation and who would otherwise face detention. However, I have concerns around how the use of electronic monitoring has been drafted in the Bill and the relative lack of privacy safeguards.

The Bill responds to the Victoria Casey KC review of practices relating to detention of asylum seekers

6. In June 2021, Immigration New Zealand (INZ) commissioned an independent review to assess its operational practices relating to the detention of asylum seekers.
7. In 2022, Victoria Casey KC provided the final review (the Casey Review) to INZ, including recommendations to improve the immigration system for asylum claimants.
8. One of the recommendations of the Casey Review included that “[e]lectronic monitoring should be available as an option for use only in those cases where the Court considers it necessary to address well-founded and serious risk of absconding, or to public safety or national security.”¹

¹ [Report to Deputy Chief Executive \(Immigration\) of the Ministry of Business, Innovation and Employment - Restriction of Movement of Asylum Claimants](#), page 31.

The Bill proposes to create a framework for asylum seekers or refugee applicants liable to deportation to be released on conditions, including enabling electronic monitoring

Electronic monitoring of asylum seekers and refugee applicants can be highly intrusive

9. Electronic monitoring will almost always be highly intrusive. It has the potential to track movement of the individual irrespective of where they are, what time of day, and who they are with.
10. This is especially so when the individuals being electronically monitored are asylum seekers or refugee applicants. These individuals are likely to be in already vulnerable situations when they arrive in the country. Requiring electronic monitoring further erodes their freedoms and protections.
11. I am also concerned as to how this would be implemented for children, those with disabilities, and the elderly. These people are at greater risk of privacy invasion through the introduction of electronic monitoring, and I have not seen how these populations will be considered as part of this proposal.
12. I note in the RIS that under the existing legislation, the status quo often leads to the detention of these individuals.² Detention, particularly for those who have not committed a crime raises further human rights concerns.
13. One of the purposes of the Bill is to reduce the number of asylum seekers and refugee applicants in detention and who are liable to deportation. I do have concerns about the potential tracking of people who are seeking legitimate protections particularly when they have not committed a crime.

Less intrusive options must be considered before electronic monitoring

14. The Casey Review notes that electronic monitoring should be available as an option “only in those cases where the Court considers it necessary to address well-founded and serious risk of absconding, or to public safety or national security.”³
15. I note alternative options to detention were referenced in the RIS.⁴ These included individuals residing in the community with no management in place or relying on existing Residence and Reporting Requirements Agreements (RRRA).

² [Regulatory Impact Statement: Providing a more flexible response to managing individuals under the Immigration Act 2009](#), paragraph 31.

³ [Report to Deputy Chief Executive \(Immigration\) of the Ministry of Business, Innovation and Employment - Restriction of Movement of Asylum Claimants](#), page 31.

⁴ [Regulatory Impact Statement: Providing a more flexible response to managing individuals under the Immigration Act 2009](#), paragraph 32.



16. I agree individuals who pose a threat or risk to public order, public health, or security, residing in the community with no management plans in place is not desirable.
17. RRRAs provide for a person to reside in the community with reporting requirements if agreed by the person liable for detention and an immigration officer.
18. RRRAs are entered into on agreement with the individual and an immigration officer. There are defined requirements the individual must meet to continue to reside in the community. A breach of RRRAs conditions is not an offence; if an individual does breach an RRRAs they could be detained under a WoC.
19. I have not seen the policy case for why existing RRRAs are not sufficient for the purposes of supporting individuals to reside in the community, and not in detention facilities. I recognise that in some situations, RRRAs will not be appropriate given the risks that individuals pose. However, I am concerned that RRRAs are not used as often as they could be, when they are a less intrusive option.
20. I note the Casey review recommended amending s 315(2) so that the decision to agree to an RRRAs is not a matter within the absolute discretion of the INZ officer. I agree with this recommendation.
21. I consider that as a matter of policy, INZ officers should be required to consider whether RRRAs can be used to manage individuals in place of applying for a warrant of commitment to ensure that electronic monitoring is only used where strictly necessary.

The conditions for the proposed electronic monitoring should be tightened

22. I have specific comments on proposed amendments to section 324J to ensure appropriate privacy safeguards are built in.
23. As I have mentioned above, section 324J outlines the purposes for which information obtained through electronic monitoring may be used.
24. The information obtained through electronic monitoring is incredibly sensitive and is being collected about very vulnerable individuals. While the Bill prescribes the purposes for which the information can be used, I do not read the drafting as restricting the purposes for which it can be used. I **recommend** that the section be drafted to provide that information **must only** be used for the specified purposes (and cannot be reused for other purposes).
25. I also have concerns as it relates to section 324J(3)(d) which requires a person who is subject to an electronic monitoring condition to allow an authorised person or an immigration officer access to any place where the equipment is located for the purposes of:
 - i. inspecting the equipment;
 - ii. servicing the equipment;
 - iii. removing the equipment from the person's body; and
 - iv. recovering the equipment.



26. Individuals should expect quiet enjoyment of their private residence. The way the Bill is currently worded suggests an authorised person or an immigration officer can access the electronic monitor at any time without a valid reason.
27. This has the potential to be highly invasive of an individual's privacy. I would expect there to be prior notice provided to the individual, unless there is a compelling reason not to do so (such as where it might prejudice the purpose for the visit).
28. It will be important for INZ to build appropriate cultural and societal considerations when seeking entry or access to the electronic monitor.
29. I **recommend** removing section 324J(3)(d) entirely. If it is not removed, I recommend amending this section to provide for prior notice, so individuals are aware an authorised person or immigration officer will be inspecting the equipment unless there is a compelling reason not to do so.

Conclusion

30. I support the intent of moving away from a default where asylum seekers and refugee applicants who are liable to deportation are housed in detention facilities.
31. I trust my comments are of use to the Committee. I do not seek to be heard on my submission but am happy to appear before the Committee if that would be of assistance.



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Privacy Commissioner

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