

# A FRESH APPROACH TO THE LEGISLATION

## AT A GLANCE

The Customs and Excise Act includes unnecessary detail, which makes it overly prescriptive and difficult to update.

The Act can be inconsistent and hard to follow because of the complexity that frequent amendments have added.

We want to make the Act clearer and easier to use, and provide more flexibility to allow for operational and technological changes in the future.

### Getting your feedback

We are interested in your views on the following issues:

- whether to shift detail from the Act to Regulations and Customs Rules
- whether a new Act should prescribe consultation requirements for making Regulations and Rules
- how to publish Regulations and Rules to ensure that they are transparent and accessible to the people affected by them.

## The law as it stands

The current Act is divided into 18 parts, each on a particular subject – for example, entry and accounting for goods, and powers of Customs officers.

The Act provides for two main types of delegated legislation: Regulations and other Orders in Council, and Customs Rules.

The Customs and Excise Regulations and Orders in Council are “legislative instruments”, providing for matters such as entry timeframes, exemptions from some requirements in the Act, and import and export prohibitions (such as those for offensive weapons). Regulations and Orders in Council require Cabinet approval and are made by the Governor-General in Council.

Customs Rules, a different type of delegated legislation, provide for technical and procedural matters, including the content of forms, setting out how goods entering or leaving New Zealand are entered into the Trade Single Window computer system, and the methods by which alcoholic volume must be calculated for the purpose of assessing excise duty.

Because these matters are comparatively minor and technical, the power to make the Rules is delegated to the chief executive of Customs.

## An opportunity to change

The Customs and Excise Act 1996 has been in force for 19 years. The Act is overly prescriptive and it is becoming increasingly unwieldy in an environment designed to move passengers and goods quickly and seamlessly through border processes.

The Act presents obstacles because of its highly prescriptive approach:

- will continue to require regular amendments
- does not allow the Government to easily respond to changes in the global environment, such as increasing volumes of trade and travel
- does not allow the Government to easily respond to changes in business practices or in domestic and international border management practices
- does not sufficiently support collaborative border management with other government agencies
- does not enable the Government to change its policy settings without substantive amendment to the legislation.

Numerous amendments to the Act have created duplication and, in some cases, complexity that makes the Act hard to follow.



**The original provisions of the 1996 Act were focused primarily on imports and duty revenue”**

The 1996 Act was not a complete rewrite of the 1966 legislation, and some key sections from the 1966 Act were transferred over to it. The original provisions of the 1996 Act were focused primarily on imports and duty revenue. Since the Act was passed in 1996, amendments have been made to increase Customs’ border protection functions in the wake of 11 September 2001. In particular, amendments were made to enhance the security of imports and exports through a secure exports scheme and goods for export management systems. Changes have also been made to support the use of SmartGate, enable the Joint Border Management System that we have established jointly with the Ministry for Primary Industries, to expand search and surveillance powers, and to allow for information sharing.

## What we propose: Principles-based legislation

We want to make the Act easier to understand and use, and more responsive to change. One way of doing this is to use a principles-based approach which would set out in the Act what is to be achieved or done in broad terms. Where detail is required about precisely what is done or how it is done, this detail would better sit in delegated legislation, such as Regulations and Customs Rules.

Detail frequently becomes outdated over time. The benefit of the principles-based approach is that the detail in delegated legislation can be more easily amended than primary legislation, so it is easier to keep up-to-date. The drawbacks are that delegated legislation can be less transparent and open to less consultation than legislation made by Parliament.

In the example below, which shows a possible redrafting of section 21(1) of the Act, you can see that the overarching requirement is retained in the Act, the primary legislation – for a person in charge of a craft en route to New Zealand to give advance notice. However, all of the detail about what the advance notice should contain could be moved into delegated legislation, such as Regulations.

### Current section 21(1):

The person in charge of a craft that is en route to New Zealand from a point outside New Zealand must, unless otherwise approved by the chief executive,—

- (a) give to the Customs, in such form and manner (for example, in an electronic form and manner) as may be approved in writing by the chief executive (either generally or for a particular case or class of case), such advance notice as may be prescribed of any or all of the following matters:
  - (i) the impending arrival of the craft:
  - (ii) its voyage:
  - (iii) its crew:
  - (iv) its passengers:
  - ...
  - (vii) the Customs place at which the craft will arrive; and
- (b) on arriving within New Zealand, proceed directly to that Customs place, unless directed elsewhere by a Customs officer.

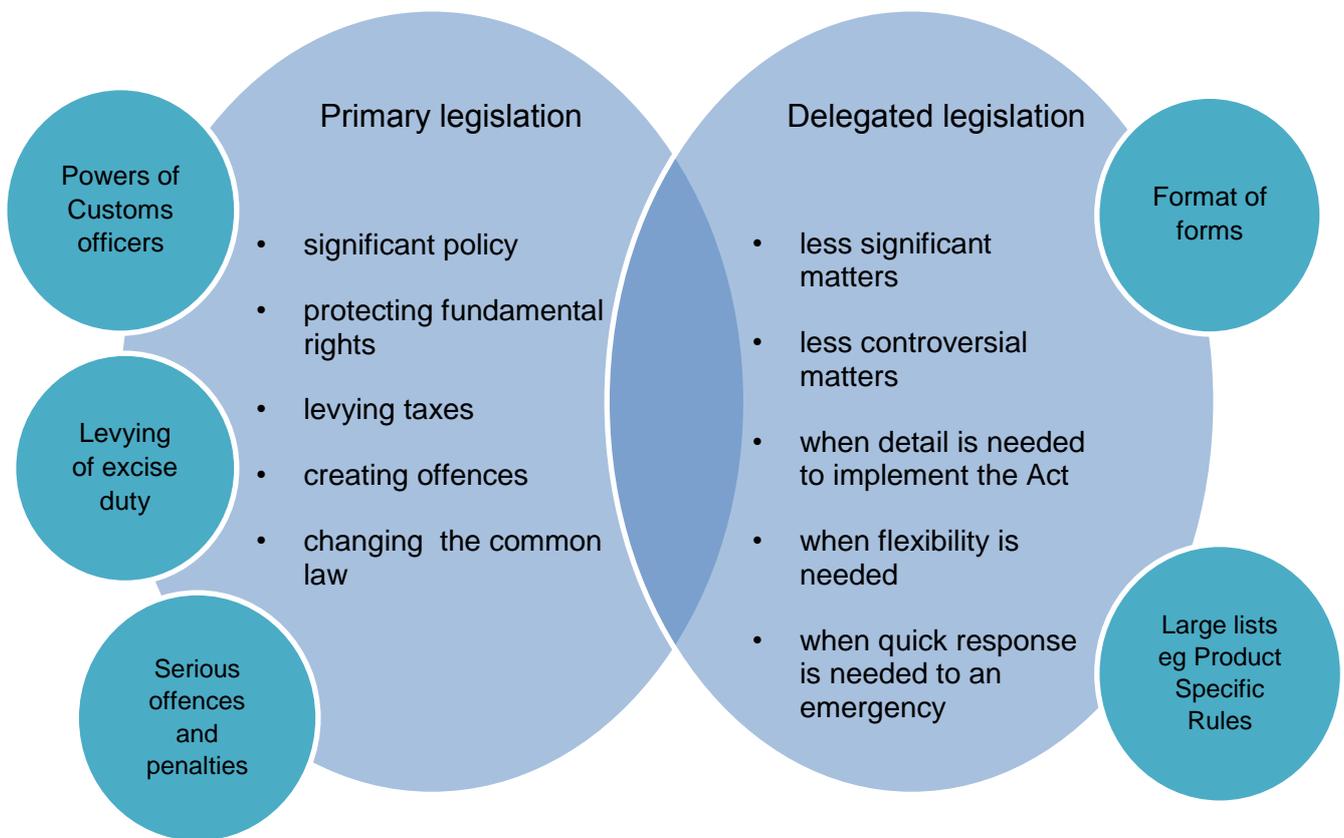
### Possible new section 21(1):

The person in charge of a craft that is en route to New Zealand from a point outside New Zealand must, unless otherwise approved by the chief executive,—

- (a) give to the Customs such advance notice as may be prescribed
- (b) on arriving within New Zealand, proceed directly to a specified Customs place, unless directed elsewhere by a Customs officer.

The Legislation Advisory Committee, which promotes good legislative standards in New Zealand, has developed guidelines that set out principles to inform whether provisions should be included in primary legislation or when they should be in delegated legislation. The diagram below sets out some of those principles.

## Principles guiding what is in primary or delegated legislation



In the Customs context, provisions that would need to remain in the primary legislation would include those that, for example:

- levy excise duty
- create offences
- give powers to Customs officers.

Provisions suited for delegated legislation generally cover less significant matters, when detail is needed to implement the Act.

## Consultation requirements in the Act

Regulations made under the Act must be consulted on with appropriate parties before they are submitted to Cabinet.

For other types of delegated legislation, such as Rules, consultation processes may be prescribed in legislation to ensure that relevant parties are adequately consulted.

Customs is considering whether a new Act should include consultation requirements for all delegated legislation, including Customs Rules. If consultation were to be required, we would want to adopt requirements similar to those found in other legislation, such as the Maritime Transport Act 1994 (section 446) – see below.

## Maritime Transport Act 1994

### Procedure for making of rules by Minister

“Before making any rule under this Act, the Minister shall—

(a) publish a notice of his or her intention to make the rule in the Gazette, and any other media the Minister considers appropriate; and

(b) give interested persons a reasonable time, which shall be specified in the notice published under paragraph (a), to make submissions on the proposal; and

(c) consult with such persons, representative groups within the maritime industry or elsewhere, government departments, Crown entities, and in the case of rules made under Part 4 (to the extent that the rules relate to pilotage or harbourmasters) or Part 27 with such regional councils or other local authorities, as the Minister in each case considers appropriate.”

## Ensuring that customs legislation is transparent

We recognise the importance of safeguards that should accompany delegated legislation, to ensure that the law is transparent and accessible to everyone. We want to ensure that delegated legislation, where used in the Customs context, also contains these safeguards.

The publication of regulations is the responsibility of the Parliamentary Counsel Office in accordance with the Legislation Act 2012. There are standard processes for the publication of Regulations, including on the New Zealand Legislation website ([www.legislation.govt.nz](http://www.legislation.govt.nz)).

For Rules, we intend to ensure that transparency is achieved by requiring rules to be published on the Customs’ website, and notifying the making of rules in the *New Zealand Gazette*.

## A FRESH APPROACH: WHAT DO YOU THINK?

- Q 1 Are there provisions in the current legislation that you think are ambiguous or overly complex? If yes, please provide specific examples.
- Q 2 What is your view on principles-based legislation, where the detail is in delegated legislation (Regulations, Orders in Council or Customs Rules)? Please give your reasons.
- Q 3 What would be the impact on you or your business as a result of moving administrative detail from the Act to delegated legislation (Regulations, Orders in Council or Customs Rules)? If you think the impacts would be negative, how could Customs manage those negative impacts?
- Q 4 Should Customs prescribe consultation requirements for delegated legislation (Regulations, Orders in Council or Customs Rules) in the new Act? If so, what consultation requirements would you expect there to be?
- Q 5 What publication requirements would you expect there to be for delegated legislation (Regulations, Orders in Council or Customs Rules)?

## Include statements of purpose and principles

The current Act has a long title that is outdated and of little help to travellers and traders who must comply with the legislation, and to Customs and the courts, when they are interpreting or applying the legislation. Typically a long title lists at a high level what the Act does rather than stating the purposes underpinning the Act. Including a purpose statement in a new Act, and omitting a long title, would be in line with modern legislative practice.

### Benefits of a purpose statement

The main rule for the interpretation of statutes in New Zealand is that the meaning of an Act “must be ascertained from its text and in the light of its purpose” (Interpretation Act 1999, section 5(1)). Adding a formal purpose statement may therefore reduce ambiguity and make it easier for users and the courts to interpret the Act, by providing a guide to Parliament’s intent when enacting the Act.

A purpose statement would ideally:

- represent the purpose of the Act, and
- encompass Customs’ functions and powers, including the management of goods, people and craft and the management of the border.

An example of a purpose statement is in the Immigration Act 2009:

**“The purpose of this Act is to manage immigration in a way that balances the national interest, as determined by the Crown, and the rights of individuals.”**

## A principles statement

A set of principles could also provide context and assist users of the Act in interpretation. A lack of a principles statement does not deter from the application or effectiveness of the Act, however, similar to the purpose statement, principles assist the courts and users of the Act in interpreting the legislation.

A set of principles could represent various components of the Customs system and could be related to key areas of Customs’ functions.

Here is an example of a set of statutory principles, from the Policing Act 2008:

## Policing Act 2008, section 8

“This Act is based on the following principles:

- a) principled, effective, and efficient policing services are a cornerstone of a free and democratic society under the rule of law.
- b) effective policing relies on a wide measure of public support and confidence.
- c) policing services are provided under a national framework but also have a local community focus.
- d) policing services are provided in a manner that respects human rights:
- e) policing services are provided independently and impartially:
- f) in providing policing services every Police employee is required to act professionally, ethically, and with integrity.”

## A FRESH APPROACH: WHAT DO YOU THINK?

Q 6 Should a new Act include a purpose statement?

Q 7 Should a new Act include a set of principles?