

## Regulatory Impact Statement

### Customs and Excise Act Review: Responses to minor offending

#### Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by Customs.

It provides an analysis of options for responding to minor offending against the Customs and Excise Act. To do this, it outlines the advantages and disadvantages of the current petty offences regime and the proposed infringement notice scheme.

Implementation costs for an infringement scheme are likely to be in the region of \$0.535 million, with ongoing costs of about \$51,000 per year (once the petty offences scheme has been wound down). The latter cost is indicative, as there is some uncertainty about the volumes of infringement notices that could be issued by Customs.

Under the petty offences regime, about 30 offenders are processed a year. Anecdotal evidence suggests that some offenders, who would otherwise be processed under the petty offences regime, are let off with a warning due to a lack of staff time and facilities. Given that infringement notices are much less time consuming to issue, it is likely that more offenders would be processed under an infringement scheme. To provide ample scope for this in the costing analysis, the numbers of offenders that could be issued with an infringement notice have been estimated at ten times the number of those processed under the petty offences regime (i.e. up to 300 offenders a year).

As part of the public consultation process (held during April – May 2015), stakeholders were asked for their views about replacing the petty offences regime with an infringement notice scheme. This proposal received support from most stakeholders, including the Board of Airline Representatives New Zealand.

The New Zealand Food and Grocery Council noted that the scheme could easily be abused as 'revenue raiser'. Others pointed to risks around consistent application of the scheme. In response these concerns, it should be noted that any revenue from an infringement notice scheme will be transferred to the Crown; it will not be retained by Customs. Further, it is proposed that issues of consistency (and proportionate responding) be dealt with by establishing and promulgating a compliance strategy (and associated intervention enforcement guidelines) for frontline Customs staff. These documents would also be made readily available to the public.

*Signed by Michael Papesch on 14 September 2014*

Michael Papesch

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14 September 2015

## **Status quo and problem definition**

1. Minor offences against the Customs and Excise Act 1996 (the Act) are currently dealt with under petty offences provisions prescribed in Section 223 of the Act. The Chief Executive of Customs (Chief Executive) can use these provisions to issue a fine where the offending relates to goods and is considered to be minor, and is not punishable by imprisonment. The amount of the fine is not allowed to exceed one third of the maximum penalty that could have applied if the offender had been prosecuted and convicted.
2. Fines for petty offences cannot be issued unilaterally by Customs. The process for a petty offence must be initiated by the offender and provides an opportunity to avoid a full prosecution. The offender must apply to the Chief Executive to be dealt with summarily under Section 223 of the Act. The application must include an admission of wrongdoing. If the Chief Executive accepts this, and the offender pays the fine, the offender avoids a criminal prosecution. If the Chief Executive declines the application, the admission cannot be used in any prosecution for that offence.
3. Petty offence provisions are usually exercised by Customs at international airports for arriving passengers with undeclared or under-declared goods (e.g. tobacco). About 30 petty offences fines are issued each year, with an average fine of about \$300. The petty offences regime is unique under New Zealand law, with no other agency operating such a regime.
4. The petty offences regime has the following advantages:
  - it allows a proportionate response to minor offending
  - Customs, the Crown and the offender avoid the cost of a full criminal prosecution
  - the offender avoids a criminal conviction.
5. The petty offences regime has the following disadvantages:
  - it lacks fairness, clarity and consistency for offenders: assessing whether an offence has been committed and the amount of the penalty to be applied is determined by the Chief Executive of Customs and not the Courts
  - it is unduly difficult and time consuming for Customs officers and offenders. In most instances dealing directly with an offender takes about four hours, with additional time needed for processing
  - some offenders, who would otherwise be issued with a penalty, are let off with a warning because of the lack of a processing facility or time constraints

- it is inconsistent with the infringement notices schemes which other regulatory agencies use for minor offending.

## **Objectives**

6. Options for dealing with minor offending against the Act have been assessed against the following objectives. These are listed in order of importance.
  - allow a proportionate response to minor offending
  - fair, transparent and easily understood
  - consistent with approaches used by other regulatory agencies (e.g. Ministry for Primary Industries, the Police)
  - procedurally simple and cost effective to administer.

## **Options and impact analysis**

7. Two options were considered:
  - Option 1: Retaining the petty offences regime (the status quo).
  - Option 2: Repealing the petty offences regime and establishing an infringement notice scheme, in accordance with the Guidelines for New Infringement Schemes issued by the Ministry of Justice.<sup>1</sup>
8. Modifying the status quo was not seen as a feasible third option because minor changes would leave the fundamental weaknesses of the petty offences intact, and open to the same criticisms as the status quo. Major changes would result in the regime taking on the same characteristics as an infringement scheme, which is already covered in this regulatory impact assessment.

### **Option 1: Retain the petty offences regime**

9. The petty offences regime could be retained as part of the sanctions framework within the Act as it provides for a proportionate response to minor offending.
10. Replacing this scheme with any other scheme would involve regulatory change, with the Cabinet and public consultation processes that this entails. Beyond that, it would require planning and managing a transition process, establishing new processes and systems, training staff and educating travellers. Retaining the current regime would avoid the cost of implementing any form of replacement.

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<sup>1</sup> <http://www.justice.govt.nz/publications/publications-archived/2008/infringement-guidelines/guidelines-for-new-infringement-schemes>

11. That said, the current scheme departs from that used by other regulatory agencies. The Ministry for Primary Industries, for example, issues an infringement notice for minor breaches of the Biosecurity Act at the border (e.g. undeclared fruit). Minor breaches of the Land Transport Act (e.g. for speeding, no warrant of fitness) also result in the issuance of infringement notices.
12. The current scheme also places considerable powers in the hands of the Chief Executive of Customs in terms of the wide discretion in determining what counts as a minor offence and the setting the level of fine. There are also difficulties surrounding the requirement for an admission of guilt. An innocent person could be compelled in some sense to make an admission to avoid the costs and time involved in a prosecution. While the Act states that this admission cannot be used in evidence in any prosecution for the offence in question, it could be used as evidence in any prosecution for a subsequent offence.
13. This framework was established nine years prior to the publication of the Ministry of Justice's guidelines on responding to minor offences (i.e. Guidelines for New Infringement Schemes), and as such is not underpinned by current thinking on this matter. Seen in the context of these guidelines, the petty offences regime lacks transparency and fairness, and would probably fall short against standards prescribed by the New Zealand Bill of Rights 1990.
14. The petty offences regime is not particularly simple or cost effective to administer. Even if an offender makes an immediate admission of guilt, a Customs officer is still obliged to prepare a full case for prosecution. This involves an unduly lengthy process for both the offender and the Customs officer. This means that minor offenders are detained for an average of four hours, with some being detained for up to eleven hours. Anecdotally, some offenders who would otherwise receive a fine, are let off with a warning because a Customs officer may lack the time or facility to process a petty offence. The average cost of processing a petty offender is estimated at about \$1,800 to issue a fine which is typically about \$300.
15. The key difference in cost is due to the necessity for a Customs officer to prepare a case as if the offender was to proceed to a full prosecution. The same requirement does not apply to issuing an infringement notice.

**Option 2: Repeal the petty offences regime and establish an infringement notice scheme (preferred option)**

16. The petty offences regime could be repealed, with minor offending subsequently dealt with under an infringement notice scheme. Infringement notice schemes are commonly used by regulatory agencies for deterring or punishing minor offending. Guidance and legislative support for operating an infringement scheme are readily available via Ministry of Justice guidelines and the Summary Proceedings Act, which provides processes for appealing and enforcing infringement notices.
17. An infringement notice scheme established in accordance with the Ministry of Justice guidelines is fairer and more transparent for minor offenders because the

level of fines is set in advance by regulations, and no admission of guilt is required. As such, it is more likely to be consistent with the New Zealand Bill of Rights Act.

18. Like the petty offences regime, it would also permit a proportionate response to minor offending.
19. An infringement notice takes much less time to issue than a petty offence. Typical processing time (with the offender in attendance) would not usually exceed half an hour. The average full cost of an infringement notice is estimated at about \$350 (including processing time, appeals, and public information), or about 20% the cost of processing a petty offence.
20. That said, greater use is likely to be made of infringement notices, as a shortage of time or facilities is less likely to be factor in letting offenders off with a warning. Assuming that no more than 300 infringement notices will be issued per year (compared to 30 under the current petty offences provisions), ongoing costs are estimated to be about \$105,000. Given that the petty offences scheme will be wound down, net additional ongoing costs for the infringement notices scheme should be about \$51,000 per annum.
21. There may also be a relatively minor knock-on effect for the Court system for appeals and non-payment. However, provisions will be made for the Chief Executive to review the issue of an infringement notice at no charge to the applicant. This provision would limit appeals to the Courts.
22. It is generally the case that the lower the infringement fee, the more likely it is that offenders will pay voluntarily. Customs anticipates that the infringement fee range will be from \$200 to \$500, with the most common infringements (e.g. under-declared tobacco for personal use), sitting at \$300. Assuming about 10% of offenders were non or late payers, the Court might need to follow up as many as 30 additional people per annum for this purpose. The actual number is likely to be much than this.
23. In the shorter term, the total amount collected via infringement notices (about \$100,000 per year) is likely to be higher than that collected under the petty offences regime. In the longer term, the amount collected should reduce due to improved levels of compliance.
24. While ongoing additional costs are likely to be minimal, implementation costs will be significant. The cost of implementing an infringement scheme will be about \$0.535 million. This includes the development of operational guidelines, recording and reporting systems (required by the Ministry of Justice), staff training, publicity and a review of the scheme after the first year of operation.
25. There are no material environmental or cultural impacts. The social impact of applying an infringement notice scheme (e.g. for travellers) will be managed via the proposed Customs compliance strategy (and associated enforcement intervention

guidelines), and will be included within the scope of the review proposed in paragraph 42.

## Summary

26. This assessment is summarised in the table below. Each option is ranked from 1 (low) to 3 (high) against each of the objectives listed in paragraph 6.

**Table 1: Summary of options analysis**

Objectives	Option 1: retain petty offences regime	Option 2: adopt infringement notice scheme
Allow a proportionate response to minor offending	1	3
Fair, transparent and easily understood	1	3
Consistent with approaches used by other regulatory agencies (e.g. Ministry for Primary Industries, the Police)	3	3
Procedurally simple and cost effective to administer	2	3
<b>Total</b>	<b>7</b>	<b>12</b>

## Consultation

27. Customs produced a discussion paper<sup>2</sup> on the proposed changes and invited public comment. The public consultation process concluded on 1 May 2015. Six submissions responded to the petty offences section of the public consultation document – five were from industry stakeholders, and one from a member of the public.
28. Three submitters, including the Board of Airline Representatives New Zealand, were in favour of the proposed infringement scheme viewing it as a more efficient and consistent way for Customs to deal with minor offending. The New Zealand Food and Grocery Council expressed concerns that such schemes can be abused and used as revenue raisers, and urged careful consultation on the form that the proposed scheme would take. The remaining two submitters did not explicitly indicate whether or not they were in favour of the proposed changes.
29. Submitters also emphasised the need for consistency in application and clarity about the basis on which penalties are imposed, and noted that the infringement scheme should be for offences where there is no *mens rea* component.
30. Customs considers that this risks can be managed in the following ways:

<sup>2</sup> <http://www.customs.govt.nz/news/resources/corporate/documents/ceact1996review-discussionpaper2015.pdf>

- revenue from infringement notices will be transferred to the Crown bank account meaning that Customs will have no financial incentive to issue infringement notices
  - details of the infringement notice scheme (e.g. description of infringeable offences, penalty levels) will be subject to public consultation
  - the establishment of a compliance strategy will assist Customs officers to be consistent in their use of infringement notices.
31. The following government agencies were consulted on the proposed changes: Ministry for Primary Industries; Ministry for Business, Innovation and Employment; New Zealand Police; Inland Revenue; Ministry of Justice; the Treasury; Crown Law Office; Ministry of Transport; Department of Internal Affairs; Ministry of Foreign Affairs and Trade; Ministry for Primary Industries; Civil Aviation Authority; Maritime New Zealand; Ministry of Defence; New Zealand Defence Force; Ministry of Health; Parliamentary Counsel Office; the New Zealand Security Intelligence Service; and the Office of the Privacy Commissioner. The Department of Prime Minister and Cabinet was informed.
32. All agencies consulted were in favour of Customs introducing an infringement notice scheme. Ministry of Justice officials have been closely involved in the proposal development and have indicated they are comfortable with the proposals to date and are keen to continue to engage with Customs to progress this work further.
33. Some government agencies have noted that an infringement notice scheme is not a 'silver bullet' when dealing with minor offending. They have noted that while infringement notice schemes are an effective way to deal with minor offending, there are a number of considerations primarily in training, implementation and the flow on effect to other agencies (i.e. the Courts when notices are not paid). These matters have been addressed in paragraphs 21 and 22, and are discussed further in the implementation section below.

## **Conclusions and recommendations**

34. Repealing the petty offences regime and establishing an infringement notice scheme is the preferred option because it is consistent with approaches taken by other agencies for minor offending, is fairer, and is appropriate for dealing with minor offending. It is also more likely to be consistent with the New Zealand Bill of Rights 1990.
35. The scheme will also help future proof provisions for minor offending because regulations are more easily modified than primary legislation.
36. While one-off implementation costs are likely to be significant for an infringement notice scheme, the cost per infringement notice issued is likely to be much less

than a petty offence. Total ongoing costs for an infringement scheme are likely to be marginally higher than the petty offences scheme, due to a probable greater use of infringement notices by Customs officers in the shorter term. In the longer term, costs for the scheme will reduce if it is successful in encouraging greater levels of compliance.

## **Implementation plan**

37. Section 223 will not be re-enacted. The Bill will make provision for the establishment of an infringement notice scheme. The Bill is intended to be introduced to the House in mid-2016 with the aim of receiving Royal Assent by the end of 2016. Details of the infringement scheme will be available for public consultation during select committee consideration of the Bill.
38. The enabling provisions in the Act will be consistent with Ministry of Justice Guidelines for New Infringement Schemes. This includes the following characteristics:
  - infringement penalties will not exceed \$1,000 (the actual penalties are likely to be in the range of \$300 to \$500)
  - Customs be able to issue infringement notices
  - infringement fees will be payable to Customs for remitting to the Crown account
  - detailed provisions, such as particular infringement offences, fees and forms will be established by Regulations.
39. From an operational perspective Customs will also need to establish:
  - systems for recording and reporting infringement notice information and statistics to the Ministry of Justice
  - operational guidelines (i.e. a compliance strategy and associated enforcement intervention guidelines) to help ensure that Customs officers issue infringement notices in a fair and consistent manner
  - a training programme to ensure that Customs officers and other relevant staff are aware of the use and purpose of the infringement notice scheme and can competently issue infringement notices in accordance with the compliance strategy and associated enforcement intervention guidelines
  - a comprehensive cutover plan for ensuring a seamless transition from the petty offences regime to the infringement notice scheme.
40. These operational changes, along with any modifications to the administrative penalties scheme and offences and penalty levels, will form part of a broader



programme of work on a compliance strategy and associated training and awareness programmes.

41. Customs will draw on the significant experience of counterpart agencies (including the Police and Ministry for Primary Industries) in designing and implementing an infringement notice scheme and will work closely with the Ministry of Justice on the design and operational aspect of the infringement notice scheme (e.g. referral of unpaid notices to the Courts).

## **Monitoring, evaluation and review**

42. A review of the implementation and functioning of the infringement scheme will be conducted after its first year of operation. The review is likely to cover the following matters:
  - the effectiveness of the scheme from the perspective of Customs officers, and other operational staff
  - areas of improvement, in terms of the fair and consistent application of infringement notices
  - numbers of reviews, appeals and non-payment (to ensure these are not excessive)
  - the actual cost of administering the scheme
  - the success of the scheme as a deterrent for non-compliance.

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