

Office of the Minister of Customs

Cabinet Economic Growth and Infrastructure Committee

## **CUSTOMS AND EXCISE ACT REVIEW PAPER 3: BIOMETRIC AND PASSENGER NAME RECORD INFORMATION**

### **Proposal**

- 1 This paper seeks Cabinet's agreement to clarify and incorporate safeguards around Customs' use of biometric information for identity verification, and to align the statutory responsibilities on Customs in respect of Passenger Name Record data with international recommended practice.

### **Executive Summary**

- 2 Customs collects and uses two forms of sensitive personal information: biometric information, and passenger information provided by airlines (known as Passenger Name Records or PNR). The paper proposes making Customs' uses and storage of these two forms of information more transparent.
- 3 Customs routinely uses biometric information to perform Customs and Immigration checks on people crossing the border, using SmartGate. Customs currently has powers to collect and use biometric information but the legislative provisions for using biometrics for Customs' purposes are not transparent. I therefore propose to clarify Customs' use of biometric information to determine whether a person is of interest for law enforcement, national security, border protection or public health purposes.
- 4 I am not proposing any change to the type of biometric information collected or used for processing passengers at the border.
- 5 Recent examples in New Zealand and Australia of people leaving the country under false pretences are of concern. SmartGate, and other automated identity verification systems, provide a much more reliable confirmation of identity than a visual check by a Customs officer. I therefore propose that a Customs officer may request a person at the border to undertake an identity check using biometric information where the Customs officer cannot verify identity with reasonable certainty by a visual check. If a person refused to undergo the biometric check, Customs would be able to exercise their current powers to require them to remain in a Customs area until their identity could be confirmed in other ways.
- 6 This paper also proposes that the Act reflect international best practice for access and use of Passenger Name Record information, including limiting Customs' ability to require airlines to provide this information no earlier than 72 hours prior to departure and no later than 24 hours after departure. I also propose that Customs retain this information for no more than three years. These measures are designed to manage concerns about the use of sensitive personal information. They also

reflect best practice and the new way in which airlines will provide this information to Customs.

- 7 The proposals made will not increase compliance costs as they do not impose any new data collection or reporting obligations on business or travellers.
- 8 Submitters acknowledged the need for Customs to use sensitive personal information including biometrics and Passenger Name Records. They proposed that Customs needs to align with international practice and balance use of this information with privacy and security expectations for storing and disclosing such information.

## **Background**

- 9 In November 2013, Cabinet agreed to a review of the Customs and Excise Act [CAB Min (13) 40/5 refers]. In February 2015, Cabinet agreed to release a public consultation document seeking views about proposed changes to the Act [CAB Min (15) 6/5 refers]. Public consultation closed on 1 May 2015 with 89 submissions received. Nine submissions commented on proposals related to biometric information and Passenger Name Records (PNR) data.

## **Customs' use and management of biometric information**

- 10 Increasingly used to establish and verify identity for border processing around the world, biometric information is information about the identity of a person established through scientifically measuring an individual's physical or behavioural characteristics. Those characteristics can include facial images, fingerprints, iris scans, DNA profiles, and palm prints. Currently in New Zealand, just facial images are used for border processing.
- 11 A photograph of a person's face, if it is of sufficient quality, can be used to generate a facial biometric. An automated identity system such as SmartGate can verify a person's identity by comparing biometric information embedded in the chip of an electronic passport with their photograph. This process is widely used and accepted internationally as a more efficient and reliable method of confirming identity than a visual comparison of a person against their passport photograph. Use of SmartGate by travellers is voluntary.
- 12 Government expects Customs to verify the identity of all people crossing the border, coming and going, to determine whether a person is of interest to Customs or to other agencies, for immigration, law enforcement, national security, border protection or public health purposes.

### ***Issues with current legislation for Customs' use of biometric information***

- 13 Customs' authority to use SmartGate to perform the Customs and Immigration checks that are usually conducted by a Customs officer is set out in a Gazette Notice issued pursuant to section 274B of the Act. The Act also covers Customs' uses of personal information for its role in verifying identity of people for border processing, law enforcement, national security, border protection or public health purposes. However, the current Act is not explicit that biometric information is

included in this personal information. This contrasts with the Immigration Act 2009 which provides an explicit authority to collect biometric information from all travellers on arrival to establish or verify their identity to check they may enter New Zealand, and foreign passport holders on departure to verify their identity and confirm they have departed.

- 14 While Customs currently relies on the fact that biometric information is a particular form of personal information, the Act does not contain explicit provisions on the use, storage and disclosure of biometric information comparable with those in other legislation which permits the use of biometric information. This is a gap for an agency which uses biometric information every day.

***Clearer legislation can support future improvements in border management***

- 15 Customs' response to border arrest alerts would be made more effective and efficient if biometric information were able to be used in the alert process. At the moment, Customs and other agencies create alerts using biographical information (for example name and date of birth). If the authorising agency for a border arrest alert were able to supply biometric information, then a biometric identity verification system could automatically check whether people being processed at the border are the subject of an alert.
- 16 The use of photographs (and in the future biometric data) for enforcing travel restrictions is a recommendation of the multi-agency review of the Phillip Smith Traynor (aka Phillip Smith) incident. The recommendations in this paper will enable Customs to continue to use biometric information to verify the identity of people of interest to other agencies at the border.
- 17 Using biometric information in this manner would reduce the risk of significant and costly disruption to airlines and other members of the travelling public because:
- people travelling under aliases or with additional non-New Zealand passports (ie dual nationals) would be more effectively identified;
  - the incidence of false positives would be reduced - that is someone being identified as a person on alert, by matching of biographical data, who is not in fact the person subject to that alert.
- 18 Using biometric information, Customs could also more efficiently identify people of interest in investigations. During surveillance for controlled deliveries of drugs, Customs investigators or Police may observe unknown people involved in the illegal activity. Biometric information generated from the surveillance footage taken of such people may in the future be able to be used at the border in an automated identity verification system to automatically check whether people being processed are the people observed in surveillance.

**Proposals: clarifying Customs' uses and management of biometric information**

- 19 Consistent with the Act review's overall goal to increase transparency, and recognising the sensitive nature of this type of personal information, I propose that

the Act specifies the following purposes for which Customs may use biometric information:

- to verify the identity of people for Customs and for other government agencies for border processing, law enforcement, border protection, national security, or public health purposes;
- to test its automated biometric identity systems (ie SmartGate) for quality assurance purposes.

***Authority to request a biometric check***

- 20** The recent example in Australia of a man who was able to use his brother's passport to travel to Syria to fight with Islamic State is of concern, because he was not identified by the Customs' officer who processed his departure. I propose that the Act make it clear that a Customs officer may request a person crossing the border to undertake an identity check using biometric information where the Customs officer cannot verify their identity with reasonable certainty by a visual check.
- 21** Such an authority would support more efficient and effective identity verification processes using technology such as SmartGate. For example, if a person presents at a manual passport control point and the processing officer is uncertain through a visual comparison whether the person matches the person shown in the passport, then that person (if using an electronic passport) can be processed through SmartGate to obtain a quick and reliable confirmation of identity.
- 22** This authority would also support strengthening Customs' ability to quickly and efficiently identify and interdict people of interest with minimal disruption.
- 23** Should the person not agree, I do not consider that this authority should extend to requiring the person to mandatorily undergo an identity check using biometric information. First, there would be an issue of how compulsion might be physically enforced. Second, existing provisions in the Act relating to remaining within a designated place (section 27) until evidence of identity and authority to travel has been provided (section 147), completion of immigration processing (section 32B), and requiring a person to remain in a designated place to enable investigation for law enforcement or public health purposes and to allow for appropriate action to be taken (section 32C) would be sufficient in the event that a person refuses to comply with a request. Faced with an option, I consider that a person would more likely verify their identity using biometric information and continue on their journey, than wait for further identity checks or an Immigration or Police officer to arrive to undertake steps to verify their identity, most likely disrupting the person's travel.

***Storage and disposal of biometric information***

- 24** There is currently no provision in the Act covering storage of biometric information. To balance storage of biometric information with the privacy expectations of the public, I propose that the Act includes provisions for Customs' storage of this information which align with those of the Immigration Act and Policing Act, confirming the Privacy Act principle that personal information should only be stored for as long as the purpose for

which it was collected still exists. I do not propose including in the Act how biometric information will be disposed of, in order to avoid prescription when methods of disposal are changing as technology develops.

**25** Customs needs to store biometric information for as long as required to:

- verify the identity of people for Customs and for other government agencies for border processing, law enforcement, border protection, national security, or public health purposes;
- test its biometric identity systems for quality assurance purposes.

**26** For the vast majority of people crossing the border, Customs has no need to store their biometric information (beyond systems testing purposes) after they have been processed and risk assessed, because they present no further interest to Customs, wider law enforcement or national security. The Department of Internal Affairs and Immigration New Zealand hold this information as the authoritative sources of identity information of New Zealanders and non-New Zealanders in New Zealand respectively, and maintain the authoritative databases of biometric information used to issue passports and approve visas respectively.

**27** Beyond risk assessment, to effectively monitor or intercept people of interest, Customs needs to be able to store the biometric information of people of interest in four circumstances:

- For Customs investigations and intelligence purposes when people of interest have crossed the border
- Biometric information received from other domestic agencies in order to monitor or intercept people of interest. For example, Customs needs to store the biometric information of people subject to travel restrictions received from the Department of Corrections so that Customs can scan this information against people crossing the border in real time to ensure those not authorised to depart do not depart. These travel restrictions can be for any length of time
- Biometric information received from law enforcement agencies overseas, in order to contribute to the prevention and detection of transnational crime by scanning this information against people crossing the border in real time. The international law enforcement interest in certain people can be ongoing
- When Customs officers obtain high quality photographs or surveillance footage, for example, from people of interest during surveillance or investigative activity. Customs would need to store this information or the biometric information generated from it in order to scan it against people crossing the border in real time, or databases held by other agencies, until it has identified the people of interest.

**28** Aside from risk assessment and monitoring or intercepting people of interest, Customs stores biometric information for 90 days for quality assurance and to

improve the functionality of its automated systems,<sup>1</sup> for example by checking why people have been erroneously declined by the SmartGate system. The biometric information of the youngest and oldest users of SmartGate can change during the timespan of their passports so Customs needs to be able to ensure people are not unduly disadvantaged from using SmartGate.

***Definition of biometric information***

- 29 I propose a definition of biometric information in the Act which aligns with the definition in the Immigration Act, and additionally includes that the measurable personal characteristic must be of a high enough standard to be able to be converted into biometric information.
- 30 The Immigration Act 2009 defines biometric information as any or all of: a photograph of a person's head and shoulders, fingerprints, or an iris scan. Under the Immigration Act definition, all head-and-shoulders photographs could be deemed as biometric which would include all photographs of this type that Customs manages, and carry stricter requirements for the management of this information than is necessary.
- 31 Customs and Immigration New Zealand agree that the definitions used in immigration and customs legislation should align. I propose that the Immigration Act be consequently amended to align the definition of biometric information with that in the Customs and Excise Bill.

***Further obligations on Customs in managing biometric information***

- 32 Customs has well established policies and controls to secure, protect, and preserve the confidentiality of information in identifiable form. When SmartGate was introduced, Customs undertook a privacy impact assessment.
- 33 In recognition of the sensitive nature of this type of personal information, I propose keeping the provision in the Act that Customs must undertake a privacy impact assessment in relation to its handling of biometric information, consistent with its earlier practice and aligning with a similar requirement on Immigration New Zealand provided for in section 32 of the Immigration Act 2009. Customs would therefore undertake a new privacy impact assessment following the proposed changes to the Act, and review its assessment if other changes are made in the future to the Act, regulations made under it, or operational policy in respect of the use or handling of biometric information.
- 34 This requirement would continue Customs' responsibility to identify the potential effects that provisions on biometric information in the Act may have on personal privacy, and examine how any detrimental effects on privacy might be lessened.

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1 As outlined in Customs' Privacy Impact Assessment for the SmartGate System, 16 November 2010.

## Customs' use of Passenger Name Record (PNR) data

### *PNR and risk profiling*

- 35 PNR is the electronic record created by airlines for each journey booked by, or on behalf of, a passenger. PNR typically includes data such as name, address, contact details, itinerary, seat number, luggage information (pieces, weight), and fare payment details. PNR is collected by airlines in their individual business formats and to a level necessary to deliver the services that passengers have paid to receive.
- 36 Customs uses PNR as an input into its risk profiling process to identify, in advance of arrival in New Zealand, people who may present a risk to the border. PNR risk profiling also assists with the facilitation of low risk passengers through border controls, and contributes to efficient passenger flows through international airports.

### *International standards and guidance*

- 37 International bodies have developed a standardised approach to PNR data provision by airlines to government agencies under the Convention on International Civil Aviation, (the Chicago Convention, 1944). New Zealand is a Contracting Party to the Convention. Annex 9 (Facilitation) to the Convention contains standards and recommended practices by the International Civil Aviation Organisation (ICAO) for PNR.
- 38 The ICAO guidance on PNR specifies the data elements which, if contained in an airline's PNR record, may be transmitted by an airline to a receiving country if required by a national law of that country. It also specifies uniform measures for PNR data transfer and the subsequent handling and disposal of that data. This approach reduces costs for airlines by ensuring governments worldwide are not asking for different information to be provided in different ways.

### *Review of New Zealand PNR policy and practice*

- 39 The three border agencies (Customs, the New Zealand Immigration Service and the Ministry for Primary Industries) that use PNR data jointly reviewed their policies and procedures in 2012. Through this process, it was agreed with airlines that in the future PNR data will be accessed through airlines transmitting (or "pushing") PNR data to Customs in the ICAO-recommended message format. The PNR data to be transferred will be limited to the nineteen data elements specified by ICAO.
- 40 Border agencies also established through the Policy Statement a common approach to other matters that would bring policy and practice more into alignment with ICAO recommended practice, including that PNR data would be stored separately from other passenger data, and that access would be restricted to designated and specifically trained officers.

### *The Act needs to better reflect international recommended practice*

- 41 The Act as it stands does not prevent Customs' operational practice more closely aligning to ICAO-recommended practice and the border agencies' agreed

approach through administrative means. However, over time, the Act will become increasingly out of alignment with policy and practice by:

- leaving matters that are arguably best dealt with in primary legislation to policy and practice, eg specification of data to be provided;
- continuing to permit certain practices that do not align with ICAO's recommended practice, eg access to airline systems;
- containing provisions which will become redundant as the process for Customs obtaining PNR changes in line with ICAO recommended practice, eg a court warrant to access airline systems outside of the current "viewing window".

**42** A risk to New Zealand's reputation is that the Act would continue to permit Customs to adopt practices that do not conform to ICAO recommended practice and which could involve costs for airlines and risks to the privacy of passengers.

### **Proposal**

**43** I propose that Customs' legislative framework for PNR data should be updated so that a responsibility is placed on Customs to have regard to ICAO recommended practice when specifying the form and manner for airlines to provide PNR, and the PNR data elements to be provided by airlines. This duty would require a justification of any departure from ICAO recommended practice.

**44** I propose that the authority of Customs to specify when PNR data must be provided by airlines is limited. I propose that this limit be between 72 hours prior to scheduled departure and 24 hours after the actual departure of the craft (unless the airline has been unable to provide the data specified during that period). This reflects the agreement with airlines referred to above. While the ambition is to receive PNR in advance of arrival this period recognises that in some circumstances further information may need to be obtained after a flight has left for New Zealand.

**45** I also propose a maximum period that Customs can retain airline PNR is specified, after which the data must be deleted or depersonalised unless it is required to be retained for the investigation of offending or for intelligence related to the detection of offending or the protection of border security.

**46** I propose that this period be three years, which aligns to the period specified in Australia's PNR Agreement with the European Union (EU). This Agreement is key to the EU's ongoing confidence to share PNR data with Australian authorities. New Zealand does not have the volume of travel to meet EU criteria for negotiation of an agreement of this nature. To ensure continued cooperation from airlines that store PNR data in Europe, New Zealand relies on the EU's recognition of the adequacy of laws relating to the protection of personal data. Closer alignment with Australia in respect of PNR storage will assist us to maintain continued cooperation.

**47** I propose the provisions in the current Act specifying that Customs may only access airline systems to view PNR data for a period 14 days either side of travel

(with provision for obtaining a warrant issued by a District Court Judge to access data outside of this period) be repealed. These provisions will be redundant once airlines implement the “push” system for providing PNR as Customs will no longer be accessing airline systems to view PNR. They will be replaced by the limits on the authority of Customs to specify when PNR must be provided. Other provisions of the Act, which will remain in place, make clear Customs’ authority to collect, store and disclose PNR (with limitations).

- 48 The proposals will not increase compliance costs as they do not impose any new data collection or reporting obligations on airlines.

### **Consultation**

- 49 The following agencies have been consulted on this paper and their views reflected in its development: Department of Internal Affairs; Energy Efficiency and Conservation Authority; Environmental Protection Agency; Inland Revenue; Ministry for Primary Industries; Ministry of Business, Innovation, and Employment; Ministry of Foreign Affairs and Trade; Ministry of Health; Ministry of Justice; Ministry of Transport; Ministry of Social Development; New Zealand Police; New Zealand Security Intelligence Service; New Zealand Trade and Enterprise; Office of the Ombudsman; Office of the Privacy Commissioner; Parliamentary Counsel Office; Statistics New Zealand; and the Treasury. The Department of the Prime Minister and Cabinet have been informed.

- 50 The Ministry of Business, Innovation and Employment (Immigration New Zealand), in particular, has been consulted to ensure that Customs legislation is consistent with, and does not duplicate, already existing legislation that relates to the use and management of biometric information from people crossing the border (the Immigration Act 2009).

### ***Views of airlines***

- 51 The Board of Airline Representatives of New Zealand (BARNZ) agree with reflecting ICAO standards and recommended practice for PNR in the Act, noting that in their view PNR is a category of personal information that needs particular protections given its sensitivities, and the costs to airlines of complying with government requirements. Overall, airlines are comfortable with the recommended approach.
- 52 BARNZ recommend that a transitional provision be included in a revised Act to address accessing data during the transition when airline systems are altered to allow the “push” of PNR data to occur.
- 53 I agree with this suggestion, and propose that authority be included in the legislation for the Chief Executive of Customs to exempt airlines from requirements conditional on the provision of data through other agreed means. This would mirror the approach taken in the Immigration Amendment Act 2015.

### **Views of the Privacy Commissioner**

- 54 The paper recognises the special nature of biometric information. I support the steps proposed to ensure that this information is protected, and in particular the proposal to include a requirement to undertake a privacy impact assessment. I recommend that there is also a requirement to consult with my Office on the privacy impact assessment.
- 55 My Office has experience working with Immigration New Zealand while they undertook privacy impact assessment on their biometric provisions, and I will make my staff available to share their experience with Customs.
- 56 The definition proposed by Customs – and that used by Immigration – poses some challenges. Since the Immigration Act was enacted in 2009, officials' understanding of the science and technology of biometrics has progressed. I recommend in exploring changes to both Acts, that officials consider reflecting these advances in the definition. This would potentially resolve some of the issues concerning the storage of photographs.
- 57 Customs' proposed three year retention for PNR information aligns roughly with current international practice. Any change to the way Customs manages PNR data needs to ensure New Zealand can continue to meet the expectations of other jurisdictions and factor in other domestic interdependencies.
- 58 The character of PNR data has always warranted specific legal protection, and my office has always held that the restricted window for warrantless access to PNR data is an important control. The change to how Customs receives PNR data means that Customs will effectively hold the role of steward for the full PNR data set. I recommend that new legislative provisions relating to access and disclosure are fit for purpose and contain an appropriate replacement for the 28 day window.

### **Financial Implications**

- 59 The proposals in this paper have minor financial implications for Customs in terms of one-off changes to procedures. Any financial implications resulting from the proposals in this paper will be considered in the context of Customs' implementation plan, and will be reported back prior to the introduction of the Bill, and incorporated in Customs' 2016 Four Year Plan and the 2016 Budget process.

### **Legislative Implications**

- 60 Subject to Cabinet agreement, the proposals will be included in a Customs and Excise Bill to be drafted by the Parliamentary Counsel Office and referred to the Cabinet Legislation Committee by mid-2016. Details of the timing of a draft Bill are set out in the overview paper.

### **Regulatory Impact Analysis**

- 61 The Regulatory Impact Analysis (RIA) requirements apply to the proposal in this paper and a Regulatory Impact Statement (RIS) has been prepared and is attached.

- 62 The Ministry of Justice's independent RIS panel has reviewed the RIS prepared by the New Zealand Customs Service on behalf of the Regulatory Impact Analysis Team (RIAT) and considers that the information and analysis in the RIS **meets** the quality assurance criteria.
- 63 The proposals will not impose any additional compliance costs on business or travellers – they do not require these parties to supply additional or new information to Customs.
- 64 The proposals in this paper are consistent with the Government Statement on Regulation.

### **Gender Implications and disability perspective**

- 65 Not applicable.

### **Publicity**

- 66 Planned publicity for the review of the Act is discussed in the overview paper.

### **Recommendations of the Minister of Customs**

- 67 The Minister of Customs recommends the Committee:
- 1 **note** that the proposals in this paper are part of a package of proposals for the development of new customs and excise legislation;

#### *Provide for Customs' ability to use biometric information*

- 2 **agree** that a Customs officer may request a person crossing the border to undertake an identity check using biometric information where the Customs officer cannot verify identity with reasonable certainty by a visual check;
- 3 **note** that the voluntary use of biometric automated systems (such as SmartGate) by persons crossing the border would be retained for general traveller processing;
- 4 **agree** that a definition of biometric information is included in the Bill which is aligned with the Immigration Act 2009, but will add that the relevant information covered by this provision is of a high enough standard to be able to be converted into biometric information;
- 5 **agree** that the definition of biometric information in the Immigration Act is subsequently amended to match the Customs definition;
- 6 **agree** that the Bill authorises Customs to use biometric information obtained or provided to it, for the following purposes:
  - to verify the identity of people for border processing and protection, law enforcement, national security or public health purposes
  - to test its biometric identity systems for quality assurance purposes;

- 7 **agree** that the Bill provides that Customs can store biometric information for only as long as the purpose for which it was originally collected still exists, after which this information must be deleted;
- 8 **agree** that the Bill retains the requirement on Customs to undertake privacy impact assessments in relation to its handling of biometric information;

*Customs' use of Passenger Name Record information*

- 9 **agree** that the Bill obliges Customs to have regard to International Civil Aviation Organisation recommended practice when specifying the form and manner for airlines to provide PNR data and the PNR data elements to be provided;
- 10 **agree** that the Bill limits the authority of Customs to specify when PNR data must be provided by airlines to the period between 72 hours prior to scheduled departure and 24 hours after the actual departure of the craft (unless the airline has been unable to provide the data specified during that period);
- 11 **agree** that the Chief Executive of Customs may exempt airlines from the specified form and manner of providing PNR data conditional on the provision of the PNR data through other agreed means;
- 12 **agree** that Customs may retain airline PNR data for a maximum period of three years after which the PNR data must be deleted or depersonalised;
- 13 **agree** that, notwithstanding recommendation 12 above, PNR data required for the investigation of offending or for intelligence related to the detection of offending or the protection of border security will be kept for as long as required for those purposes;
- 14 **agree** that the provisions in the Customs and Excise Act 1996 specifying that Customs may only view PNR data for a period 14 days either side of travel and for obtaining a warrant issued by a District Court Judge to access that data outside of the 14 day period not be retained;

*Next steps*

- 15 **agree** that the Parliamentary Counsel Office is issued drafting instructions for the drafting of a Bill to implement the proposals set out in these recommendations;

- 16 authorise** the Minister of Customs, in consultation with any Minister with a portfolio interest, to make decisions, consistent with the overall policy decisions in this paper, on any issues which arise during the drafting process.

Hon Nicky Wagner  
**Minister of Customs**

Date: \_\_\_\_ / \_\_\_\_ / \_\_\_\_

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