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Paper prepared by: Hon Meka Whaitiri, Minister of Customs

Date considered by Cabinet: 25 October 2022

Name of paper: Customs and Excise (Arrival Information) Amendment Bill: Approval for introduction

Cabinet Reference: LEG-22-MIN-0173

Purpose of the paper: This paper sought the Cabinet Legislation Committee's agreement to introduce the Customs and Excise (Arrival Information) Amendment Bill.

Redactions Some parts of these papers have been withheld under sections 9(2)(f)(iv) and 9(2)(h) of the Official Information Act 1982. Any redactions appear in the text as grey boxes, with an explanation of why the redaction was made.



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Cabinet Legislation Committee

Minute of Decision

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Customs and Excise (Arrival Information) Amendment Bill: Approval for Introduction

Portfolio **Customs**

On 20 October 2022, the Cabinet Legislation Committee:

- 1 **noted** that the Customs and Excise (Arrival Information) Amendment Bill (the Bill) holds a category 4 priority on the 2022 Legislation Programme (to be referred to Select Committee in 2022);
- 2 **noted** that in June 2022, the Cabinet Social Wellbeing Committee agreed to a range of changes to the Customs and Excise Act 2018 to provide for Customs' use of the New Zealand Traveller Declaration (NZTD) in legislation, relating to the digitising of the paper arrival card [SWC-22-MIN-0127];
- 3 **noted** that the Bill provides for a clear arrival information obligation to help with Customs-related border management matters, such as collection of revenue and detection of restricted or prohibited goods;
- 4 **approved** the Customs and Excise (Arrival Information) Amendment Bill [PCO 24500/7.0] for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives;
- 5 **agreed** that the Bill be introduced on 10 November 2022;
- 6 **agreed** that the Government propose that the Bill be:
 - 6.1 referred to the Foreign Affairs, Defence and Trade Committee for a consideration period of four months;
 - 6.2 enacted by 21 June 2023

Sam Moffett
Committee Secretary

Present:

Hon Andrew Little (Chair)
Hon Nanaia Mahuta
Hon Poto Williams
Hon Meka Whaitiri
Dr Duncan Webb, MP

Officials present from:

Office of the Prime Minister
Officials Committee for LEG

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Office of the Minister for Customs

Cabinet Legislation Committee

Customs and Excise (Arrival Information) Amendment Bill Approval for Introduction

Proposal

- 1 This paper seeks Cabinet agreement to introduce the Customs and Excise (Arrival Information) Amendment Bill (the Bill).

Policy

- 2 On 29 June 2022, Cabinet agreed to a range of changes to the Customs and Excise Act 2018 (the Act) to provide for the New Zealand Customs Service's (Customs) use of the New Zealand Traveller Declaration (NZTD) [SWC-22-MIN-0127] in legislation. The NZTD is a digital system, which enables travellers to New Zealand to comply with some border management information requirements, such as arrival card requirements. This legislation focuses on the third tranche of NZTD programme, which is the digitalisation of the paper arrival card and relates to Customs' use of the NZTD.
- 3 NZTD is an integral part of work to build New Zealand's safer and smarter border. NZTD has also supported the Government's border health requirements in response to COVID-19 at the air border by verification of health requirements.
- 4 The benefits of digitising the New Zealand Passenger Arrival Card (the "arrival card") include more targeted risk assessment on arrival, reducing unnecessary referrals of travellers to border officers. It will also provide an opportunity for travellers to experience a more streamlined experience on arrival by allowing them to voluntarily provide information in advance of travel. In addition, a digital system has the ability to provide greater guidance around questions, such as additional prompts to help travellers answer questions accurately.
- 5 A digital arrival card could be implemented using existing Customs legislation, however, changes are desirable to improve the enforcement and functionality of the system.
- 6 This Bill amends the Act to provide for a clear arrival information obligation to help with Customs-related border management matters, such as collection of revenue and detection of restricted or prohibited goods. The Bill also aims to improve the collection of arrival information by introducing new offences to enforce the system.

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- 7 Specifically, the Bill provides:
- an explicit obligation on arriving passengers to provide prescribed arrival information
 - two new offences – one relating to failure to provide prescribed arrival information and at the time required and one for providing arrival information that is erroneous in a material particular
 - a regulation-making power to set the time by which arrival information must be provided to Customs
 - a regulation-making power to exempt persons from the requirement to provide arrival information
 - chief executive rules will prescribe the information that must be provided
 - a power for Customs to collect certain information about persons arriving in New Zealand to verify compliance with traveller requirements set out in legislation administered by other agencies.
- 8 This Bill also provides for the Chief Executive of Customs to collect other arrival information for the purpose of verifying other agencies' traveller data entry requirements. This would be used where another enactment designates information as 'arrival information' for this purpose. Verification could be needed to manage emergency situations at the border.
- 9 The term New Zealand Traveller Declaration is not used in the Bill because it is a name for the system, which are not normally included in legislation. This is because if the name of the system changes it would result in the need to amend primary legislation.
- 10 The Bill covers Customs' related NZTD changes. s 9(2)(h) OIA
 [REDACTED]
 [REDACTED]
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It is important that design and implementation address digital barriers

- 11 Using an electronic system may create barriers to use for some groups, such as disabled and older persons. Barriers include access to online systems and devices, digital literacy and the confidence to use digital systems. I am committed to ensuring the persons who may struggle with the electronic nature of NZTD are well supported. Travellers can have someone complete their NZTD on their behalf e.g. a whanau member.

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- 12 Work is underway to improve the user friendliness of the system. Government Web Accessibility Standards will also need to be met before the digital arrival card goes live.
- 13 The NZTD Programme, who are developing the digital arrival card, are in the early stages of developing a user testing strategy. I have asked Customs to ensure appropriate targeted user testing of groups that may face digital barriers is undertaken and ensure there are measures in place to support travellers to meet this requirement.
- 14 The paper arrival card is expected to continue to be available to support the transition to the digital arrival card, in particular where people do not have a device to do their NZTD on arrival. However, people will be encouraged to use the electronic system.
- 15 It is unlikely people will struggle with the questions in the digital arrival card because the questions are not expected to substantially change from those used in the existing paper arrival card.

Risks

- 16 The Bill provisions are unlikely to be contentious because there is likely to be recognition of the continued value of arrival information for managing risks on arrival and that electronic collection can improve the timeliness of this information. Information collected is likely to be more reliable as it does not rely on hand written information.
- 17 There has been some public criticism about the lack of user friendliness and digital accessibility of NZTD for verification of health requirements. The planned use of NZTD will be different to when it was used for health verification. For example, it will not be required offshore and there are no documents to upload such as vaccination certificates.

Seeking agreement to amend the level of the offence fine

- 18 Cabinet had agreed that two new offences will be created in relation to this new obligation [CAB 22 MIN 0251]:
- failing to provide the prescribed information within the prescribed time; and
 - when the information is provided to Customs, it is erroneous in a material particular.
- 19 Cabinet agreed that the maximum penalty for this offending for an individual should be a fine not exceeding \$5,000. There was an error in the recommended level of fine. The policy intent was for the fine to be similar to existing offences. The maximum penalty for this offending for an individual should be a fine not exceeding \$1,000. The offending referred to in the preceding paragraph is similar to offending in section 363(1)(a) and section 364(1)(a) of the Act; those offences carry a maximum fine of \$1,000 for an

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individual, accordingly the maximum fine for these new offences should be consistent.

- 20 I used the authorisation Cabinet had given to me [SWC-22-MIN-0127] to make changes to amend offence provisions for an individual fine from \$5,000 to \$1,000 because \$5,000 was provided in error. I am now seeking Cabinet agreement to this change.

Impact analysis

- 21 Two regulatory impact assessments were prepared in accordance with the necessary requirements and were submitted when Cabinet policy approvals were sought [SWC-22-MIN-0127].

Compliance

- 22 The Bill complies with each of the following:
- 22.1 the principles of the Treaty of Waitangi
 - 22.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 (see below)
 - 22.3 the disclosure statement requirements
 - 22.4 the principles and guidelines set out in the Privacy Act 2020
 - 22.5 relevant international standards and obligations
 - 22.6 the [Legislation Guidelines](#) (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

Human rights

- 23 The amendments to the Act in this Bill to require arrival information are unlikely to be inconsistent with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.
- 24 The requirement to provide information could impact on section 14 of the New Zealand Bill of Rights Act 1990, the right to freedom of expression. However, this is considered justified because information is necessary for Customs to undertake its functions under the Act, for example, to enable the collection of duty. Any changes to the timing of providing information through the proposed regulation-making power could impact on this right and would need an assessment for consistency with the New Zealand Bill of Rights Act 1990.
- 25 Section 25(c) of the New Zealand Bill of Rights Act 1990 provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. There is justification for this right to not be met in proposing two strict liability offences. There is currently no enforcement requirement to compel a person to provide a Customs-related NZTD. The Bill includes a strict liability offence to address this gap because of

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the nature of the offence (something is either done or not done), and it provides a low-cost and easy to administer way to encourage compliance. Providing an offence in the Act allows for the creation of an infringement offence in regulations to provide a low cost way of enforcement. Strict liability offences mean if the person commits the act or omission prohibited under the offence they may be pursued for the offence, regardless of their mental state at the time. However, enforcement officers may exercise discretion in considering the circumstances of the failure and there are processes in existing legislation that provide a defendant with an opportunity to appeal the offence.

- 26 Clause 7 of the Bill provides for a 'reasonable steps' defence to the new offence proposed in section 28B(1)(b) to allow for consideration of the circumstances despite the strict liability nature of the offences.
- 27 Moving to an online platform could impact on people's freedom of movement if they do not have access to online systems to complete their NZTD. In addition, lack of access could result in people being charged with offences. To mitigate this paper arrival cards will be available to those that do not have access to a device to complete their NZTD. In the medium term, other solutions are being investigated (such as kiosks at the airport) to provide travellers with a portal to complete their NZTD on arrival where they do not have their own device or online access.

Privacy Commissioner recommended changes

- 28 The Privacy Commissioner recommends the proposed Bill should include the type of information that may be collected for the New Zealand Travel Declaration Card and not leave it to the chief executive rules to prescribe this. The Commissioner noted:

'that using Chief Executive powers to make rules to prescribe the type of information that may be collected, allows for the types of information to be changed without any transparency or oversight from the public or Parliament (a change from the expectations of the current Customs and Excise Act 2018). This may result in over collection of personal information that goes beyond the intended purpose of the Bill and unduly impacts on individual privacy rights'

- 29 I consider that prescribing information in chief executive rules is appropriate as the information requirement may change over time and the rules provide a timely way to update requirements. The use of chief executive rules for setting out arrival information requirements aligns with the existing approach for collecting arrival information. I consider that there are appropriate checks and balances on using chief executive rules to set out information requirements. Chief executive rules are secondary legislation for the purposes of the Legislation Act 2019, which means that the Minister of Customs must present them to the House of Representatives and they can be disallowed by the House of Representatives. The Chief Executive of Customs cannot collect information which is outside of the scope of the Act. While there are no public consultation requirements, members of the public have a range of

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mechanisms to raise any concerns about chief executive rules, including making a complaint to the Ombudsman, a parliamentary committee or a Member of Parliament.

Consultation

30 The paper was prepared by Customs in consultation with the Ministries of Health, Business, Innovation and Employment, Foreign Affairs and Trade, Justice, Transport, Ministries for Pacific Peoples, Primary Industries, Ethnic Communities, Office for Seniors, Office for Disability Issues, Department of Internal Affairs, Treasury, Stats NZ, and Crown Law Office. The Department of the Prime Minister and Cabinet, Te Arawhiti and Te Puni Kōkiri were informed.

31 The Office of the Privacy Commissioner was also consulted.

Binding on the Crown

32 This Bill binds the Crown.

Creating new agencies or amending law relating to existing agencies.

33 The Bill does not create a new agency that is legally separate from the Crown.

34 The legislation will not amend the existing coverage of the Ombudsmen Act 1975, the Official Information Act 1982 or the Local Government Official Information and Meetings Act 1987.

Allocation of decision making powers

35 The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

Associated regulations

36 Regulations and chief executive rule changes will be needed to bring the Bill into operation. ~~s 9(2)(f)(iv)~~ Cabinet Legislation Committee agreement will be sought for regulations to support the implementation of the changes. For example, regulations to set out exemptions from the requirement to provide an NZTD and the timing of when arrival information is required.

37 Regulations will be made before the empowering provision comes into force under section 43 of the Legislation Act 2019. This provides power to make regulations before the legislation comes into force or take effect.

38 Chief executive rules prescribe the arrival information that must be provided to Customs and the way by which it is provided (for example, through the NZTD). Chief executive rule changes will also be made in ~~s 9(2)(f)(iv)~~. These are made under section 421 of the Act and must be published in the *Gazette* 28 days before they come into force.

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39 Cabinet policy approval may be sought for additional exemptions from the requirement to provide arrival information in s 9(2)(f)(iv) OIA

If changes are agreed, Cabinet Legislation Committee approval for regulations would be sought s 9(2)(f)(iv) OIA

Other instruments

40 This Bill does not contain any provision empowering the making of other instruments that are deemed to be legislative instruments or disallowable instruments (or both).

Definition of Minister/department

41 The Bill does not contain a definition of Minister, department (or equivalent government agency), or chief executive of a department (or equivalent position).

Commencement of legislation

42 The commencement date for the Bill is 21 June 2023.

Parliamentary stages

43 This Bill should be introduced into the House in November 2022 in order to ensure that it goes through its final House stages and Royal Assent in early May 2023, and commences on 21 June 2023. A short period between final house stages and commencement is proposed to allow for any technical and operational adjustments to be made before the NZTD (digital arrival card phase) comes into force on 21 June 2023.

44 It is proposed that the Bill be referred to Foreign Affairs, Defence and Trade Committee for a period of four months.

Proactive Release

45 I propose to release this paper proactively subject to appropriate redactions within 30 business days of final decisions being made.

Recommendations

46 The Minister of Customs recommends that the Cabinet Legislation Committee:

1 **note** that the Customs and Excise (Arrival Information) Amendment Bill holds a category 4 priority on the 2022 Legislation Programme, referral to select committee by end of the year

2 **note** Cabinet agreed to a range of changes to the Customs and Excise Act 2018 to provide for Customs' use of the New Zealand Traveller Declaration (NZTD) [SWC-22-MIN-0127] in legislation, relating to the digitising of the paper arrival card

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- 3 **note** that the Bill provides for a clear arrival information obligation to help with Customs-related border management matters, such as collection of revenue and detection of restricted or prohibited goods. In particular, the Bill provides for:
- 3.1 an explicit obligation on arriving passengers to provide prescribed arrival information
 - 3.2 two new offences – one relating to failure to provide prescribed arrival information and at the time required and one for providing arrival information that is erroneous in a material particular
 - 3.3 a regulation-making power to set the time by which arrival information must be provided to Customs
 - 3.4 a regulation-making power to exempt persons from the requirement to provide arrival information
 - 3.5 chief executive rules will prescribe the information that must be provided
 - 3.6 a power for Customs to collect certain information about persons arriving in New Zealand to verify compliance with traveller requirements set out in legislation administered by other agencies.
- 4 **approve** the Customs and Excise (Arrival Information) Amendment Bill for introduction, subject to the final approval of the government caucus and sufficient support in the House of Representatives
- 5 **agree** that the Bill be introduced on 10 November 2022
- 6 **agree** that the Government propose that the Bill be:
- 6.1 referred to the Foreign Affairs, Defence and Trade Committee for consideration for a truncated four month select committee process
 - 6.2 enacted by 21 June 2023.

Authorised for lodgement

Hon Meka Whaitiri
Minister of Customs

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