

12 October 2022

Hon David Parker, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Customs and Excise (Arrival Information) Amendment Bill

Purpose

1. We have considered whether the Customs and Excise (Arrival Information) Amendment Bill (the Bill) is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act).
2. We have not yet received a final version of the Bill. This advice has been prepared in relation to the latest version of the Bill (PCO 24500/4.0). We will provide you with further advice if the final version includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 25(c) (right to be presumed innocent). Our analysis is set out below.

The Bill

4. This Bill amends the Customs and Excise Act 2018 (the Act), to provide for clearer arrival information obligations to help with Customs-related border management matters, such as collection of revenue and detection of restricted or prohibited goods.
5. The proposed amendments support the digitalisation of the paper arrival card. While a digital arrival card can be implemented using existing legislation, the Bill aims to improve the enforcement and functionality of the system.
6. Specifically, the Bill provides:
 - a. an explicit obligation on arriving passengers to provide prescribed arrival information;
 - b. two new offences – one relating to failure to provide prescribed arrival information and one for providing erroneous arrival information of a material particular;
 - c. regulation-making power to set the time by which arrival information must be provided to the New Zealand Customs Service (Customs), and to exempt persons from the requirement to complete arrival information; and
 - d. for the Chief Executive of Customs to collect other arrival information, as required, for the purposes of verifying other agencies' traveller data entry requirements, where they are specified in other enactments.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹
8. Clauses 4 and 6 of the Bill engage the right to freedom of expression through compelled expression – requiring an individual to provide information.
9. Clause 4 of the Bill requires persons arriving in New Zealand to provide Customs with the information specified in the chief executive's rules (chief executive's rules mean the rules made by the chief executive of the New Zealand Customs Service, as defined in s 5 of the Act). The chief executive's rules will specify what information, and how the information, is to be provided. Clause 4 also provides a power to make regulations to set the time by which arrival information must be provided to Customs and to exempt persons from the requirement to complete arrival information. A person commits an offence if the person fails to provide the required information or provides erroneous information; and is liable, on conviction, to a fine not exceeding \$1,000.
10. Clause 6 also engages the right to freedom of expression by giving Customs the power to collect information about people arriving in New Zealand if that information is designated as arrival information in other enactments.
11. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:²
 - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
 - b. If so, then:
 - i. is the limit rationally connected with the objective?
 - ii. does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
 - iii. is the limit in due proportion to the importance of the objective?
12. Customs has a role to maintain and ensure travellers' compliance with the relevant legislation regulating border processes. The compelled expression provisions of this Bill are connected to this purpose as they enable Customs officers to collect information to ascertain whether an individual is compliant with legislative requirements. This information and its format, as required by the chief executive's rules, will help with customs-related border management matters, such as collection of revenue and

¹ See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

² *Hansen v R* [2007] NZSC 7 [123].

detection of restricted or prohibited goods. These requirements will also improve the enforcement and functionality of the digitised arrival card system.

13. We consider that the requirement for individuals entering New Zealand to provide information pursuant to the chief executive's rules is proportionate and impairs freedom of expression no more than reasonably necessary. The rules will only apply to persons arriving in New Zealand. Regulations may also be made to exempt people from these requirements where it is not practical or necessary to collect arrival information from a particular class of persons, for example, persons rescued at sea.
14. Although the Bill does not stipulate the extent of the information that will be required by the chief executive's rules, any rules will nevertheless need to be consistent with the Bill of Rights Act (i.e. impose a justifiable limit on freedom of expression) in order to ensure that the information requirements are lawful.
15. The power to collect arrival information in clause 6 is limited to information which has already been identified for collection by other legislation. It may only be collected for the purpose of verifying whether a person has complied with the requirements under other legislation that they are required to comply with before, or when, they arrive in New Zealand. In order for Customs to verify compliance on behalf of other agencies, it needs the authority to collect this information. We therefore consider that clause 6 is also proportionate and impairs freedom of expression no more than reasonably necessary to ensure compliance with legislation.
16. We therefore consider that the Bill appears to be consistent with the right to freedom of expression affirmed in s 14 of the Bill of Rights Act.

Section 25(c) – Right to be presumed innocent until proved guilty

17. Section 25(c) of the Bill of Rights Act affirms that everyone who is charged with an offence has, in relation to the determination of the charge, the right to be presumed innocent until proved guilty according to law.
18. The purpose of s 25(c) is to protect the fundamental liberty and dignity of those accused of offences in light of the grave consequences a criminal charge and conviction may entail.³
19. To this end, the right to be presumed innocent includes three main components:⁴
 - a. the onus of proof lies with the prosecution throughout;
 - b. the standard of proof is “beyond reasonable doubt”; and
 - c. mens rea (a guilty mind) is a requirement of the offence.

³ See *R v Oakes* (1986) 26 DLR (4th) 200 (SCC) at [212 – 213].

⁴ See Butler & Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2015) at [23.4.19]; Paul Rishworth et al. *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at [675].

Strict liability offences

20. Strict liability offences give rise to a *prima facie* inconsistency with s 25(c) because the accused person is required to prove a defence (on the balance of probabilities) to avoid liability. This means that, where the accused is unable to prove a defence, they could be convicted even where reasonable doubt about their guilt exists.
21. Strict liability offences may nevertheless be justifiable limits on rights under s 5 of the Bill of Rights Act. They have been found to be more likely to be justifiable where:
 - a. the offences are regulatory in nature;
 - b. the defendant will be in the best position to justify their apparent failure to comply with the law, rather than requiring the Crown to prove the opposite; and
 - c. the penalty for the offence is proportionate to the importance of the Bill's objective.
22. The Bill introduces two new strict liability offences, both of which are punishable, on conviction, with a fine not exceeding \$1,000. Their purpose is to enforce the requirement for travellers to provide information demonstrating their compliance with legislation regulating border processes.
23. We consider that the *prima facie* limits to the right affirmed under s 25(c) of the Bill of Rights Act proposed by the Bill are justified pursuant to s 5. In particular:
 - a. Penalising non-compliance with the information provision requirements by way of a strict liability offence is rationally connected to the objective of the Bill, which is to prevent non-compliance with border-related legislative requirements. For example, it is important for Customs to be able to detect whether people arriving in New Zealand are carrying restricted or prohibited goods.
 - b. People exercise a choice in overseas travel and are expected to meet certain expectations of care and accept the enhanced standards of behaviour required of them when entering New Zealand.
 - c. The defendant is best placed to explain their non-compliance with the information provision requirements and any steps they have taken to comply with the law.
 - d. Clause 7 of the Bill provides a defence for providing erroneous information if the defendant proves that the defendant took all reasonable steps to ensure that the information provided was not erroneous in a material particular. The explicit reverse onus nature of this offence is justified given the nature and context of the conduct being regulated and the ability of the defendant to exonerate themselves. A defence for a failure to supply information is already provided under subpart 1 of Part 3 of the principal Act.
 - e. The offences in the Bill are public welfare regulatory offences designed to protect the general public from possible harm and to regulate border control.
 - f. The penalty for non-compliance is proportionate and solely financial in nature. The maximum fine that can be imposed, at the discretion of the court, is \$1,000, which is at the lower end of the spectrum and proportionate to the objective of

ensuring compliance with the legislative requirements. No terms of imprisonment can be imposed.

24. Customs officials have also advised they anticipate prosecutions for these two new offences would be rare and, given the low penalty amounts, likely to be made in conjunction with prosecutions for other offences.
25. We therefore conclude that the Bill appears to be consistent with the right to be presumed innocent until proved guilty affirmed in s 25(c) of the Bill of Rights Act.

Conclusion

26. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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