Office of the Minister of Immigration

Chair
Cabinet Policy Committee

RECOGNITION OF MARRIAGE AND DE FACTO RELATIONSHIPS FOR IMMIGRATION PURPOSES: SECOND PAPER

Proposal

1. This paper proposes aligning the treatment of married and de facto relationships for immigration purposes and adjusting the policy requirements to reduce the potential for abuse.

Executive Summary

2. Immigration policies treat married and de facto couples differently in that de facto couples must be living together for at least two years before the relationship will be recognised. Marriages are recognised, however, as soon as that legal status comes about. This distinction is inconsistent with human rights requirements and Cabinet's decision on neutral laws for relationships [CAB Min (01) 27/14 refers]. It is proposed that, for residence to be granted, both married and de facto couples be required to be living together in a genuine and stable relationship for either 12 or 24 months. The Department of Labour considers that a 12-month requirement would most effectively manage the potential for abuse and the expectations of New Zealand citizens and residents.

3. The following policy adjustments are, *inter alia*, proposed to reduce the potential for abuse and ensure that only those in a genuine and stable relationship with a New Zealand citizen or resident, or a temporary permit holder (where applicable), are approved for temporary entry or residence:

- enabling immigration officers to defer a residence decision for up to 12 or 24 months, and issue a temporary visa or permit, where a relationship has been assessed as genuine and stable but the couple has not lived together for 12 or 24 months;
- shifting the onus of proof to the applicant, by replacing a requirement for the New Zealand Immigration Service (NZIS) to accept a relationship as genuine unless there is evidence to the contrary, with a requirement for the applicant to satisfy the NZIS of the genuineness of the relationship;
- enhancing guidance on the factors that need to be taken into account in determining whether a relationship is genuine and stable;
- introducing minimum requirements for the recognition of relationships: that the couple are aged at least 18 years (or 16 years if there is parental support for the relationship), are not close relatives and have met before lodging the application; and
- extending current restrictions on sponsorship so that a newly sponsored partner may not themselves sponsor a partner for at least five years, and may only sponsor one additional partner.

4. Current temporary entry policy, and policy allowing partners to be included on residence and temporary entry applications, also treat married and de facto couples differently and it is proposed that these distinctions be removed.

Background

5. On 19 February 2003 Cabinet noted the proposals under POL (03) 14 which, *inter alia*, invited the Minister of Immigration to prepare a new submission for the Cabinet Policy Committee including consideration of:

(a) whether to require both married and de facto couples to have been living together for a period of two years before an application for residence will be considered;

(b) the parties to the relationship having to be aged at least 18 years of age, with no provision for a lower age if there is parental support;

(c) the implications of the proposals for temporary entry and work permit arrangements;

(d) examples of likely impacts of the proposals on immigrants from a variety of circumstances; and

(e) the possibility of allowing for the revocation of residence granted on the basis of the applicant being married or in a de facto relationship with a New Zealand citizen or resident, should the relationship later prove to be non-genuine [CAB Min (03) 6/6 refers].

Problem Definition

6. There are two problems with current spouse and de facto partner immigration policies:

(a) *The policies differentiate on the basis of marital status* - the policies treat married and de facto couples differently in that the latter are required to demonstrate that they have been living together in a genuine and stable relationship for at least two years, whereas married couples are required to demonstrate only that they are living together in a genuine and stable relationship; and

(b) *There is potential for the policies to be abused* - the policies require that applicants be living together in a genuine and stable relationship with a New Zealand citizen or resident. However, the policies also state that the NZIS must accept a relationship as genuine, unless there is *evidence* to the contrary. In practice this makes it difficult for a visa or immigration officer to decline an application, even where an officer has reason to believe that the relationship is not genuine and has been entered into with the sole purpose of gaining residence in New Zealand.

Further, the existing restriction allowing a New Zealand citizen or resident to sponsor no more than two partners in total, at least five years apart, is not mirrored for the partners who have been sponsored. Immigration officers report that, in some cases, the new resident is promptly divorcing their New Zealand spouse and attempting to sponsor a new (often a previous) partner from overseas.

Policy Proposals

Alignment of treatment of spouses and de facto partners for residence purposes

7. Officials consider that marriages and de facto relationships should be treated on the same basis, in that it is the existence of a genuine and stable relationship with a New Zealand citizen or resident that is relevant, not their legal marital status. Aligning the recognition of marriage and de facto relationships for immigration purposes would be consistent with Cabinet's decision that neutral laws on relationships, whether married, de facto or same-sex, should be applied across the board [CAB Min (01) 27/14 refers].

8. The following factors are relevant in determining the appropriate period of time that a couple be required to live together[1] before the relationship is recognised for the purpose of residence:

- The expectation of New Zealand citizens and residents that they will be able to live with their partner in New Zealand, regardless of their partner's country of origin;
- The need for the couple to provide evidence to enable the NZIS to assess the genuineness and stability of the relationship; and
- The effect that the period of time has in providing a disincentive to establish a relationship for the sole purpose of obtaining New Zealand residence.

9. As noted in POL (03) 14, a **12-month** duration of relationship requirement is less demanding than current de facto partner policy, but more rigorous than current spouse policy. It would increase current requirements for couples who have been married for less than one year. The 12-month requirement would not provide the same level of disincentive to establish a relationship of convenience as 24 months, but it should allow sufficient time for couples to gather evidence of their relationship to enable NZIS to make a decision.

10. The 12-month requirement would reduce the risks of overstaying associated with long-term temporary permits where residence is not granted. A 12-month requirement is likely to be more acceptable to applicants and their New Zealand partner, and may be less of a barrier to skilled migrants seeking to bring their partner to New Zealand with them as a resident.

11. A **24-month** requirement is no different to current de facto policy, but more rigorous than current spouse policy requirements. A 24-month requirement would have the greatest impact in reducing the risk associated with couples who have been married for less than two years. The requirement would provide a strong disincentive to establish a relationship of convenience and would provide plenty of time for applicants to gather evidence of their relationship. However, it is likely to be perceived as a barrier by genuine applicants. The NZIS already receives complaints from New Zealanders who consider that their partner should not have to meet any immigration requirements. Such complaints may increase if a 24-month requirement is introduced.

12. After two years on a temporary permit, those who do not meet the residence requirements are more likely to be well-settled resulting in pressure to allow them to stay as an exception to policy, or to overstay. The longer an overstayer has lived in New Zealand the more difficult (and therefore costly) it is to locate and remove them. The difficulty of removal increases if the overstayer has a New Zealand born child. More women are likely to become pregnant or have a child in the first 24 months of their relationship than in the first 12 months. If a couple has a child, but separates before 24 months, the non-New Zealand partner/parent may not be eligible for residence.

13. A 24-month requirement may also undermine efforts to attract skilled migrants if the same requirement is applied to the inclusion of partners on residence applications. This issue is discussed further below.

Implications for health, education and benefit take-up

14. Applicants are likely to want to come to New Zealand on temporary visas/permits to continue living together for the remainder of the time required to meet either the 12 or 24-month requirement. In either case, partners or spouses are unlikely to be issued with permits valid for a full 24 months, as they will have to have been together for some time to obtain a

[1] Time spent in a genuine and stable relationship overseas would count towards duration of relationship.

temporary permit on the basis of a genuine and stable relationship. (Temporary entry criteria are discussed below).

15. Partners and spouses of New Zealanders are generally only eligible for publicly funded health and disability services if they have a residence permit, or a permit that allows them to reside in New Zealand for 24 months or more. Those who do not meet the eligibility criteria may be charged the full costs of any health services accessed.[2] The Ministry of Health is currently reviewing the Eligibility Direction and expects to report to Cabinet by the end of August. The eligibility settings for partners on permits of less than 24 months validity, who have applied for residence and are in a genuine and stable relationship with a New Zealander, but do not meet the length of relationship requirement, will be considered as part of this review.

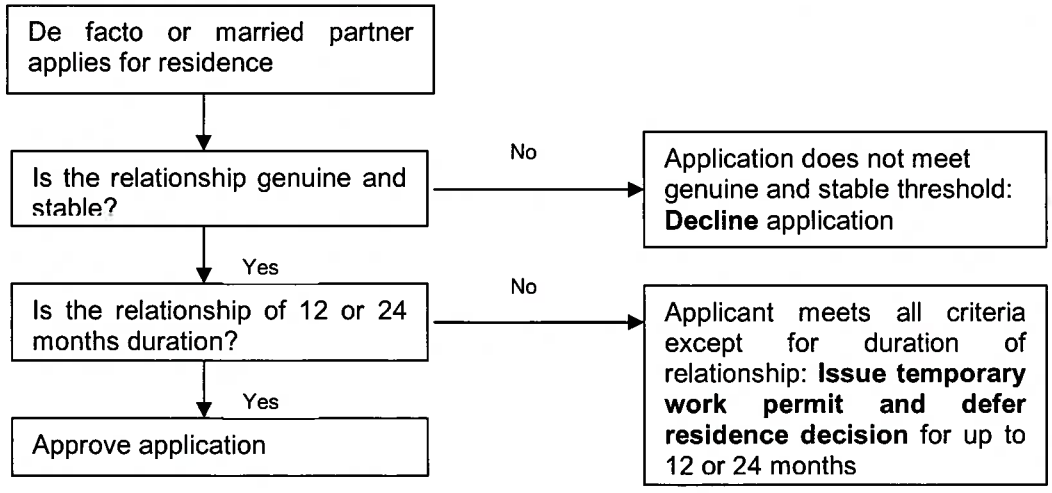
16. Under both the 12 and 24-month options the temporary permit holder would be ineligible for subsidised education or benefits. New Zealand citizens and residents may see this as unfairly discriminatory against their partner, especially under the 24-month option. The 12-month option would reduce the period of time for which the non-resident partner was ineligible for subsidised education. It would also lessen the difficulties associated with a lack of access to publicly funded health services, depending on the outcome of the upcoming eligibility review. For all of the above reasons, a 12-month duration of relationship requirement is the Department of Labour's preferred option.

Adjustments to reduce the potential for abuse

Residence application process

17. The extension of a time requirement to all couples would be likely to lead to more applications for temporary visas and permits so couples could continue to live together while the qualifying period for residence was met. There is a danger that the decision made at the point where a temporary visa or permit is issued may be less thorough than a residence determination. Officials therefore consider that partners who intend to reside in New Zealand should apply for residence even if they have not met the required length of relationship.

Figure one: Residence application process



[2] Pregnant women who are not eligible for public health services are charged for antenatal services. However, any baby born in New Zealand is eligible to receive publicly-funded health services. A health care provider can only charge ineligible women for labour, birth and post-natal services if the provider can identify that those services are specific to the mother and of no benefit to the baby.

18. The residence application could be declined where the relationship was not found to be genuine and stable. Couples whose relationship is of short duration are unlikely to meet the genuine and stable threshold.

19. Where the relationship is assessed as genuine and stable but the couple has been together for less than the required duration for residence (12 or 24 months), it is proposed that the partner could be issued with a temporary work visa or permit for up to 12 or 24 months. The residence decision would then be deferred until the couple had lived together for 12 or 24 months. The onus would be on the applicant to approach the NZIS before their temporary permit expired for residence to be finally determined. It is proposed that the current policy allowing for the deferral of a decision for up to six months in the case of doubt be removed.[3] With the onus of proof on the applicant (discussed below), there should be no need to defer the decision for reasons of doubt.

Shift the onus of proof to the applicant

20. The main barrier to good decision-making is the requirement for the NZIS to accept a relationship as genuine unless there is evidence to the contrary. While in theory the requirement provides some protection against arbitrary decision-making, in practice it is very difficult for immigration officers to obtain *evidence* that a relationship is not genuine, despite having very strong reason to believe that it is not. It is recommended that this requirement be removed and the onus of proof be placed on applicants to satisfy the NZIS of the genuineness of the relationship. This requirement would be applied to both temporary entry and residence applicants.

21. In addition to shifting the onus of proof to the applicant, it is proposed that there be enhanced guidance on the factors that need to be taken into account in assessing whether or not a relationship is genuine and stable. The sorts of factors that would be taken into account would be consistent with the factors listed in section 2D(2) of the Property (Relationships) Act 1976, which relates to whether two people are living together as a couple. For example, they would include but not be limited to:

- The duration of the relationship;
- The nature and extent of common residence;
- Whether or not a sexual relationship exists;
- The degree of financial dependence or interdependence, and any arrangements for financial support, between the parties;
- The ownership, use, and acquisition of property;
- The degree of commitment to a shared life;
- The care and support of children;
- The performance of household duties; and
- The reputation and public aspects of the relationship.

22. This proposal would shift the onus of proof to the applicant, as is the case with all other areas of immigration policy. The nature of relationships means that the decision will ultimately rest on the judgement of the visa or immigration officer assessing the application. Setting out the factors to be taken into account will ensure that there is a firm basis for decision-making and will provide guidance to applicants about the type of evidence that is likely to be required. Residence applicants will continue to have recourse to the Residence Appeal Authority.

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[3] Current policy allows for an immigration officer to defer the decision for up to six months if they doubt that the couple is in a genuine and stable relationship, or that the sponsor's primary place of residence is New Zealand, and the officer considers that the only means of resolving that doubt is to defer a final decision.

Introduce minimum requirements for the recognition of relationships

23. While policy should be sufficiently flexible to meet the different cultural needs of New Zealanders, the standards applied should be consistent with New Zealand law. Immigration policy already requires that a genuine relationship is one that is "entered into with the intention of being maintained on a long-term and exclusive basis". It is recommended that the following additional minimum requirements be introduced for the recognition of relationships for the purpose of both temporary entry and residence:

(a) The parties to the relationship are aged at least 18 years of age, or at least 16 years if there is parental support for the relationship.

The Marriage Act 1955 requires people to be at least 20 years of age to marry (or 16 if they have parental consent). However, the age at which guardianship ceases is likely to be reduced from 20 years to 18 years, or 16 years where the young person is married or in a de facto relationship and there is parental consent for the relationship.[4]

Cabinet asked that consideration be given to not providing for a lower age if there is parental support. Officials do not recommend this. It would be inconsistent with approaches being taken in other New Zealand legislation, for example guardianship legislation, where 16 and 17 year olds will be treated as adults if they are married or in a de facto relationship. Not recognising relationships involving 16 and 17 year olds (where there is parental support) may also raise an issue of discrimination under the Human Rights Act 1993 and the Bill of Rights Act 1990. While the Immigration Act 1987 expressly recognises the potentially discriminatory nature of immigration decisions and removes the ability of people to challenge them under the Human Rights Act, there must still be a good reason for maintaining any distinctions arising from those decisions.

In addition, only six applications approved for residence in 2001/02 on the grounds of partnership involved applicants under the age of 18 years – all were 17 years old. Under the duration of relationship requirements proposed in this paper, none of the above applicants would have actually been granted residence until they were at least 18 years old. Given that this provision is clearly not being abused, and in light of the other proposals in this paper, officials consider there is no need to create a policy that is inconsistent with other New Zealand legislation, including human rights legislation.

(b) The parties to the relationship are not close relatives.

This requirement would preclude relationships that are among the prohibited degrees of marriage listed in the Second Schedule of the Marriage Act 1955.

(c) The parties have met before the application is lodged.

24. These requirements would assist to minimise the potential for abuse and, in particular, help to address concerns about applications that involve "internet relationships" and proxy marriages[5] where the genuineness and stability of the relationship is often difficult to ascertain. Australia and the United Kingdom have similar requirements. The requirements are unlikely to adversely affect anyone in a genuine and stable relationship with a New Zealand citizen or resident (or in the case of temporary entry policy, a temporary permit holder). Applicants in a genuine arranged marriage would be unaffected by the requirement that the couple have met and, as discussed below, temporary entry policy would continue to

[4] This was agreed by Cabinet in May 2002 as part of a package of amendments to the Guardianship Act 1968 [CAB (02) M 10/7 refers].

[5] A proxy marriage is where one party is unable to be physically present at the marriage.

enable people in such circumstances to travel to New Zealand specifically for the purpose of marriage.

Extend sponsorship restrictions

25. Sponsorship restrictions were introduced in October 2001 limiting New Zealand citizens and residents to sponsoring no more than two partners, at least five years apart [CAB (01) M 41/5C refers]. Officials recommend that restrictions on sponsorship be aligned so that a newly sponsored partner may not themselves sponsor another partner for at least five years, and may only sponsor one additional partner. At present New Zealand citizens and residents may only have two relationships recognised for immigration purposes, while sponsored partners may have three (one through which they are sponsored into the country and two once they are residents or citizens). Recognising only two relationships in total for both sponsored partners and New Zealand citizens and residents therefore aligns the sponsorship criteria for both groups of people. This would help to prevent cases of people establishing a relationship with a New Zealand citizen or resident and then divorcing them in order to sponsor a new (often a previous) partner from overseas.

Implications of proposals for other areas of immigration policy

Temporary entry policy

26. Existing temporary entry policy has provision for:

- the entry of non-resident partners of New Zealand citizens or residents;
- the entry of partners of temporary visa/permit holders; and
- entry for the purposes of marriage or applying for residence under de facto partner policy.

27. Under all of the above policies, a de facto partner is defined as a partner in a heterosexual or same sex relationship who has been living with their partner in a genuine and stable relationship for at least two years immediately before their application is made. To align spouse and de facto partner requirements under temporary entry policy, it is proposed that de facto partners be recognised if they are in a genuine and stable (heterosexual or same sex) relationship and that, as with spouses, there be no duration of relationship requirement.

28. As discussed above, shifting the onus of proof and introducing minimum requirements will reduce the potential for abuse of temporary entry policy based on relationships. Current temporary entry policy also allows immigration officers to require the applicant to appear for an interview. As with residence policy, temporary entry policy should emphasise that the application will be declined if the relationship is of insufficient duration to determine its genuineness and stability, or the genuine intention to marry or apply for residence under partner policy.

29. Those temporary permit holders who go on to apply for residence under relationship policy would, of course, have to meet the full duration of relationship requirements before they were granted residence. It should be noted that the determination on a residence application may differ from a previous finding of genuine and stable for a temporary permit.

Partners of residence applicants

30. Spouses or de facto partners of residence applicants may be included on their partner's application. Officials have considered whether the standard for inclusion on a residence application should be the same as that proposed for partner residence policy by requiring that couples have lived together in a genuine and stable relationship for either 12 or 24 months. It is important not to undermine other aspects of residence policy, particularly skilled immigration policy, by not allowing a General Skills applicant (for example) to include their

partner on their residence application if the relationship was of relatively short duration. New Zealand could risk losing skilled and talented migrants. On the other hand, not having a similar time requirement would be inconsistent with partner residence policy and may mean other residence categories are more open to abuse.

31. To manage these immigration risks, officials propose that all residence applicants be able to include their partner on their application regardless of the length of their relationship, as long as the relationship is genuine and stable. If the relationship is less than 12 or 24 months, and assessed as genuine and stable, it is proposed that the partner be issued with a temporary permit to make up the required amount of time. The decision on the partner's residence application would be deferred until the expiry of the required time period.

Revocation of residence

32. Cabinet asked for consideration of the possibility of allowing the revocation of residence granted on the basis of the applicant being married or in a de facto relationship with a New Zealand citizen or resident, should the relationship later prove to be non-genuine. Section 20(1) of the Immigration Act 1987 already enables the Minister of Immigration to revoke a residence permit that has been "procured by fraud, forgery, false or misleading representation, or concealment of relevant information". It is also an offence under section 142 (1) of the Act to provide false or misleading information in support of an application.

33. In practice very few residence permits granted on the basis of a relationship with a New Zealand citizen or resident are revoked because of the difficulty in obtaining evidence that false or misleading information has been provided. The standard of evidence required essentially means that revocation will only occur if one of the parties admits to a relationship of convenience. However, because there are strong incentives against admitting to the provision of false information – the New Zealand party could be prosecuted and the migrant could have his or her residence permit revoked – such admissions are rare. The situation is further complicated in cases where the New Zealand party has not realised that the relationship is not genuine until after residence had been granted but the migrant maintains that the relationship simply broke down.

34. The Department of Labour is reviewing the Immigration Act 1987 in 2003/2004, including the revocation provisions of the Act. One of the aims of this work will be to develop a simpler, faster system that will enable the revocation of residence in cases where the residence has been fraudulently obtained, including cases involving a non-genuine relationship with a New Zealand citizen or resident.

Human Rights Implications

35. The proposed alignment of the treatment of married and de facto couples for immigration purposes would remove a potential source of discrimination on the grounds of marital status. However, the proposal to introduce a minimum age for the recognition of relationships appears to raise an issue of inconsistency with the right to be free from age discrimination. It would be particularly difficult to justify a requirement for parties to a relationship to be aged at least 18 years of age, with no provision for a lower age if there is parental support. To recognise relationships involving 16 and 17 year olds where there is parental support appears to be justifiable in terms of section 5 of the Bill of Rights Act 1990.

Legislative Implications and Regulatory Impact Statement

36. The proposed alignment of the treatment of married and de facto couples for the purpose of inclusion in an application would require an amendment to Regulation 20 of the

Immigration Regulations 1999. A Regulatory Impact Statement is not required because the proposal is of a machinery nature and does not substantially alter existing arrangements.

Financial Implications

37. Implementing the proposed policy adjustments would require changes to NZIS computer systems, policy manuals and business processes. Implementation costs are estimated at $0.350 million (GST exclusive) in 2003/04 and would be met from within Vote: Immigration baselines. Deferring residence applications for the remainder of the required duration of relationship may incur costs that are not covered by current fee levels. The Department of Labour will monitor the numbers of residence applications that are deferred and the level of interviewing and assessment required to process these applications. Any recommendations to change the fees will be provided in the annual fees review (a separate paper on Immigration fees recommends that the Department of Labour review fees annually in the future).

Consultation

38. The Ministries of Justice, Social Development, Foreign Affairs and Trade, Women's Affairs, and Health, the Department of Internal Affairs (Identity Services), Te Puni Kokiri and the Treasury were consulted in the preparation of this paper and agree with its recommendations. The Department of the Prime Minister and Cabinet, the Ministry of Pacific Island Affairs and the Department of Internal Affairs (Office of Ethnic Affairs) were also consulted.

Publicity

39. There would be no advance notice of these policy changes in order to mitigate against the risk of a surge in applications. If the proposals are agreed, the Minister of Immigration will announce the changes on the day that the policy adjustments take effect (September 2003).

Recommendations

40. It is recommended that the Committee:

1. **note** that Cabinet previously considered a paper *Recognition of Marriage and De Facto Relationships for Immigration Purposes* and, *inter alia*, invited the Minister of Immigration to prepare a new submission for Cabinet Policy Committee on aligning the treatment of married and de facto relationships for immigration purposes [CAB Min (03) 6/6 refers];

2. **agree** that residence and temporary entry immigration policy should treat married and de facto couples on the same basis, and that they must have been living together in a genuine and stable relationship for:

    2.1 at least 12 months before residence may be granted (Department of Labour preferred option);

    OR

    2.2 at least 24 months before residence may be granted;

3. **agree** that a decision on an application for residence under partner policy, where the couple has been assessed as being in a genuine and stable relationship, may be deferred and a temporary visa or permit may be issued for the duration of the qualifying period for residence agreed in recommendation 2;

4. **agree** to remove current policy allowing for the deferral of a marriage or de facto policy residence decision for up to six months in the case of doubt;

5. **agree** that the onus of proof be shifted to the applicant, by replacing the requirement for the New Zealand Immigration Service (NZIS) to accept a relationship as genuine unless there is evidence to the contrary, with a requirement for the applicant to satisfy the NZIS of the genuineness of the relationship;

6. **agree** that enhanced guidance on the factors that need to be taken into account in determining whether a relationship is genuine and stable be introduced;

7. **agree** to the introduction of the following minimum requirements for the recognition of a relationship for temporary entry and residence purposes:

   (i) The parties to the relationship must be aged at least 18 years of age, or 16 years if there is parental support for the relationship; OR

   (ii) The parties to the relationship must be aged at least 18 years of age; and

   (iii) The parties to the relationship may not be close relatives; and

   (iv) The parties must have met before lodging the application;

8. **agree** that a sponsored partner may not themselves sponsor a partner for residence for at least five years, and may sponsor no more than one partner in total;

9. **agree** that there be no duration of relationship requirement for a temporary visa or permit to be issued on the basis of a marriage or de facto relationship if the applicant otherwise meets policy requirements;

10. **agree** that where the spouses or partners in a residence application are in a genuine and stable relationship of less duration than agreed at recommendation 2, the non-principal partner's residence decision may be deferred and a temporary permit may be issued for the remainder of the required duration;

11. **note** that the Department of Labour is intending to examine the revocation provisions of the Immigration Act 1987 in 2003/2004;

12. **invite** the Minister of Immigration to instruct Parliamentary Counsel Office to prepare an amendment to Regulation 20 of the Immigration Regulations 1999 to enable the decision in recommendation 1 to be applied to the inclusion of partners on other applications for a visa or permit;

13. **note** that implementation costs of these proposals are estimated at $0.350 million (GST exclusive) in 2003/04 and can be met within Vote: Immigration baselines;

14. **note** that the Department of Labour will monitor the impact of the agreed proposals on the level of interviewing and assessment required, and provide any recommendations to change the fees in the 2004 fees review; and

15. **note** that the Minister of Immigration will announce the policy adjustments on the day that they take effect.

Hon Lianne Dalziel
Minister of Immigration