

# Regulatory Impact Statement

## Customs and Excise Act Review: Controlled Deliveries

### Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the New Zealand Customs Service (Customs).

It provides an analysis of options to address the problem of the limited scope of controlled deliveries undertaken by Customs (usually together with the New Zealand Police).

The following are constraints on the analysis:

- Customs resources available to undertake controlled deliveries are limited. This investigative technique can be very labour intensive which limits its use to higher priority or strategically important border interceptions. The financial impacts of the options in this RIS are discussed but not quantified.
- there is a lack of available quantitative information in some areas, for example the numbers of investigations of commodities other than drugs that might be suitable for controlled deliveries.

The impacts discussed in this paper are primarily on Customs as the enforcement agency and on suspected offenders. There will be minimal impact on partner agencies in the context of existing joint investigations. The impacts on suspected offenders are related to criminal behaviour and are therefore not considered to be relevant measurable impacts, apart from where they increase or reduce the likelihood of detecting criminal offending.

*Signed by Terry Brown on 10 November 2015*

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10 November 2015

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## Executive Summary

- 1 The proposal to add a new controlled delivery provision to the Customs and Excise Act will enable Customs officers to release certain types of specified goods for further investigations. It will mean an investigation technique that has been used effectively to investigate drug trafficking is able to be used to deal with other forms of smuggling.
- 2 Customs considered three options including the status quo. The preferred option is option one, which allows Customs to undertake controlled deliveries of prescribed regulated goods. It is proposed to include three type of goods at commencement:
  - objectionable publications
  - goods that are designed, manufactured, or adapted with intent to facilitate the commission of a crime involving dishonesty
  - large scale tobacco smuggling.
- 3 Controlled deliveries of these goods align with Customs priorities, are legislatively straightforward and represent forms of smuggling where a controlled delivery would assist identification of principals and 'on the ground' organisers. Other goods may be added by legislative amendment at a later date.
- 4 Because of the resource requirements, this is a power that Customs considers will only be used infrequently for non-drug goods. As it is a power already utilised by Customs for drugs and precursors, there will only be minimal implementation costs.



## Objectives

- 5 The overall objective is for Customs to have a comprehensive set of powers that provides the ability to efficiently facilitate legitimate trade and travel, and effectively detect and investigate illegitimate trade and travel.
- 6 To ensure the primary objective is met, the following criteria have been identified to assess the options in this paper against. If these criteria are met for the individual options, then the objective is likely to be achieved:
  - efficiency: maximum benefits are delivered at lowest cost (a high cost option will be considered unfavourably)
  - effectiveness: the desired outcomes are achieved
  - responsiveness: system can accommodate change over time and situations which are not currently evident
  - transparency: powers and obligations are clear, easy to understand and publically available
  - consistency: similar situations result in similar responses
  - legitimacy: legislation is consistent with other international conventions, treaties etc
  - feasibility: the legislation facilitates implementation and is administratively feasible
  - proportionality: change is proportional to the need for change. Rules, penalties, and processes are in proportion with the size of offences and risk and incentivise voluntary compliance.
- 7 In general, the efficiency, effectiveness, and responsiveness criteria are given more weight than others in the analysis. This is because Customs' core values are focused on efficiency and effectiveness at the border, i.e. as a border agency, we need to be able to efficiently process traders and travellers while effectively clearing people and goods (including the detection of harmful or dangerous people and goods).
- 8 The following table explains the key used in the analysis of the criteria:

Rating	Explanation
✓	The criterion is met
?	Not enough information or evidence to determine whether the criterion is met
~	The criterion is neither met nor not (neutral)
✗	The criterion is not met

## Status quo and problem definition

- 9 Customs (usually together with the New Zealand Police) carries out controlled deliveries of drugs and precursor substances when these have been detected on importation into New Zealand. A controlled delivery could involve replacing or



leaving a controlled drug in its package and then permitting the package to reach its destination in order to identify the true importer.

- 10 Customs carries out approximately █████ controlled deliveries of drugs or precursor substances each year and these deliveries are usually part of a wider investigation. It is an essential law enforcement technique that can break down sophisticated smuggling activity usually connected with organised crime.
- 11 Controlled deliveries are limited to controlled drugs and precursor substances as this specific investigation technique was considered in light of the Misuse of Drugs Amendment Act. At the time it was considered appropriate to set this investigation technique out in the Amendment Act to ensure it could be employed in drug investigations. It has not previously been considered in light of other regulated goods, the import and export offences for which largely sit in Customs legislation.
- 12 There are over 60 types of goods regulated at the border, and many of these are now considered to be involved in organised smuggling activity. Examples include firearms, offensive and restricted weapons (such as knuckledusters and stun guns), credit-card skimming devices, and strategic goods (such as bomb-making instructions and terrorism-related material).
- 13 Under current legislation, controlled deliveries can only be employed to investigate the importation of controlled drugs and precursor substances. There is no explicit statutory authority for controlled deliveries to be used for other regulated goods.
- 14 We think there is a need to carry out controlled deliveries of other types of regulated goods. This is largely due to the increasing complexity of smuggling activity, the involvement of organised criminal groups in the importation of a wider range of regulated goods and the emergence of new and innovative postal services.
- 15 The current restriction of controlled deliveries to drugs affects Customs' ability to work jointly with other customs administrations as part of joint international operations. Most comparable countries have an ability to carry out controlled deliveries on all regulated goods and this is generally set out in non-regulatory guidelines rather than legislation.<sup>1</sup>
- 16 New Zealand Customs can cooperate with these other countries when controlled international controlled deliveries are required for controlled drugs and precursor substances, but not for any other types of regulated goods.
- 17 The emergence of more sophisticated organised crime smuggling of a more diverse range of regulated goods since the Act was enacted has enhanced the need for law enforcement agencies to develop and implement a variety of investigation techniques. A 2010 report drew attention to trans-national organised criminal networks trading in humans, firearms, counterfeit goods and

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<sup>1</sup> Examples include Australia which can carry out controlled deliveries of any regulated good and this is set out in legislation; and the United Kingdom which can carry out controlled deliveries of any kind of goods which is governed by interagency agreements.



environmental resources, cybercrimes and financial crimes, as well as the more traditional trade in drugs.<sup>2</sup>

- 18 New Zealand is a party to the United Nations Convention against Transnational Organised Crime which requires countries to operate within their domestic capability to combat organised crime, and cooperate internationally to protect the international system from exploitation by organised criminal groups and networks.
- 19 Customs is restricted from fully contributing to this requirement through domestic and international controlled deliveries of goods, other than drugs and given the increasing organised criminal activity in other regulated goods, this limitation is becoming more prominent.

## Options and impact analysis

- 20 We have considered the status quo and two additional options to address the problem of the limited scope of the controlled delivery power identified above. The two additional options are:
  - option one: allow Customs to undertake controlled deliveries of a prescribed range of regulated goods, in addition to controlled drugs and precursors
  - option two: allow Customs to undertake controlled deliveries of any good or class of goods regulated at the border.
- 21 These options are focused on the high-level policy of undertaking controlled deliveries. The specific mechanism by which regulated goods would be prescribed under option one will be by the approval of Parliament as an amendment to primary legislation. Customs considered the option of adding commodities by Order in Council but decided against it because of the serious nature of this technique and the link to warrantless powers under the Search and Surveillance Act 2012.
- 22 Both options are constrained by the availability of Customs resources to undertake controlled deliveries, particularly as this technique is very labour intensive.
- 23 The table below assesses these options against the most relevant criteria. More weight is given to the effectiveness of our protection and security of the border as this is Customs' core reason for carrying out controlled deliveries.

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<sup>2</sup> Ministry of Justice, *Strengthening New Zealand's Resistance to Organised Crime – An all-of-Government Response*, August 2011.



Relevant criteria	Status quo	Option one (preferred)	Option two
Efficiency for Customs	✘	✓	✓
Effectiveness	~	✓	✓
Responsiveness	✘	✓	✓
Transparency	✓	✓	✓
Consistency	✘	~	✓
Legitimacy	✘	✓	✓
Feasibility	✓	✓	~
Proportionality	✓	✓	✘
<b>Conclusion</b>	Does not meet the criteria. This option does not allow Customs to effectively investigate import and export offences and therefore to prevent and respond to organised smuggling activity.	Meets the criteria but does not treat all regulated goods in the same way – although there is the potential to do so in the future. It allows Customs to effectively protect and secure the border through the use of alternative investigation techniques.	Partially meets the criteria but is not a proportionate response to the problem. It allows Customs to effectively protect and secure the border through the use of alternative investigation techniques.

*Status quo*

- 24 Without the ability to use controlled deliveries on other regulated goods, it is difficult for Customs and the Police to penetrate the criminal supply chains trading in regulated goods. The status quo is already preventing Customs from responding to changes in organised criminal activity and more complex border risks by limiting the situations in which a controlled delivery can be used.
- 25 In particular, the absence of a controlled delivery power limits the opportunities to identify the organisers and principals of smuggling activity. This is also contrary to comparable countries and international border developments and therefore lacks legitimacy.

*Option one (preferred)*

- 26 Option one allows Customs to use the controlled delivery technique for a greater range of goods and potentially exposes more offenders within organised smuggling supply chains. A controlled delivery can provide a faster and more effective investigation technique compared with other forms of surveillance and tracking in certain cases.



- 27 Some examples of the types of goods for which controlled deliveries could be used are firearms, ATM and credit card skimming devices, restricted and offensive weapons, and strategic goods.
- 28 We propose that three specific regulated goods be included in the provisions in this Bill that would take effect at commencement. The goods identified align with Customs priorities (particularly the priority of protecting the border), are legislatively straightforward and are assessed by Customs to represent forms of smuggling where a controlled delivery would assist identifying the principals and 'on the ground' organisers involved. The goods are:
- objectionable publications, which are often imported through organised networks.
  - goods that are designed, manufactured, or adapted with intent to facilitate the commission of a crime involving dishonesty (e.g. credit card skimming devices that clone access cards used at ATMs).<sup>3</sup> These goods are associated with organised crime.
  - large scale tobacco smuggling, which is also associated with organised crime.
- 29 Several other goods from the full range of regulated controlled by Customs at the border were looked at for potential inclusion in this provision. These included firearms, undeclared cash shipments and fraudulent documents. These were either not considered a priority at this time, were able to be effectively dealt with other investigative techniques or were not as legislatively straightforward as those selected. The option remains to add these goods at a future date.
- 30 Section 81 of the Search and Surveillance Act 2012 provides warrantless search powers in respect to the controlled delivery of drugs and precursors. However, the use of a similar warrantless power for the goods specified above is not considered to be necessary at this time. The use of warrantless search powers may however be justified for other regulated goods and that the application of such a power should be considered on a case by case basis in future proposals to specify goods for controlled delivery.
- 31 The specific warrantless search powers that should apply to controlled deliveries of regulated goods would be considered as part of a review of the Search and Surveillance Act, commencing in 2016. However the overarching provision authorising the delivery of regulated goods from Customs' control will be included in the new Customs and Excise Bill.

*Option two*

- 32 Option two is similar to option one, however it allows Customs to carry out controlled deliveries on any type of good that is regulated at the border. This meets the objective of ensuring Customs has the powers needed to respond to smuggling activity as the risks associated with certain goods become known. This option also provides added flexibility, as the power to carry out controlled deliveries would be available at any time for any good controlled at the border.

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<sup>3</sup> As prescribed under Schedule 1 of the Act 'Prohibited imports'.



- 33 Despite this flexibility creating efficiency gains in the future, it is not appropriate for this flexibility to extend to goods that are highly unlikely to be involved in organised smuggling. For example, many goods are regulated at the border for product safety reasons, such as unsafe baby walkers, or protectionism reasons, such as the export of dairy products, and not because they are illegal to possess in New Zealand. These goods are unlikely to ever be associated with organised crime and other investigation techniques are in place to handle such cases more appropriately. This option extends an invasive power to goods that are not appropriate for controlled delivery.
- 34 This option would also require a form of general empowering provision linking the controlled delivery provision in the Customs and Excise Act to the relevant powers in the Search and Surveillance Act 2012. Given the serious and potentially invasive nature of these warrantless powers, such a general response would be neither proportionate nor appropriate.

### *Impacts*

- 35 Options one and two both have the following impacts (note that efficiency gains and increased costs are currently estimated based on anecdotal evidence and not on actual data):
- increased efficiency for Customs and Police: a controlled delivery can be used instead of a range of less effective investigative tools (we estimate that approximately 3 – 4 deliveries would be carried out on goods other than drugs each year. This is expected to be of the same magnitude regardless of how wide the range of goods is, given that resourcing and prioritisation of investigative activity will remain the same under both options
  - there may be some additional costs to Customs if we decide to undertake more controlled deliveries each year This is difficult to quantify as we do not currently record the costs of specific investigative techniques. Controlled deliveries are considered to be an expensive task (although the specific costs are not currently recorded). Increased efficiency gains (by reducing the number of other investigation techniques employed for a particular investigation) are expected to mitigate these additional costs and therefore it is expected that the additional controlled deliveries could be incorporated within the current fiscal baseline
  - increased likelihood of organised smuggling activity being broken down and therefore better long-term enforcement and social outcomes as a result of the disruption of organised smuggling activity
  - better alignment with other countries, including the Border Five (B5) countries of whom we work closely with on joint operations to detect large-scale organised smuggling, and with the World Customs Organization's ongoing initiatives.



- 36 On balance, option one best achieves the objective, meets the relevant criteria, and represents an effective and proportionate response to the problem. It provides the oversight and limitations appropriate to an invasive power in the New Zealand context.

**Recommended option:** allow Customs and Police to undertake controlled deliveries of a prescribed range of regulated goods, in addition to controlled drugs and precursors.

## Consultation

- 37 In February 2015, Customs released a public discussion paper with specific options for change identified. The paper sought views from the public on the problems and potential options for addressing these problems.
- 38 Customs received 89 submissions on the public discussion paper. Three submissions were received from relevant industry groups on the proposal, with all supportive of Customs' preferred option.
- 39 These groups acknowledge and support the value that controlled deliveries have as an investigation technique. They also requested that relevant businesses be consulted when new types of goods are to be prescribed as subject to a controlled delivery.
- 40 The following stakeholders have been involved in the development of the proposal via membership of a stakeholder reference group: Importer's Institute; Port Chief Executives Forum; New Zealand Airports Association; Business New Zealand; Board of Airline Representative New Zealand Inc; International Container Lines Committee; Customs Brokers and Freight Forwarders Federation of New Zealand; and Conference of Asia Pacific Express Carriers.

## Formal departmental consultation

- 41 Formal departmental feedback was sought on a draft Cabinet paper and earlier version of this RIS. The following agencies were consulted: the Department of the Prime Minister and Cabinet; Inland Revenue; Ministry of Business, Innovation, and Employment; Ministry of Transport; Ministry for Primary Industries; New Zealand Police; Department of Internal Affairs; Ministry of Justice; Civil Aviation Authority; Crown Law Office; Government Communications Security Bureau; Maritime New Zealand; Ministry for the Environment; Ministry of Defence; New Zealand Defence Force; Ministry of Foreign Affairs and Trade; Ministry of Health; New Zealand Security Intelligence Service; Office of the Privacy Commissioner; and The Treasury.
- 42 The Police, which is operationally likely to be involved in controlled deliveries, support the proposal. The Ministry of Justice has also been extensively consulted and its views have been incorporated. The Ministry of Justice was concerned about the link to search and surveillance warrantless powers. This is addressed by having future amendments made through primary legislation and not by Orders in Council.



## Implementation

- 43 The recommended proposal, if agreed to by Cabinet, will be given effect by legislation replacing the Customs and Excise Act 1996. A Bill will be introduced to Parliament in 2016 and Customs will continue to work with other agencies to ensure that implementation requirements are identified and given effect in the Bill.
- 44 Controlled deliveries are already utilised by Customs so the procedures, training and equipment to support them is already in place. Some updating of existing guidelines will be required. The main impact will be on decision makers who will now be able to consider a controlled delivery as an investigative option to deal with intercepts of the three identified commodities.
- 45 Customs is setting up a team of officials to develop an implementation plan for the new legislation. For example, details of the changes for controlled deliveries will be incorporated into an overall training package on changes to the Act. Customs will also identify any publicly available material that needs to be amended. Implementation costs for this proposal are expected to be minimal.
- 46 Customs and Police are currently revising their Memorandum of Understanding (MOU) and will set out in the MOU how Customs and Police will cooperate on controlled deliveries, including the additional goods proposed. As appropriate, other agencies may be part of the MOU in future.

## Monitoring, evaluation and review

- 47 As part of the implementation of the proposed changes, Customs will implement additional monitoring and evaluation mechanisms to ensure the benefits of the changes are being realised. In areas where no monitoring is currently done, we will be creating long-term processes that enable adequate information to be collected.
- 48 Customs also plans to review the use of the provision for controlled deliveries after three years, but will also revisit the goods covered each time a new good or class of goods is considered for inclusion.