

# POWERS

## AT A GLANCE

Customs' goal is to ensure that our Act gives us the powers we need to adequately protect the border and manage the collection of Crown revenue.

Most of our powers remain fit for purpose despite New Zealand's borders having seen technological changes and new security concerns over the last 20 years. However, we believe that a small number of our powers in the Act either need to be amended to allow us to adapt to these changes, or are not set out clearly enough.

### Getting your feedback

We are interested in your views on the following issues or proposals:

- clarifying arrival and departure obligations for marine craft:
  - removing certain exemptions for arriving craft
  - explicitly providing a power to stop and direct departing craft
- explicitly confirming Customs' powers exercised in the contiguous zone
- recognising Defence Force officers and Police officers as Customs officers in certain situations
- allowing Customs to perform certain functions outside New Zealand
- extending Customs' powers to carry out controlled deliveries of certain goods (currently this power applies only to illegal drugs and precursor substances)
- whether to clarify in the Act the obligation for a person to present accompanying baggage when requested by a Customs officer
- whether to place a new obligation on passengers to empty their pockets during a routine baggage search
- confirming Customs' ability to examine electronic devices as part of a routine baggage search
- requiring a person to provide a password or encryption key for their electronic device when requested by a Customs officer.

The border is an important point for protecting New Zealand from security threats and from the introduction of prohibited and harmful goods, and for collecting revenue. Recent terrorism events internationally and other cross-border safety concerns have increased the importance of border security worldwide.

However, the short period of time when people and goods are passing through the border means that critical decisions need to be made quickly. Once people or goods enter into the country, it can be difficult to trace them.

**“The Customs and Excise Act contains over 140 powers”**

**“Customs processing provides a brief and one-off opportunity to identify risk or criminal activity. If there is delay, and the opportunity is not taken, the person or goods will leave the jurisdiction and probably become unreachable.”<sup>13</sup>**

Customs is therefore provided with strong powers in relation to people, goods and craft in order to protect our border. Worldwide, Governments commonly accept that border-related powers need to be more intrusive than domestic powers.

Our powers also recognise that intentionally non-compliant people at the border hide in plain sight and try to appear legitimate. New Zealand Customs, like other border agencies worldwide, relies on the ability to randomly select people, goods and craft for further risk assessment. This means that significant discoveries of criminal offending can often be made even when there has been little or no suspicion of wrongdoing.

## Carrying out functions on behalf of other agencies

Because of our unique position at the border, Customs also performs functions on behalf of other New Zealand government agencies, and we are given powers under other legislation to fulfil these wider government functions. As a result, there is an expectation that we perform functions that extend beyond traditional customs functions. We also think that performing functions on behalf of other agencies is a Customs function itself because of our unique position at the border.

However, many of the functions we perform on behalf of other agencies are also necessary for Customs' purposes. For example, some of our screening of people, goods and craft is undertaken both for Customs' purposes and on behalf of other agencies for

Examples of other legislation enforced by Customs at the border:

- Arms Act 1983
- Biosecurity Act 1993
- Climate Change Response Act 2002
- Immigration Act 2009
- Misuse of Drugs Act 1975
- Passports Act 1992
- Terrorism Suppression Act 2002
- Wine Act 2003

<sup>13</sup> Ladley, A and White, N, Conceptualising the Border, Institute of Policy Studies, Wellington, 2006, p 46-47.

their specific purposes. The burden on people, goods and craft crossing the border is reduced because they are able to meet different border agencies' requirements at the same time.



Customs has roles or functions under 50 current Acts”

## Meeting New Zealand’s international obligations

Some of our powers also enable New Zealand to meet its international obligations in relation to controlling the border.

### Example of an international obligation

New Zealand is a signatory to the International Convention on the Simplification and Harmonization of Customs Procedures (the Revised Kyoto Convention). This means that our powers and actions must be consistent with the requirements and practices provided for under this convention.

An example of those requirements is that all goods, including vehicles and other craft, that enter or leave the particular territory must be subject to Customs control, whether or not they are liable to duties and taxes (Article 6.1).

## New developments and higher security expectations

The advances in technology, new risks at the border and evolving international priorities mean that Customs is required to meet higher expectations around security than ever before. For example, it is now easier to conceal prohibited material and evidence of offending on small electronic devices while crossing the border. It is important that border agencies have the appropriate enforcement powers to address these new developments and to meet the growing expectations of protection and security.

However, it is also important that our border powers maintain a balance between on the one hand protecting national sovereignty, revenue and public safety and, on the other, the rights of individuals:

**“The controls and powers that are inherent in border control activity will inevitably involve some limit on the ability of individuals to exercise the rights set out in the Bill of Rights Act. The question is not whether the general rights are being limited, but whether the rights and freedoms are prescribed by law and “subject only to such reasonable limits as can be demonstrably justified in a free and democratic society” (section 5).”<sup>14</sup>**

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<sup>14</sup> Ladley, A and White, N, Conceptualising the Border, Institute of Policy Studies, Wellington, 2006, p 57.

## Powers: The law as it stands

The Customs and Excise Act provides a wide range of powers that gives Customs the ability to:

- assist people, goods and craft with their obligations, and enforce those obligations, in order to facilitate travel and trade and ensure the security of the border
- search and examine goods and craft
- detain and seize certain types of goods in certain situations
- question people, require them to provide documents and otherwise gather relevant information
- detain, search and arrest people
- carry out investigations.

Our powers help to achieve rapid movement of legitimate travel and trade by allowing Customs to focus on the illegitimate travel and trade. Our powers also allow us to identify and assess risk, and to then respond to risks appropriately and efficiently.

## Powers: Our goal

GOAL	WHICH WILL RESULT IN THE FOLLOWING BENEFITS
<p>To ensure that our Act gives us the powers we need to adequately protect the border and manage the collection of Crown revenue.</p> <p>We also recognise that Customs has an obligation to protect people's freedoms and rights at the border to the appropriate extent.</p>	<ul style="list-style-type: none"> <li>• Customs has comprehensive knowledge about who and what is crossing the border</li> <li>• Customs has the ability to control and intervene with border activity as appropriate</li> <li>• Customs can better contribute to government objectives and collaborate with other border and law-enforcement agencies to improve the border experience for traders and travellers</li> <li>• the New Zealand public is protected from high-risk events,<sup>15</sup> such as terrorism and criminal activities.</li> </ul>

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<sup>15</sup> By "high-risk events" we mean those that could potentially damage New Zealand's international reputation, endanger people or the environment, or involve a large-scale breach of the border. Examples include terrorism events, pandemics, mass illegal migration, and cross-border drug operations.

## Powers: Key issues and opportunities

Customs believes that our powers are largely fit for purpose. Amendments to our legislation have ensured that our powers remain relevant for enforcing modern border controls. The specific issues or problems we have identified (see the boxes below) are those resulting from recent advances in technology and border security, or resulting from “ad hoc” amendments to the Act made as necessary for specific, immediate purposes.

### Arrival and departure powers for marine craft

- Customs has limited powers in relation to departing marine craft
- exemptions from Customs requirements for some arriving marine craft are no longer appropriate given increased border risks.

### Powers exercised in the contiguous zone and in other countries

The range of powers that Customs can exercise beyond New Zealand’s territorial water are inconsistent and do not support our contribution to wider government operations, such as responding to the arrival of mass illegal immigrant vessels and pre-clearance.

### Controlled deliveries

We have no specific authority under the Act to carry out controlled deliveries of goods other than illegal drugs.

### Baggage searches

- there is no explicit obligation on passengers to comply with a Customs officer’s request to empty their pockets during a baggage search
- there is some confusion over what is “accompanying baggage” for the purposes of a baggage search.

### Electronic devices

Customs believes that our general power to examine and search goods that are in our control (for example during a baggage search) includes electronic devices such as laptops, smartphones and portable hard drives. We would like this to be made explicit in the Act.

We also want the Act to make it clear that a person must provide access to their electronic devices if Customs requests this.

## Arrival and departure powers for marine craft

Customs has extensive powers at the border in relation to marine craft to ensure that we can adequately protect New Zealand from illegal entry, prohibited goods, illegal drugs, and other criminal activity. These powers need to be more extensive than those for aircraft because of the ability of marine craft to meet other craft or people within New Zealand waters, and between New Zealand and overseas ports, and transfer people or goods from one craft to another. The same threats do not exist for aircraft, which must of course operate in a much more controlled and restrictive way.

### Customs' powers in relation to arriving and departing craft include:

- questioning people on a craft
- boarding a craft
- searching a craft and any goods or baggage on board
- securing or removing goods from the craft
- chasing a craft (and firing at the craft as a last resort)
- seizing and detaining a craft.

We have identified several gaps in our powers that could be exploited by criminal syndicates, illegal immigrant vessels, and other non-compliant travellers or traders. Our focus has traditionally been on arriving people and craft, and on import goods, but Customs is increasingly expected to provide assurance also of export goods and departing people and craft. As a result, the gaps relate to both departing and arriving marine craft.

### Risks presented by exemptions from some requirements for arriving marine craft

People who arrive on a craft in New Zealand or depart on a craft are exempt from some Customs requirements if they did not, or do not intend to:

- travel beyond the Exclusive Economic Zone of 200 nautical miles out from the territorial sea baseline
- meet with any other craft or person that came from outside the Exclusive Economic Zone.

The requirements they are currently exempt from are: complying with any Customs direction concerning disembarkation; going to a Customs Controlled Area; making accompanying baggage available for examination; and complying with any directions about the movement of that baggage. These exemptions do not remove the requirement for the person to report to a Customs officer on arrival.

We believe the risk posed by these exemptions is more significant for arriving craft than departing craft. This is because arriving craft have the ability to bring people and prohibited

and dangerous goods into New Zealand and there is a risk that the exemptions can be used to escape Customs' attention. It is important that Customs can provide assurance that the entry of people, goods and craft into New Zealand is monitored and controlled, particularly to keep out undesirable goods.

While most arriving marine craft from outside the Exclusive Economic Zone comply with Customs requirements, just one case of non-compliance could bring a significant threat to the border and the safety of New Zealanders.

### Example of an information gap that could pose a threat

A vessel that had departed New Zealand arrived back in New Zealand's waters under customs arrival exemptions. Another vessel reported to government agencies that the arriving vessel had been dredging black coral within New Zealand's Exclusive Economic Zone. Black coral is a protected species under the Wildlife Act 1953.

If Customs had not been informed of the illegal activity, we would not have selected the craft for further risk assessment, unless we had evidence that an offence had been committed.

### No explicit Customs powers to stop and direct departing craft

Currently, Customs officers have the power to stop, direct and search **arriving** marine craft. We also have an explicit search power for **departing** marine craft, and the Act does not prevent Customs from stopping and directing departing craft for this purpose. But we want it to be made absolutely clear that Customs officers have the power to stop and direct departing craft, as with arriving craft. This current lack of consistency means that the Act is not transparent about Customs' powers at the border.

The number of non-complying marine craft departing New Zealand is low. But a single non-complying craft could pose a significant threat to New Zealand's security and reputation, and it is important that our powers reflect this.

It is much easier to sneak into or out of the country on a yacht than on a commercial aircraft. Doing this on aircraft is becoming even more difficult because of the information that airlines and Customs have access to and the strict aircraft security requirements.

Our current powers in relation to **departing** marine craft do not support our expanding role in providing assurance to our international partners for goods exported from New Zealand, and for departing people and craft.

## Our preferred solutions

### Removing certain exemptions for arriving craft

This preferred solution would address our inability to enforce certain requirements when arrival exemptions apply. We do not believe that more craft would necessarily be subject to searches or directions by a Customs officer under this option, as we will usually have no concerns with a craft in this category and will not enforce all arrival requirements. However, it is important that the necessary powers do exist if Customs is concerned that a craft has not complied with

#### The following exemptions would be removed

- the requirement to comply with any Customs direction concerning disembarkation
- making accompanying baggage available for examination, and complying with any directions about the movement of that baggage.

obligations, has committed an offence, or is carrying illegal or dutiable goods.

Customs' ability to randomly select craft for full processing deters non-compliance and promotes the integrity of our border. Removing these particular exemptions will ensure Customs can protect New Zealand from threats.

### An explicit power to stop and direct departing craft

This preferred solution would address the lack of transparency identified with Customs' powers for departing marine craft, and would confirm the comprehensive and flexible set of powers that allow us to respond effectively to most likely scenarios.

This option would explicitly align all Customs' powers for departing marine craft with those we have for arriving marine craft, so that our power to stop and direct departing craft was not merely implied. This power is not used often – approximately only once a year – as it is only needed when we suspect a departing craft has not met departure requirements or intends to commit an offence.

To the extent a departing craft is exercising its right to innocent passage, we believe this option remains consistent with this right affirmed in the United Nations Convention on the Law of the Sea. Passage is not innocent if it is prejudicial to the peace, good order or security of New Zealand. For example, the right of innocent passage would probably not apply if a craft fails to meet its departure requirements and attempts to unload or load people, goods or currency in breach of customs laws.

## Other solutions we are considering

### Status quo

Retaining the status quo in both of the areas discussed above would continue to leave a gap in the border that could be exploited by criminal syndicates or other non-compliant parties. This gap would also become more concerning as border risks become more varied and complex. Compliant craft will also continue to be affected as Customs focuses unnecessary effort on all marine craft.

The status quo also involves a lack of transparency around the extent of Customs' powers. We are not able to fully assure the New Zealand public that we can respond appropriately in high-risk situations, despite our range of powers that imply this.

### Who would be affected by change

A very small number of commercial and private craft would be affected – we estimate between one and three craft each year. We also believe there would be minimal additional compliance costs for those craft.

## ARRIVAL AND DEPARTURE POWERS FOR MARINE CRAFT: WHAT DO YOU THINK?

- Q 73 Do you think the arrival exemptions discussed above for marine craft should be removed? Please give your reasons.
- Q 74 Do you think the Act should make it explicit that Customs can stop and direct departing marine craft? Please give your reasons.
- Q 75 Can you think of other ways in which Customs could manage the risks posed by marine craft within New Zealand waters?
- Q 76 Would Customs' preferred solutions proposed above result in additional compliance costs for you or your business?

## Powers available in the contiguous zone

The Customs and Excise Act allows Customs to exercise certain powers beyond the territorial waters and up to the outer limits of New Zealand's contiguous zone.

It is common worldwide for border agencies' powers to extend to the outer limits of the contiguous zone, and in some cases beyond this zone. This is because border agencies may need to respond to situations in the outer limits of their country to protect the border itself.

### Example of a country with customs powers in, or beyond, the contiguous zone

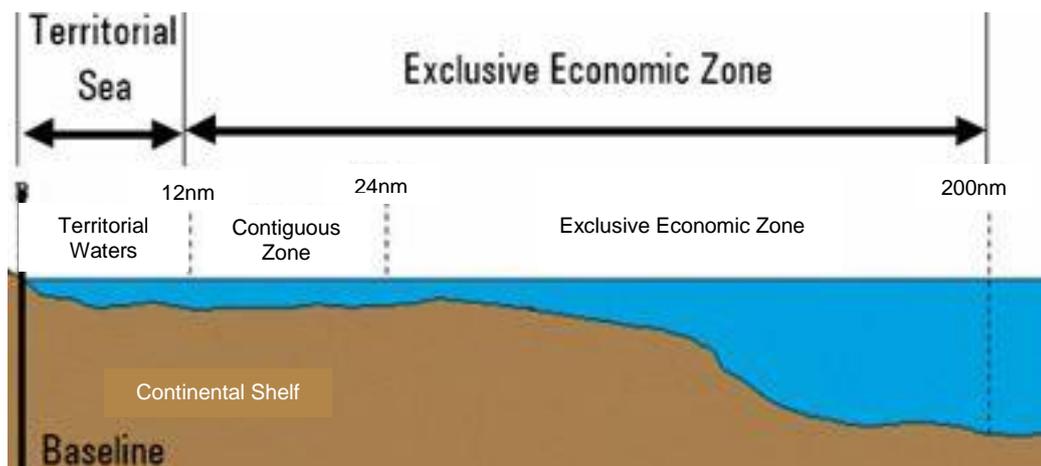
Australia's Border Protection Command is a taskforce made up of officers from the Australian Customs and Border Protection Service and the Australian Defence Force.

This taskforce coordinates and controls operations in Australia's Exclusive Economic Zone, contiguous zone, and territorial sea. This includes performing customs functions, such as responding to threats posed by prohibited imports and exports.

### What is the contiguous zone?

The territorial limits of New Zealand are the outer limit of the territorial sea (which extends to 12 nautical miles from the coast).<sup>16</sup> The contiguous zone then extends from the outer limit of the territorial sea (12 nautical miles from the coast) to 24 nautical miles from the coast.

New Zealand's Exclusive Economic Zone extends to 200 nautical miles from the coast, and includes the contiguous zone.



<sup>16</sup> See Part 1 of the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977 for more information.

## When and how we currently exercise powers in the contiguous zone

We do not exercise powers in the contiguous zone very often as they are usually only required for high-risk situations. The mere existence of the powers acts as a deterrent for illegal activity in this zone.

### Example where we might use powers in the contiguous zone

Customs might use powers in this zone if a boat that we suspected of trying to smuggle people or prohibited goods was trying to enter New Zealand. Here, there is not only a threat to New Zealand's border from illegal activity, but there are safety concerns for the people on board the boat, or for the safety of the first responders.

Given the types of high-risk situations where these powers would be exercised, it is common for government agencies to carry out joint operations to ensure the safest and most effective response – for example, Customs would work alongside our Navy or Police.

### Examples of Customs' powers in the contiguous zone

- questioning people on certain craft in relation to the craft, its voyage, and any people or goods that have been carried by the craft
- boarding and searching a craft
- searching a person on board a craft
- chasing any craft that refuses to stop, and as a last resort firing on it to make it stop
- detaining a craft so that we can investigate criminal offences
- seizing and detaining goods if we have good cause to suspect they are an instrument of crime or tainted property and we are satisfied they are being, or are intended to be, exported or imported.

## We want to increase transparency

Most of the powers that we exercise in the contiguous zone are ones that the Act explicitly says apply in that zone. Some of the powers are implied as they naturally follow from the powers that the Act explicitly refers to. We want to make the Act more transparent for these situations, so that it is clear how Customs operates.

## Our preferred solution

### **Explicitly confirm the powers Customs can exercise in the contiguous zone in the new Act**

Our preferred option would ensure that the Act is clear and consistent on the powers that Customs needs in order to respond adequately to any high-risk situations in the contiguous zone.

Under this option, those powers that currently apply in the contiguous zone only by implication would be explicitly referred to in the Act as applying in that zone. This would allow us to continue enforcing compliance effectively in the contiguous zone and would provide greater transparency around which powers apply. For example, the Act could explicitly provide that the requirement to present baggage on arrival to New Zealand is a power that applies in the contiguous zone; currently that power is implied by the ability to search craft in that zone.

## Other solutions we are considering

### **Extending Customs' powers in the contiguous zone to all powers in the Act**

Under this option the Act would explicitly state that all powers given to Customs under the Act can be exercised by Customs officers in the contiguous zone.

We do not think this is a viable option: it may be inconsistent with the UN Convention on the Law of the Sea because some of our powers go beyond enforcing customs and revenue laws within New Zealand. We believe that this potential breach of New Zealand's international obligations would outweigh any benefits that may be achieved under this option.

We also do not believe it is necessary for all Customs' powers to be available in the contiguous zone in order for us to protect the border.

### **Status quo**

Customs would continue to be explicitly authorised to exercise some powers in the contiguous zone, mainly powers relating to boarding and searching craft. Retaining the status quo would mean continuing some unnecessary confusion and lack of transparency.

## Who would be affected by change

Customs does not use its powers in the contiguous zone very often. When they are used, the people affected are likely to be those acting unlawfully in the contiguous zone, including people attempting to enter New Zealand illegally.

**POWERS AVAILABLE IN THE CONTIGUOUS ZONE:  
WHAT DO YOU THINK?**

Q 77 Do you think there should be greater transparency in the Act about the range of powers Customs can exercise in the contiguous zone? Please give your reasons.

## Other agencies' staff as authorised Customs officers

There are times when Customs needs to call on the expertise of the Police and Defence Force. These are rare but high-risk emergency situations – for example, when a criminal syndicate-owned vessel with a large amount of illegal drugs is attempting to arrive in, or leave, New Zealand. Police and Defence Force staff can currently be authorised to exercise the powers of a Customs officer, including in these high-risk situations.

Under the current Act, this requires written authorisation from the Customs chief executive: the chief executive has the power to authorise a suitably qualified and trained person who is not a Customs officer to exercise any function or power that may be performed or exercised by a Customs officer. This can also apply in the contiguous zone where these people may not normally have jurisdiction. For example, a Police officer does not have jurisdiction to enforce the law in the contiguous zone, except when authorised by another agency that does have jurisdiction there.

The current written authorisation process works well for most situations, but it is not suitable for emergencies, where a fast response is required. Other legislation has more practical authorisation processes – see the Fisheries Act example below:

### Example: Fisheries Act

The Fisheries Act 1996 provides that officers in command of any Defence Force vessel or aircraft, and all Police constables, are fishery officers for the purpose of exercising powers conferred on fishery officers. This applies in New Zealand's contiguous zone and Exclusive Economic Zone, as well as within New Zealand itself.

## Our preferred solution

### Recognise Defence Force and Police officers as Customs officers in certain situations

Under this option, the new Act would recognise New Zealand Defence Force officers and New Zealand Police officers to be Customs officers for the purposes of responding to emergencies or situations requiring a multi-agency response. In routine or planned situations, however, the current written authorisation process would still apply.

This option would create efficiencies for Customs, the Police and the Defence Force. By providing agencies with the necessary powers, it would allow them to better prepare, respond and coordinate in high-risk emergencies. These responses are likely to require multi-agency teams and may also involve dangerous weapons. They are particularly likely to apply in the contiguous zone, where Customs has wide-ranging powers.

## Example: multi-agency response

If an illegal immigrant vessel was attempting to enter New Zealand, staff from several agencies would be required to respond – for example Customs, Immigration New Zealand, the Police and the Navy.

As Customs is one of the few agencies that has the necessary powers in the contiguous zone, we would lead the response team in that zone.

It is more practical and efficient if each agency present has the necessary powers required to enforce the law and protect New Zealand from the threats that an illegal vessel may present.

Allowing multi-agency responses also ensures that New Zealand government agencies can work collaboratively to protect our border in the most effective and efficient way.

It is unclear at this stage whether the liability associated with Customs powers exercised by Police and Defence personnel falls with Customs or with the other agency. We will do further work to determine whether there are liability implications for Customs, Police and Defence, particularly under the Health and Safety in Employment Act 1992.

We are also considering whether it is appropriate for Defence Force and Police officers to be permitted to carry their weapons (if authorised to carry them in their ordinary work) when acting as Customs officers. Carrying weapons could be justified to ensure the government can respond appropriately to high-risk and dangerous situations, but it may also be inappropriate given that Customs officers do not carry weapons. We will continue to do further work with these other agencies on this question.

## Other solutions we are considering

### Status quo

Retaining the status quo would maintain the current written authorisation process, which would continue to be unworkable in situations requiring a fast response.

### Who would be affected by change

Customs' preferred option for authorising Police and Defence staff as Customs officers would not, however, apply to all Police and Defence staff because not all staff operate in the contiguous zone. It would only apply to specialist response units – that is, to the Police Special Tactics Group and to equivalently trained Defence Force staff.

## **AUTHORISED CUSTOMS OFFICERS: WHAT DO YOU THINK?**

- Q 78 Do you think new legislation should recognise Police officers and Defence Force officers as Customs officers in certain emergency or high-risk situations? Please give your reasons.
- Q 79 Do you think Police officers and Defence Force officers should be armed (if authorised to be armed in their ordinary work) when acting as Customs officers?
- Q 80 Can you think of other improvements that would allow government to operate more efficiently in responding to high-risk and emergency situations, particularly in the contiguous zone?

## Performing Customs functions outside New Zealand

Border agencies worldwide are looking at new ways of better managing the risks to their borders, while allowing legitimate travellers and goods to be quickly cleared. One method is to “push the border out” by collecting information as early as possible and responding to threats before they reach the border. Some countries are also working together to develop collaborative approaches to managing border flows in some situations.

### Example: United States Container Security Initiative

“United States Customs and Border Protection has stationed teams of officers in foreign locations to work together with host foreign government counterparts.

Their mission is to target and prescreen containers and to develop additional investigative leads related to the terrorist threat to cargo destined to the United States.”<sup>17</sup>

New Zealand Customs will work more collaboratively with other countries and international organisations as we all attempt to develop more efficient and secure borders. A possible future example is the pre-clearance of people, goods and craft in other countries, such as Australia, Canada and the US, before they depart for New Zealand.

New Zealand Customs officers cannot perform their Customs functions or make decisions outside New Zealand (although some powers can be exercised out to 24 nautical miles). We think this is a barrier to us collaborating internationally and working towards regional and global initiatives for border management.

However, although Customs’ powers do not apply in other countries or on the high seas, we do currently perform some Customs functions in these areas, relying on people voluntarily complying with our requirements.

### Example of where Customs performs off- shore border clearance

Customs processes many cruise ship passengers on-board the ship before they arrive in New Zealand.

This allows us to process a large number of passengers – sometimes the equivalent of seven 747 airplane loads.

Processing off-shore is becoming a much larger part of our work, particularly as the cruise industry expands.

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<sup>17</sup> United States Customs and Border Protection, CSI: Container Security Initiative, [www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief](http://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief).

## Our preferred solution

### **Allow certain functions to be performed outside New Zealand**

Our preferred option increases our ability to facilitate legitimate traders and travellers and to create a more efficient and customer-friendly border experience. It retains some limitations around the functions that can be performed offshore, and this would protect the rights of individuals. Only certain administrative functions would be authorised and only with the permission of the host country.

An enabling provision would be included in the new Act rather than an all-inclusive mandate. This provision would allow for Regulations or Rules to be made that would specify certain functions under the Act that could be performed in other countries (with the consent of the host country) or on the high seas. This would allow people, goods and craft to satisfy customs arrival obligations before they arrive in New Zealand. It would only apply to Customs' functions and would not encroach on those of other New Zealand border agencies.

This option would also recognise certain obligations that could be placed on people so that Customs can successfully fulfil the relevant functions. The enabling provision would not be wide enough to allow more intrusive powers to be exercised in other jurisdictions, such as personal search and detention powers, as these would probably conflict with the domestic laws of the host country. The enabling provision could also be used to delegate our functions to equivalent border officers overseas.

If Customs contributes to new pre-clearance initiatives in the future, which is highly likely due to the global shift in this direction, we would not need to amend the Act again to cater for these opportunities. Instead, the new functions could simply be specified in Customs Regulations or Rules, using the authority of the enabling provision. This would be a quicker and more flexible process than making changes to the Act.

This option is similar to arrangements in other countries. Customs agencies in Australia, Canada, the United States, and the United Kingdom are able to exercise certain customs powers in other jurisdictions with the agreement of the other country.

## Other solutions we are considering

### **Status quo**

Retaining the status quo would not change the territorial reach of Customs' powers. We would continue to perform some administrative functions offshore but this would rely on the voluntary compliance of travellers and traders.

It is likely that future changes to the Act would be required to allow Customs to contribute to worldwide border initiatives, such as pre-clearance of people, goods and craft.

## Who would be affected by change

Under our preferred option, the most common use of the new powers would be for the pre-clearance of cruise ship passengers while they are on the way to a New Zealand port. In future, pre-clearance could become more common for other craft, as well as people and goods.

### **PERFORMING CUSTOMS FUNCTIONS OUTSIDE NEW ZEALAND: WHAT DO YOU THINK?**

- Q 81 Do you think that Customs officers should be authorised to perform certain functions outside New Zealand? Please give your reasons.
- Q 82 What types of functions do you think Customs should be able to perform overseas? What functions should we not be able to perform overseas?
- Q 83 Do you think Customs should play a greater role overseas to enable us to best facilitate the movement of people, goods and craft into New Zealand? Please give your reasons.

## Controlled deliveries

Customs (usually together with the New Zealand Police) sometimes carries out deliveries of controlled drugs and precursor substances when these have been detected on importation into New Zealand. These controlled deliveries are a highly effective method that has been used for many years in investigating drug offences.

### What is a controlled delivery?

When illegal drugs have been detected arriving in New Zealand in a package or inside goods, Customs may release the package or goods and track them to their destination so that the true importer can be identified.

Controlled deliveries of drugs are authorised under the Misuse of Drugs Amendment Act 1978.

Controlled deliveries have often been successful in breaking the chain in a string of illegal drugs coming into our community and in exposing the criminal syndicates that are involved. They are especially useful for investigating illegal drug imports when the origin and destination of a package are disguised.

The Search and Surveillance Act 2012 also permits a Customs officer to exercise further powers during the course of a controlled delivery, such as searching a person, place or vehicle.

As criminal syndicates develop more advanced and complex ways of importing illegal goods, Customs will need to adapt. We think there will be a need in the future to carry out controlled deliveries of illegal goods other than drugs, but currently we have no legislative authority to do this.

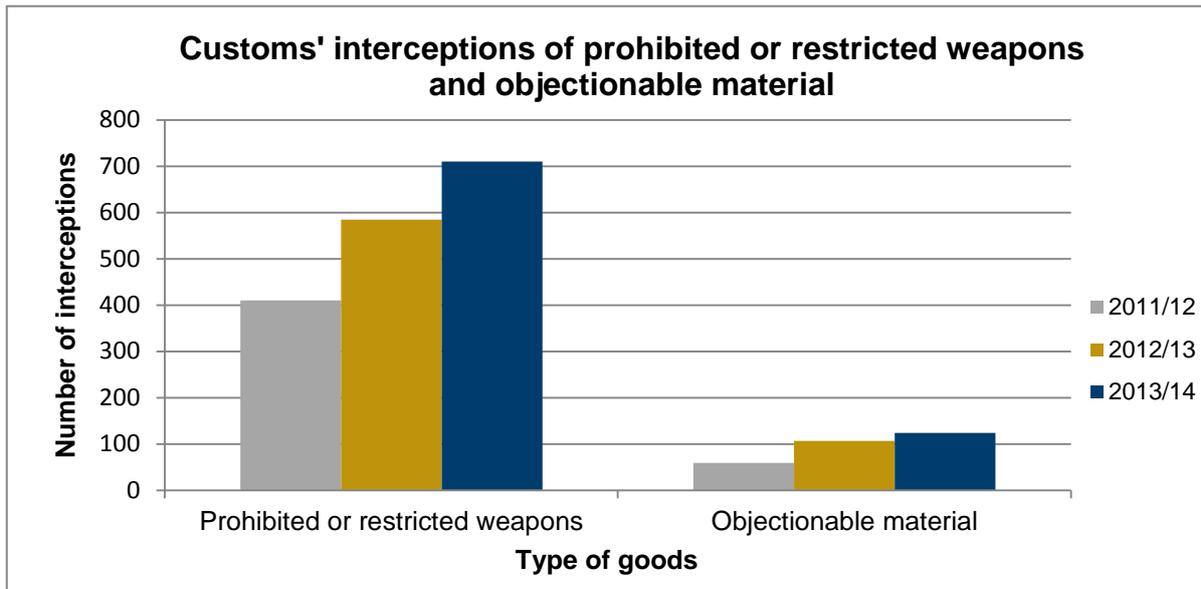
### Example of where a controlled delivery could have been used

A package arrived in New Zealand from Hong Kong containing 12 stun guns (a restricted weapon).

Previous seizures of prohibited goods destined for the same address had alerted Customs to ongoing importing of prohibited goods, many of which were dangerous weapons intended for gang-related activity.

If a controlled delivery had been used, Customs would have been able to carry out a more thorough investigation and obtain evidence of the actual importer.

Customs' interceptions of prohibited or restricted weapons and objectionable material have been increasing in recent years. These types of imports cannot currently be subject to a controlled delivery. The graph below shows the increase in interceptions of these goods over the last three years.



## Our preferred solution

### Allow Customs to undertake controlled deliveries of certain goods

Under this option, our Act would include a controlled delivery power for certain goods, one that is very similar to the current power in the Misuse of Drugs Amendment Act 1978. We expect that this option would enable Customs to adequately protect the border from harm. We would like your views on this option and on which goods could be subject to controlled deliveries.

We think these other controlled deliveries should be limited to a specific range of goods, such as prohibited or restricted weapons and objectionable publications. The types of goods could be prescribed in Regulations or Rules.

### Goods that could be subject to controlled deliveries

- restricted weapons, such as pepper sprays or stun guns
- objectionable publications, such as objectionable DVDs or books
- ATM and credit card skimming devices
- counterfeit money.

As with the power in the Misuse of Drugs Amendment Act 1978, the new power would also allow for controlled deliveries within New Zealand after overseas customs agencies have discovered the attempted importing of the prohibited goods into New Zealand. The power would also link to the Search and Surveillance Act 2012 so that Customs officers could search people, places or vehicles, as is currently permitted during controlled deliveries of drugs or precursor substances.

The new power would also exclude any criminal or civil liability for Customs officers and freight and mail carriers who are involved in a controlled delivery, in the same way as for controlled deliveries for drugs.

The Misuse of Drugs Amendment Act 1978, not our customs legislation, would continue to govern controlled deliveries of drugs and substances used to manufacture drugs (precursor substances).

The Ministry for Primary Industries has indicated that goods of interest as potential biosecurity threats should not be subject to controlled deliveries. Customs recognises the importance of biosecurity protection for New Zealand, and we would take into account any biosecurity impacts when we identify a specific list of goods to be included in the legislation.

## Other solutions we are considering

### Status quo

Retaining the status quo would prevent Customs from undertaking controlled deliveries for prohibited goods other than drugs. This will hinder our future ability to fully investigate prohibited imports as new technologies are used to evade border controls.

Customs would continue to use other investigative methods for these types of goods where appropriate. But often a controlled delivery will be the most effective mechanism for identifying the true importer and getting the evidence needed for a prosecution.

### Who would be affected by change

Controlled deliveries of goods other than drugs could provide benefits to the community by preventing harm from these goods.

However, controlled deliveries are an expensive exercise for Customs, and it is likely that controlled deliveries of other goods would be infrequent – probably less than 20 a year – and would be used only for ongoing investigations. The investigation of illegal drug imports would remain the priority over investigation of other goods.

Legitimate trade would not be affected by any new controlled delivery power.

## CONTROLLED DELIVERIES: WHAT DO YOU THINK?

Q 84 Do you think Customs should be allowed to carry out controlled deliveries of prohibited goods? Please give your reasons.

Q 85 If you support the option of expanding the range of goods that can be subject to a controlled delivery, then what prohibited goods do you think should be included? What prohibited goods should not be included?

## Baggage accompanying passengers

The Customs and Excise Act specifically requires arriving and departing passengers to allow their accompanying baggage to be examined by Customs officers. Passengers who refuse can, if convicted, be fined up to \$1,000.

The purpose of this power is to ensure that we can detect prohibited, restricted, forfeited and dutiable goods crossing the border. Customs must be able to assure the public that these goods are being controlled and that revenue is collected when it is due. This contributes to our overarching function of protecting New Zealand's sovereignty by controlling who and what enters New Zealand.

### What is “accompanying baggage”?

The Customs and Excise Act does not define what is meant by “accompanying baggage”. This review provides an opportunity to clarify exactly what items a Customs officer’s baggage examination power applies to. We understand that accompanying baggage is distinct from goods that are on or about a person (that is, attached to them). For example, a passenger’s suitcase is considered to be accompanying baggage, but the line becomes blurred when baggage is attached to a person by straps, such as a backpack, handbag or computer bag, or when a person is carrying clothing, such as a large jacket.



Customs undertakes over 10,000 baggage searches every year”

A Customs officer would usually ask a person to present their suitcase for examination as part of a baggage search. But to examine any item on or attached to a person, a Customs officer must have reasonable cause to suspect that the passenger is hiding certain types of goods on their person.

There can sometimes be confusion and inconsistency both for passengers and for Customs officers when it is not clear if the passenger is required to present some items to be examined.

### Example where there could be confusion over accompanying baggage

A passenger presents their suitcase for examination when asked by a Customs officer. They are also carrying a handbag.

Currently, it is unclear whether a handbag carried by a person is accompanying baggage or whether it is an item on or attached to the person. It is therefore unclear whether a Customs officer is entitled to examine the handbag and its contents in the same way as suitcases.

It is also very easy for a passenger to move an item outside the scope of a routine baggage search and require a threshold to be met before the item can be examined. For example, a passenger could remove a prohibited item from their main suitcase and place the item in a small bag strapped to their body.

Customs officers will usually err on the side of not examining the item if there is doubt about whether it is accompanying baggage. If we have cause to suspect that the person is carrying certain goods, such as dutiable or prohibited goods, then we can carry out a personal search, which will include any small bags. We think the lack of clear distinction between types of baggage could potentially pose threats to the border and create inconsistencies for passengers.

## Solutions we are considering

We are considering two options to address this inconsistency and possible lack of transparency. We do not currently have a preferred option.

We intend to talk further with those interested in this issue, including our government agency partners, as any changes could be relevant to their own interests in having effective examinations of accompanying baggage at the border.

### **Status quo**

Currently, Customs officers use their discretion to decide not to examine items if there is doubt about whether the item falls within the definition of “accompanying baggage”. However, this use of discretion may not allow the public to clearly understand what their obligations are.

If we retained the legislative status quo, we could expand and improve the training of Customs officers in using their discretion and explaining passengers’ rights during a baggage search. This would include giving our officers further guidance on what is “accompanying baggage” and what is not.

### **Clarify the obligation to present accompanying baggage**

Under this option, a person’s obligation to present accompanying baggage to a Customs officer for examination would be clarified in the Act, providing greater transparency for passengers. It would also ensure that Customs can clearly examine baggage of interest to us.

Clarifying this obligation in the Act would take account of passengers’ rights to be free from unreasonable search, and ensure that the distinction between what is and what is not a personal search is not blurred.

## Who would be affected by change

The issue and the options we have presented would apply to air passengers and marine ship passengers arriving in or departing from New Zealand. Currently Customs searches the accompanying baggage of only a small percentage of travellers – less than 0.2% of arriving passengers, or roughly 10,000 people.

The issue affects only those passengers who are required to have their baggage searched by Customs – it does not apply to baggage searches carried out by, for example, the Ministry for Primary Industries for biosecurity purposes.

## BAGGAGE ACCOMPANYING PASSENGERS: WHAT DO YOU THINK?

- Q 86 Which of the two options do you support, and why?
- Q 87 Do you support Customs officers having discretion to determine what constitutes accompanying baggage for the purposes of a baggage search?
- Q 88 Do you understand what baggage you are required to make available for examination by Customs officers when travelling? If not, what would make this clearer for you?



## Examining goods in the pockets of a person's clothing

Currently, a person can be asked by a Customs officer to empty their pockets of any items, but our legislation does not require them to comply. Customs has powers to search baggage to ensure that we can prevent illegal and dangerous goods from entering (or in some cases, leaving) New Zealand, but this power does not extend to items carried on or about a person, such as items in pockets. Instead Customs relies on a person agreeing to empty their pockets when we ask them to do so.

At the moment Customs can only search a person's pockets as part of a personal search, and these can only take place if a Customs officer has reasonable cause to suspect the person has hidden certain items on or about their person. Refusing to empty your pockets is not enough on its own to establish this required level of suspicion. Personal searches are very infrequent, with only 365 searches carried out in 2013/14, representing a negligible proportion (0.006%) of all arriving passengers.

It is rare for people to refuse to empty their pockets when asked. However, even a small proportion of people refusing to do so can present a significant threat to New Zealand.

We think that there is a risk that people crossing the border could bring illegal or dangerous goods into New Zealand in the pockets of their clothing, or attempt to depart with prohibited goods (such as illegal drugs) in their pockets.

### Example where we might want to require a person to empty their pockets

A person arriving into New Zealand could carry illegal drugs in the pockets of their coat. Customs has no power to require the person to empty their pockets unless a Customs officer has reasonable cause to suspect the person is carrying dutiable, uncustomed, prohibited or forfeited goods hidden on or about his or her person. This is despite the fact that we have the power to examine the entire contents of the person's accompanying baggage as part of a routine baggage search.

A further example is a person carrying a small flash drive with objectionable material or evidence of terrorist activity on it.

## Solutions we are considering

We are considering three options, and do not currently have a preferred option. We intend to talk more with parties who have an interest in this issue, as well as getting public feedback, to determine the most appropriate and effective option.

### **Status quo**

Retaining the status quo would continue to leave gaps in our ability to fully assess whether a person is carrying illegal or dangerous goods, or goods that are liable for duty. A person could potentially carry these items into the country undetected in the pockets of their clothing.

We would continue to ask passengers to empty their pockets when undergoing a baggage search, but the person would be under no legal obligation to do so.

### **Require passengers to empty their pockets – no threshold**

This option would provide a new power for Customs to require a passenger to empty their pockets. It would only apply to passengers arriving in or departing from New Zealand and would align with the current requirement for these people to present their accompanying baggage for examination.

Customs estimates this option is likely to affect only those passengers who are currently subjected to a baggage search, which is a small number of passengers (about 0.2% of all arriving passengers, or 10,000 passengers per year).

Under this option, a search threshold (that is, a reasonable suspicion that a person is carrying certain goods, or a similar threshold) would not have to be met for the person to be required to empty their pockets. Instead, the contents of a person's pockets would be examined as part of a routine baggage search. The obligation to empty pockets already exists if the personal search threshold is met, and we believe the risk is presented by passengers where the reasonable suspicion threshold is not reached.

Resorting to a personal search merely to identify the contents of a passenger's pockets seems to be an unnecessary escalation. We think it would be more appropriate to have a separate power in the Act to require any passenger to empty their pockets. This could in fact reduce the likelihood of a personal search if the officer can immediately identify that the contents of their pockets are not prohibited.

This option would also require an accompanying offence and penalty for failing to empty your pockets. The penalty would need to align with those for equivalent offences in the Act, such as failing to present your accompanying baggage.

Other comparable countries, including Australia and Canada, include the emptying of a person's pockets within powers relating to general baggage and goods examination. This option would align with these countries' legislation.

### **Require passengers to empty their pockets if a threshold is met**

This option would provide a new power for a Customs officer to require a passenger to empty their pockets but only when a certain threshold is met. We think that any threshold should be lower than for a personal search, as we can currently examine the contents of pockets as part of a personal search. However, as there is no precedent in New Zealand for this lower level of threshold, we are unsure what the appropriate threshold would be.

Customs estimates this option would affect fewer passengers than under the previous option (less than 0.2% of arriving passengers, but possibly more than 0.006%, which is the percentage for personal searches).

The requirement for a threshold to be met would provide travellers with some protection, while also enabling Customs to better assess whether passengers are carrying risk goods. However, this option may not be as effective as the previous option in enabling us to detect prohibited, dangerous and dutiable goods, because people who are carrying those goods may fail to satisfy the applicable threshold.

Like the previous option, this option would require an accompanying offence and penalty for failing to empty your pockets when required under this power.

### **Who would be affected by change**

This issue and the options we have presented would apply to passengers arriving in or departing from New Zealand. Under the second option, these will be air passengers and cruise ship passengers who are subject to a baggage search by Customs (this does not include baggage searches conducted by the Ministry for Primary Industries for biosecurity purposes). Under the third option fewer people would be affected, because a threshold would have to be met.

It is important to note that not all passengers subjected to a routine baggage search would also be required to empty their pockets. Therefore the passengers affected would be less than the 0.2% of passengers currently subject to routine baggage searches.

We need to have a better understanding of the impacts for passengers of any potential change to the legislation – for example, in relation to protections against unreasonable searches.

## EXAMINING GOODS IN POCKETS: WHAT DO YOU THINK?

- Q 89 Which of the three options do you support, and why?
- Q 90 Do you understand your current obligations and rights in relation to items carried across the border in the pockets of your clothing? If not, what could make this clearer?
- Q 91 Would you be opposed to presenting the contents of your pockets for examination by a Customs officer who is already searching your baggage? Please give your reasons.
- Q 92 If you support the third option – a power to require passengers to empty their pockets if a particular threshold is met – what do you think the applicable threshold should be?



## Electronic devices

When the Customs and Excise Act 1996 was introduced there was a key focus on protecting New Zealand's borders from threats posed by people, craft and physical goods.

The common use of electronic devices, such as laptops, smartphones and portable hard drives, was not anticipated in 1996. Today, these goods can be used to carry material that used to be in paper form, such as travel documents and objectionable images, as well as carrying, for example, objectionable images or software that can be used in criminal activity.

In a previous chapter (see from page 63), we addressed Customs' role in managing virtual and digital goods at the border as part of exercising controls over restricted or prohibited imports. This current section addresses Customs' examination of electronic devices, and the content on an electronic device, which can include virtual and digital goods.

### Customs' current search powers for electronic devices

The current Act gives Customs the power to search electronic devices at the border as part of our routine examination powers. This helps us detect objectionable material and evidence of offending, such as evidence of illegal drugs being brought over the border. Many travellers are now also carrying travel documents – such as tickets and booking details – on their electronic devices. The examination of travel documents on these devices may be necessary to verify travel information provided to Customs, the identity of passengers, and the validity of travel documents, or to detect evidence of offending against the Act.

Customs only examines a person's electronic devices if the owner is subject to a routine baggage search, and then not in all cases. Most people will normally not be subject to a baggage search – currently these searches cover only about 0.2% of arriving passengers.

We have identified two issues relating to Customs' powers to access and examine electronic devices at the border, discussed below.

### Examining electronic devices

The Customs and Excise Act predates today's extensive use of electronic devices. We want our legislation to make it absolutely clear that the content of those devices is included in our examination powers.

Our view is that the content of electronic devices is currently within the scope of our general goods examination power. This is because electronic documents are movable personal property and are "goods" for the purposes of the Act. It would also be inconsistent if we were able to carry out searches of hard-copy documents but not electronic documents held on a device being moved across the border.

This review provides an opportunity to make it clear that our routine goods examination powers extend to the content of electronic devices. This is currently not transparent for the public.

## Why might Customs want to search an electronic device?

- to verify travel documentation, such as how a ticket was paid for, where the ticket was booked and issued, the class of travel, or any unusual travel routes
- to detect objectionable images
- to detect evidence of offending against the Customs and Excise Act (such as importing prohibited items)
- to verify the value of dutiable goods through electronic receipts or invoices.

Customs can detain and search electronic devices in other areas of our business as well – for example when we exercise a search warrant. Our exercise of search warrants is governed by the Search and Surveillance Act 2012, which specifically refers to electronic forms of information.

## How does Customs search an electronic device?

To search an electronic device – such as a smartphone, tablet, laptop or flash drive – found during a baggage search at the airport, Customs usually connects the device to a terminal designed to pick up certain material. Sometimes a Customs officer may carry out a manual scan of the device if a terminal is not available.

If the terminal (or the Customs officer) does not detect any indications of prohibited items or illegal activities in this initial search, the device is returned to the owner immediately. The terminal does not retain any copied information from the device.

If the terminal (or the Customs officer) does detect an indication of prohibited items or illegal activities, Customs will detain the device for a full forensic analysis by our Electronic Forensics Unit.

Customs performs only very limited searches of a device at the border: this protects the owner's privacy while also ensuring that we can still fulfil our control functions for goods crossing the border. We do not unnecessarily look at personal information on electronic devices, such as family photos and personal messages; instead we scan the device for a particular range of information (see the examples above under "Why might Customs want to search an electronic device?").

Despite no threshold applying in the Act for when Customs can search an electronic device, we only perform more extensive searches of a device, such as forensic analysis and copying of the information, if we suspect that the device contains prohibited or restricted material, or evidence of Customs-related offending. This material or evidence is usually uncovered during the initial scan of the device at the border. However, that initial scan does not retain or copy any information.

## The escalation of examinations of electronic devices at the border



Information collected from electronic devices is also governed by our own principles for dealing with information (see page 30 for these principles).

## Passwords and encryption

When Customs does examine a person's electronic device, the owner is not legally obliged to provide us with a password or encryption key to access the device. We have found that it is relatively uncommon for someone to refuse to provide this, but if they do refuse it can mean we have no way of uncovering evidence of criminal offending even when we know the device does hold this evidence.

If a person refuses to provide access, it is likely that Customs will seize the device for forensic examination and not return it immediately to the owner (unless there is nothing to suggest the device contains prohibited material). However, some devices cannot be accessed and examined by our Electronic Forensics Unit without password or encryption access. If Customs cannot require access to an electronic device, it is not possible to treat the device in the same way that we treat the examination of accompanying baggage. This undermines the purpose of examining electronic devices and is a barrier to us effectively investigating and prosecuting criminal offending.

The Anti-Money Laundering and Countering Financing of Terrorism Act 2009 empowers us to require a person to provide access (such as passwords, codes and encryption keys) to an electronic device in relation to the movement of cash in breach of that Act. The Search and Surveillance Act also imposes this obligation on owners of devices where a search is performed under that Act; however, searches under that Act usually take place only if criminal offending is suspected.

## Summary of possible solutions

We are considering three options for increasing transparency around Customs' ability to examine electronic devices, and three options for ensuring Customs can effectively access these devices. These options are summarised in the table below:

Options for examining electronic devices	Options for access to electronic devices
Customs can examine electronic devices without meeting a threshold (but our power to do so would be explicit in the Act) – this is our preferred option.	A person has a legal obligation to provide Customs with access to their electronic device if required by Customs (an explicit power in the Customs and Excise Act) – our preferred option.
Customs can examine electronic devices if a threshold is met (and our power to do so would be explicit in the Act).	A person has a legal obligation to provide Customs with access to their electronic device if required by Customs (the current power in the Search and Surveillance Act would apply to Customs).
Status quo: Customs can examine electronic devices without meeting a threshold (but our power to do so would not be explicit in the Act).	Status quo: Customs cannot require a person to provide access to their electronic device.

These options are discussed in more detail below.

## Our preferred solutions

### Examining electronic devices:

#### Explicitly include electronic devices in the scope of routine baggage searches

This option would include an explicit reference to electronic devices in the new Act. Customs officers would continue to be able to examine electronic devices as part of a routine baggage search (if required), but there would be greater transparency for the public.

This option would continue the practice of performing an initial examination on electronic devices without a threshold having to be met. This would confirm that Customs treats electronic devices and their content in the same way as physical goods accompanying a person across the border. In our view, this would allow us to adapt to changing technology and new methods of concealing prohibited material, such as objectionable material.

This option would also continue the practice of only performing full forensic examinations of electronic devices and copying the material when evidence of prohibited material or illegal activities is discovered on the device. The search is then escalated to a full forensic search of the device (see the diagram on page 133 for the current escalation process). This aligns with our personal search powers, where there may be an escalation from a routine baggage search to a personal search.

Customs does not examine the content of electronic devices outside of a routine baggage or personal search, and this would not change under this option.

This option is consistent with similar powers available to customs agencies in Australia, Canada, the United States and the United Kingdom. However, developing law in other countries is beginning to place greater weight on the privacy implications associated with information contained on electronic devices, including at the border.

### Example of where Customs could find material of interest on a cellphone

A passenger is stopped for a routine baggage examination when they arrive in New Zealand. Customs discovers evidence on their cellphone suggesting that the passenger is part of a group attempting to smuggle cocaine into New Zealand.

Content on the cellphone informs Customs that other members of the group are arriving in New Zealand in the following days. Customs is able to detain these associates when they arrive and we discover cocaine inside their baggage.

#### **Passwords and encryption:**

##### **Require a person to provide a password or encryption key on request**

Under this option, a new power would be included in the new Act to authorise Customs officers to require access to an electronic device in order to examine that device effectively. Access is likely to be in the form of a password, encryption key, or identification access.

A new offence and penalty would be included for failing to provide the relevant access when required to do so.

This option is consistent with the powers that Customs has under the Search and Surveillance Act 2012, and also the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, to require people to provide access to an electronic device. It also aligns with comparable countries, such as Australia, the United States, Canada and the United Kingdom.

### Other solutions we are considering

#### **Examining electronic devices:**

##### **Allow for the examination of electronic devices but with a threshold**

This option would include an explicit reference to electronic devices in the new Act, as with our preferred option for examining electronic devices. But it would only allow Customs officers to examine electronic devices once a threshold has been met (rather than as part of a routine baggage search).

It is likely that this threshold would be similar to that currently provided for invoking our personal search powers, which is a reasonable suspicion that a person is hiding certain

material on or about their person. In this case the threshold could instead be reasonable suspicion that an electronic device holds certain material.

We believe that having a threshold that must be met before we can examine an electronic device does not allow us to meet the changing risks that electronic goods pose at the border. Under this option, electronic devices would not be treated in the same way as physical goods accompanying a person across the border; instead they would be treated in the same way as people suspected of hiding prohibited goods on their person.

A more practical alternative may be to limit a threshold to escalated searches. For example, a preliminary or cursory search of a device could be conducted as part of a routine baggage search, but any further search, such as cloning, forensic analysis, and copying of the content on the device, could be subject to a threshold. This threshold would probably be based on what material is found on the device during the preliminary examination.

### **Passwords and encryption:**

#### **Apply the Search and Surveillance Act to Customs' powers to examine electronic devices**

This option would extend the scope of section 130 of the Search and Surveillance Act 2012 to apply to Customs' examinations of electronic devices at the border. That particular section places a duty on a person to assist with access to an electronic device when required to do so by an officer exercising a search power that relates to data held on the device. This section does not currently apply to Customs' examination of goods powers.

This option would extend section 130 to cover whichever option is adopted for the examination of electronic devices. This would enable Customs to require a person to provide the relevant access to the electronic device without the need for a separate provision in the Customs and Excise Act.

The offence for failing to comply with this obligation without reasonable excuse would also apply, and, if convicted, the person would be liable to a maximum prison term of three months.

Reporting requirements also accompany the search powers in the Search and Surveillance Act: any person who exercises a warrantless search power (such as searching an electronic device) must report in writing on the search as soon as practicable. Customs' chief executive would also be required by that Act to report on the exercise of these powers in every annual report to Parliament under this option.

However, these reporting requirements would create unrealistic obligations for Customs, as there could potentially be electronic device examinations a number of times each day. When the Search and Surveillance Act was passed, Parliament deliberately did not extend that Act to all of Customs' powers because the border environment is unique. If this option is adopted it may be possible to exclude the reporting requirements from Customs' use of this power.

## Status quo

Retaining the status quo would mean that Customs would be hampered in responding to changing risks related to technology. Because the Customs and Excise Act does not explicitly refer to electronic devices, it can be difficult for the public to identify when Customs can search these devices.

This option would not restrict Customs from continuing to examine electronic devices as part of routine baggage searches at the border. But we would not have the power to require a person to provide access to that device, and there could be a lack of transparency for the public.

Currently, there are costs and other impacts associated with us not being able to require access to electronic devices, both for Customs and for the device's owner. These include: prolonged questioning by Customs officers; devices being seized for extended periods; and Customs being unable to examine the devices efficiently to identify evidence of criminal offending. In some cases, searches may be escalated unnecessarily because a person has refused to provide a password.

## Who would be affected by change

The issue of access to electronic devices mainly affects international air passengers.

Most people voluntarily give Customs access to their electronic device when requested, and options involving legislative change would target the handful of people who refuse to provide access. However, the number who refuse may increase as technology continues to develop.

Customs recognises that accessing a person's smartphone or laptop can be a sensitive and personal matter, as many people will have personal items such as family photos or emails on their devices. The options we have identified raise issues of individual privacy and the need for protection against unreasonable search, and those considerations need to be balanced against the need to protect the community from harm.

Whichever option is adopted, the power to examine electronic devices will continue to be constrained by the protection in the New Zealand Bill of Rights Act 1990 against unreasonable search. The collection or use of any personal information will also continue to be governed by the Privacy Act 1993. Specifically, personal information collected from electronic devices will be used only for the purposes for which it was collected. This is achieved by limiting any initial examination to a cursory screening, rather than a full forensic analysis.

## ELECTRONIC DEVICES: WHAT DO YOU THINK?

- Q 93 Do you think that the new Act should explicitly include electronic devices in the scope of Customs' routine baggage search powers at the border? Please give your reasons.
- Q 94 Do you think there should be a threshold that must be met before Customs can examine an electronic device? If yes, what should that threshold be?
- Q 95 Do you think Customs should have the power to require travellers to provide access to their electronic devices? Please give your reasons.
- Q 96 Can you think of other ways for Customs to respond when new technology provides new ways of concealing offending at the border?

