



Cabinet Economic Development Committee

Summary

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Maritime Powers Extension Bill: Interdicting Drug Shipments in International Waters

Portfolio

Customs

Purpose

This paper seeks agreement to provide the New Zealand Customs Service (Customs) with the power to interdict suspected drug smuggling vessels in international waters which requires amendments to both the Customs and Excise Act 2018 (once enacted) and to the Misuse of Drugs Act 1975.

Previous Consideration

In August 2017, the previous government agreed to provide Customs with the power to interdict (board, search and take enforcement action) vessels suspected of smuggling drugs in international waters [EGI-17-MIN-0253].

A key assumption of the proposal was that existing offence provisions in the Misuse of Drugs Act 1975 and the Crimes Act 1961 would be sufficient to enable prosecution of those apprehended under the proposed new powers in New Zealand courts. The Minister of Customs (the Minister) advises that it has become apparent that the criminal offence provisions in New Zealand's domestic law were not sufficiently clear.

Summary

Customs currently has specific powers to respond to drug smuggling in New Zealand's territorial sea (out to 12 nautical miles from the coast) and contiguous zone (from 12 to 24 nautical miles from the coast). Customs works closely with international and domestic law enforcement partners to support enforcement actions at sea.

As a party to certain international conventions, New Zealand is obliged to cooperate in the suppression of drug trafficking by vessels in international waters and to take necessary legislative and administrative measures to address the problem effectively. International law permits (but does not require) states to interdict drug trafficking vessels in international waters beyond the contiguous zone in specified circumstances. However, there is currently no specific legislation in New Zealand that implements the relevant provisions into domestic law.

The Minister is seeking agreement to:

- proceed with the proposal to provide Customs with the power to interdict suspected drugs smuggling vessels in international waters beyond the contiguous zone (including the power to board, search and take enforcement action) under the Customs and Excise Act 2018 (once enacted); and

- amend the Misuse of Drugs Act 1975 to provide clear criminal offences and jurisdiction for New Zealand courts so that offenders apprehended in international waters (including in the contiguous zone) may be prosecuted in New Zealand.

Customs seizures of methamphetamine and the potential methamphetamine yield from precursors are detailed in **paragraph 18** of the attached paper.

Customs power at sea is illustrated in **paragraphs 26-33**.

New Zealand's obligations to suppress the illicit traffic in narcotic drugs and psychotropic substances is detailed in **paragraphs 34-42**.

Comment on the proposed legislative amendments is provided in **paragraphs 43-63**.

Regulatory Impact Analysis

A Regulatory Impact Statement (RIS) has been prepared and is attached.

The Customs' Regulatory Impact Statement Panel has reviewed the RIS and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Baseline Implications

None.

Legislative Implications

The Minister is recommending a separate omnibus bill, the "Maritime Powers Extension Bill" to amend the Customs and Excise Act 2018 (once enacted) and the Misuse of Drugs Act 1975.

Timing Issues

The Minister has recommended that the Bill should be passed in 2018 (Category 2) – ideally at the same time as the new Customs and Excise Bill comes into force on 1 October 2018. This will ensure that Customs has these powers available at the start of the summer, when international movements of small craft are at their highest.

Announcement

None indicated.

Proactive Release

The paper under DEV-18-SUB-0014 and the accompanying Regulatory Impact Statement will be published at the time that the Bill is introduced to the House. Some material may be withheld in accordance with the provisions of the Official Information Act 1982.

Consultation

Paper prepared by Customs. Crown Law Office, Defence, NZDF, Treasury, MFAT, MoH, MBIE (Immigration), MoJ, DPMC (Prime Minister) (National Security and Intelligence), Police, MoT and MPI were consulted.

The Minister of Customs indicates that New Zealand First and the Green Party will be consulted.

The Minister of Customs recommends that the Committee:

- 1 note that the absence of a specific legislative framework limits Customs' ability to respond to identified drug smuggling activities in international waters beyond the contiguous zone;
 - 2 agree to confirm the previous government's decisions on 21 August 2017:
 - 2.1 to give Customs the statutory power to board, search and, if evidence of offending is found, take necessary enforcement actions in respect of vessels in international waters beyond the contiguous zone in line with those powers that apply within New Zealand's contiguous zone;
 - 2.2 that the threshold for exercising the proposed powers in a given case contain the following elements (and subject to drafting by Parliamentary Counsel):
 - 2.2.1 the applicable international legal conditions have been satisfied (which may include obtaining prior flag state consent); and
 - 2.2.2 there is reasonable cause to suspect that:
 - 2.2.2.1 an offence has been, is being or will be committed under sections 6, 12A or 12AB of the Misuse of Drugs Act 1975 [or otherwise as amended], and that the vessel to be interdicted has been, is being or will be used to facilitate (assist in the commission of) that offence (or an attempt or conspiracy to commit such an offence); and
 - 2.2.2.2 the vessel to be interdicted has been, is being, or intended to be involved in, or connected to, the facilitation of illicit drugs crossing New Zealand's border;
 - 2.3 that Customs' powers in international waters beyond the contiguous zone apply to New Zealand flagged vessels, foreign vessels, and stateless vessels;
 - 2.4 that the scope of Customs' powers in international waters beyond the contiguous zone be limited to what is consistent with New Zealand's international legal obligations under the UN Convention on the Law of the Sea and the United Nations Convention on the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- [EGI-17-MIN-0253]
- 3 agree to amend the Customs and Excise Act 2018 (when enacted) to give effect to these decisions under paragraph 2;
 - 4 agree to amend the Misuse of Drugs Act 1975 to provide jurisdiction and offences for smuggling controlled drugs, precursors or equipment and material in international waters (including the contiguous zone) which will apply to situations where:
 - 4.1 an individual is on any vessel in international waters; and
 - 4.2 they are in possession of a controlled drug, precursor substance or other equipment, material and substances used in the production of drugs, or are otherwise knowingly involved in the carrying or concealment of the drug on this or any other vessel; and

- 4.3 it is intended that the drug is to be imported into, or has been exported from, New Zealand;
- 5 agree that offending in international waters should be treated as analogous to the relevant offences under section 6, 12A and 12AB of the Misuse of Drugs Act and that the same penalties should apply;
- 6 note that where evidence of other customs, immigration or biosecurity offending is identified when exercising powers in international waters beyond the contiguous zone, Customs will not have the power to take any enforcement action, unless authorised separately;
- 7 agree that the Parliamentary Counsel Office be issued drafting instructions to implement the proposals set out in these recommendations;
- 8 invite the Minister of Customs to report back to the Cabinet Legislation Committee with a draft Bill to seek approval to introduce to the House.

Vivien Meek
Committee Secretary

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MARITIME POWERS EXTENSION BILL: INTERDICTING DRUG SHIPMENTS IN INTERNATIONAL WATERS

Proposal

- 1 This paper seeks agreement to provide the New Zealand Customs Service (Customs) with the power to interdict suspected drug smuggling vessels in international waters. This requires amendments to both the Customs and Excise Act 2018 (once enacted) and to the Misuse of Drugs Act 1975.
- 2 This will further incorporate New Zealand's existing rights and obligations under international law into domestic law.

Executive Summary

- 3 Illicit drugs, such as methamphetamine, are causing substantial harms to individual New Zealanders, their families and whānau, and the wider community. It is critical to ensure that law enforcement agencies have access to the full suite of options to disrupt and dismantle the organised crime groups bringing these substances into New Zealand. Without constraining the availability of illicit drugs in our communities, it will be difficult for demand reduction and treatment options to be effective.
- 4 In August 2017, Cabinet agreed to pursue legislative changes to enable Customs officers to interdict (board, search and take enforcement action) against vessels in international waters. These powers would only apply where there is reasonable cause to suspect the vessel was involved with smuggling illicit drugs across New Zealand's borders [EGI-17-MIN-0253].
- 5 This decision was made in response to recent attempts by organised criminal groups to evade border controls through use of motherships and small vessels to transport illicit drugs into New Zealand. Section 6(c), Section 6(a)
The number of incidents in other countries in our region has also increased.
- 6 Customs currently has specific powers to respond to drug smuggling in New Zealand's territorial sea (out to 12 nautical miles from the coast) and contiguous zone (from 12 to 24 nautical miles from the coast). Customs works closely with international and domestic law enforcement partners to support enforcement actions at sea.
- 7 As a party to certain international conventions, New Zealand is obliged to cooperate in the suppression of drug trafficking by vessels in international waters and to take necessary legislative and administrative measures to address the problem effectively. International law permits (but does not require) states to interdict drug

trafficking vessels in international waters beyond the contiguous zone in specified circumstances. However, there is currently no specific legislation in New Zealand that implements the relevant provisions into domestic law. I consider it important that this issue is addressed to ensure that Customs has the powers it needs better to manage this elevated risk and provide powers to counter new business models of smuggling drugs into New Zealand.

- 8 The proposal to which Cabinet agreed in 2017 would have extended Customs' current powers into international waters, with reliance on existing offence provisions to prosecute those involved. However, it has become apparent that the existing offence provisions do not provide the full ability to prosecute those people found in international waters who are involved either directly or indirectly in smuggling illicit drugs across New Zealand's border. This risks making the effective interdiction powers in international waters vulnerable to legal challenge in New Zealand's courts.
- 9 Therefore, I am asking Cabinet to confirm the previous Cabinet decision to amend the Customs and Excise Act, and to agree to amend the Misuse of Drugs Act 1975 to create clear criminal offences and jurisdiction for New Zealand courts in relation to people who are involved in narcotics smuggling activities in international waters.
- 10 I consider it important to ensure that Customs has the powers it needs with some urgency in order to respond to the elevated level of risk. I have proposed this omnibus bill be treated as a Category 2 – that it must be passed by the end of 2018, ideally by October, to align with the start of summer when the risk is highest.
- 11 This will provide Customs with a clear ability to deal with vessels trafficking drugs through international waters with New Zealand as a target, with the objective of keeping illicit drugs from getting to New Zealand. It will also ensure that any drugs or other evidence can be seized, and individuals can be arrested and prosecuted in New Zealand.

Background

Previous decisions

- 12 On 21 August 2017, Cabinet agreed to provide Customs with the power to interdict (board, search and take enforcement action) vessels suspected of smuggling drugs in international waters [CAB-17-MIN-0443]. The main elements of this proposal are presented in this paper for Ministers' consideration.
- 13 A key assumption of the earlier proposal was that existing offence provisions in the Misuse of Drugs Act 1975 and the Crimes Act 1961 would be sufficient to enable prosecution of those apprehended under the proposed new powers in New Zealand courts.
- 14 However, it became apparent that the criminal offence provisions in New Zealand's domestic law were not sufficiently clear. This lack of clarity would make enforcement actions vulnerable to legal challenge on New Zealand Bill of Rights Act 1990 grounds, such as unlawful detention and habeas corpus applications, as well as broader grounds such as abuse of process. This would not have achieved the key objective of providing a clear and enabling legislative framework for responding to vessels in international waters that are engaged in illicit drug smuggling activities targeting New Zealand.

15 Therefore, I am seeking Cabinet agreement to:

15.1 proceed with the proposal to provide Customs with the power to interdict suspected drugs smuggling vessels in international waters beyond the contiguous zone (including the power to board, search and take enforcement action) under the Customs and Excise Act 2018 (once enacted); and

15.2 to amend the Misuse of Drugs Act 1975 to provide clear criminal offences and jurisdiction for New Zealand courts so that offenders apprehended in international waters (including in the contiguous zone) may be prosecuted in New Zealand.

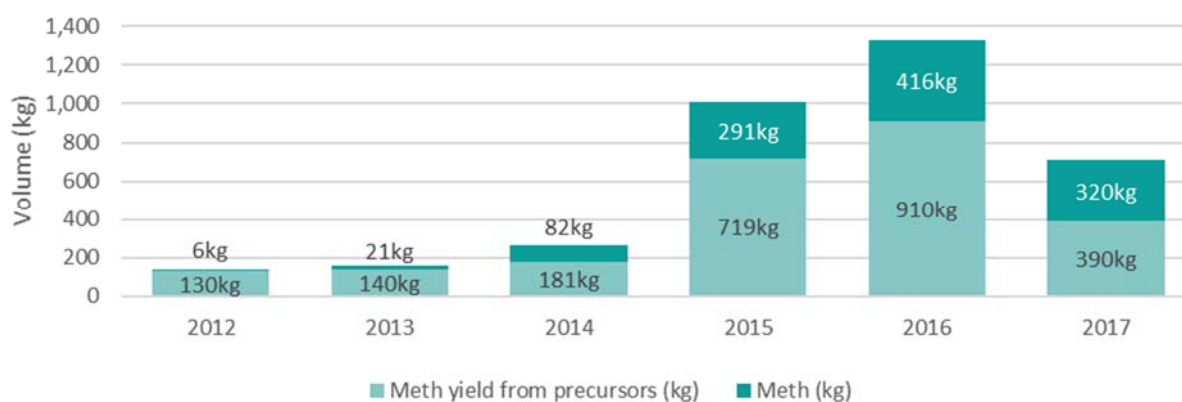
Drug smuggling activity is increasing

16 Illicit drugs, such as methamphetamine, are causing substantial harms to individual New Zealanders, their families and whānau, and the wider community. As part of coalition and support agreements, the Government has signalled its intention to take a serious focus on combatting organised crime and to prevent the harms caused by illicit drugs to individuals, families and whānau and the wider community.

17 New Zealand is an attractive market for international drug trafficking syndicates. The price of methamphetamine in New Zealand is about \$600 per gram which is substantially higher than other markets – about 12 times the price in the United States. Customs' seizures of methamphetamine have increased, on average, by 66 percent each year (from 20kg in 2010 to 416kg in 2016). While methamphetamine is the presenting issue, Customs is seeing a much broader range of drug types being trafficked from a more diverse range of countries. Over the last 12 months, there has been an increase in the seizures of cocaine, MDMA, synthetic cannabis, tobacco and fentanyl.

18 While this increase shows that Customs is stopping more illicit drugs getting into the market, other indicators suggest the size of the market is not decreasing accordingly. Users report that methamphetamine remains easily available in New Zealand, yet there are potentially reduced numbers of users. These indicators are consistent with an expanding methamphetamine market in New Zealand.


Figure 1: Customs seizures of methamphetamine and the potential methamphetamine yield from precursors



Source: Customs. Seizures for 2017 are preliminary only and exclude large seizures that are pending confirmation of exact weight by ESR.

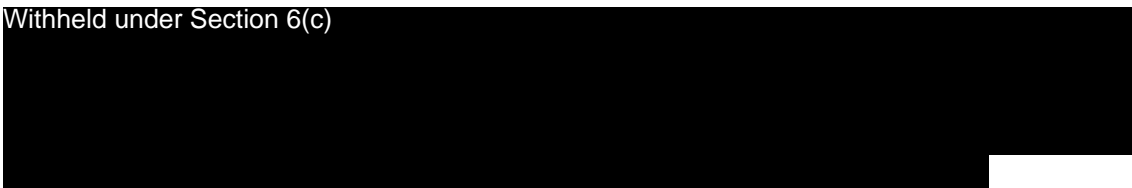
The use of motherships and small craft for drug smuggling is increasing

19 Withheld under Section 6(c)



20 Criminal groups have the flexibility to manage and disguise the routing and timing of their voyage to avoid official attention. Vessels can land at remote locations or transfer goods to domestic vessels without getting close to the coastline. If detected, traffickers have the option of trying to outrun enforcement vessels and can move outside a country's jurisdiction with relative ease. These advantages are multiplied if more than one support vessel is used to transport goods to shore.


21 Withheld under Section 6(c)



22 Recent examples include:

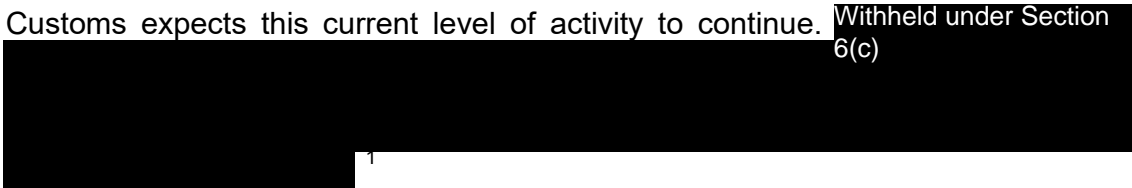
22.1 500kg of methamphetamine was seized on Ninety Mile Beach in June 2016 [Operation FRONTIA]

22.2 Withheld under Section 6(c)



22.3 in February 2017, 1.4 tonnes of cocaine was seized by Australian authorities 370km east of Sydney on the yacht *Elakha* – it is alleged that the *Elakha* sailed from Tauranga and met a mothership in the Tasman Sea.

23 Customs expects this current level of activity to continue. Withheld under Section 6(c)



24 There are more individual incidents of drugs being smuggled through mail and passenger streams than on vessels. However, vessels can carry large quantities of drugs of high value on the black market. Intervening these vessels in international waters provides a powerful opportunity to disrupt the flow of drugs into New Zealand earlier on in the supply to keep illicit drugs further away from New Zealand shores.

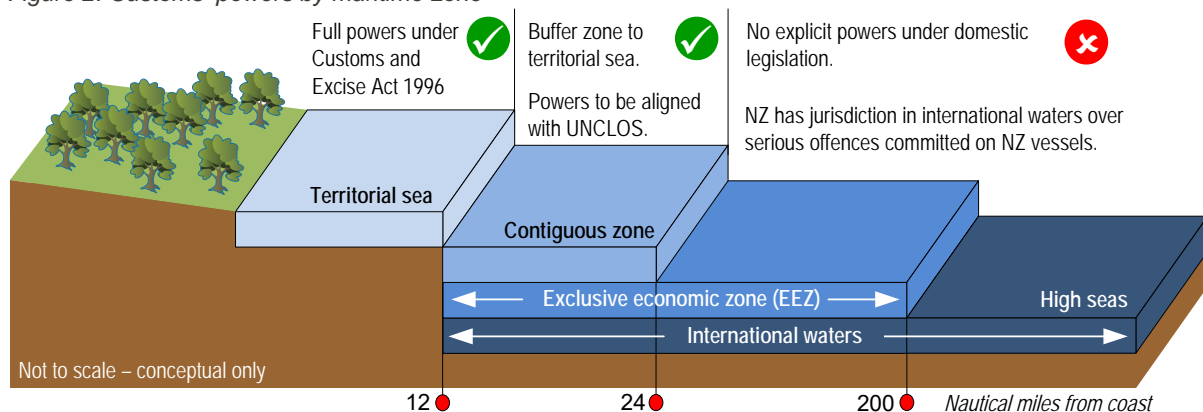
¹ A vessel may be stateless because it does not have the right to fly the flag of any state. Under international law, a vessel that sails under the flags of multiple states according to convenience is also regarded as stateless.

- 25 These proposed powers will provide Customs and other law enforcement agencies with an additional tactical option for responding to attempts to smuggle drugs into New Zealand. It will also provide a greater opportunity to gather information about information with relevant agencies to disrupt and dismantle transnational criminal groups' activities upstream from New Zealand.

Customs' powers at sea

- 26 Under the 1982 UN Convention on the Law of the Sea (UNCLOS), a coastal state such as New Zealand has different rights in different maritime zones. Figure 2 illustrates the relevant zones and provides a summary of the powers currently available to Customs under New Zealand domestic law.

Figure 2: Customs' powers by maritime zone



Territorial sea

- 27 New Zealand has sovereignty over its territorial sea (out to 12 nautical miles from the coast). The Customs and Excise Act provides for a broad range of obligations and powers in the territorial sea including:
- 27.1 the requirement that all craft submit arrival documentation to enable Customs to make a risk assessment;
 - 27.2 the power to board and search any craft arriving or departing from New Zealand, which enables compliance checks and detection of offending; and
 - 27.3 powers to seize goods, detain and seize craft and arrest individuals, where prohibited or restricted goods are found, or other offences are identified.

The contiguous zone

- 28 The contiguous zone (from 12 to 24 nautical miles) is the zone adjacent to the territorial sea. It is part of international waters, and New Zealand does not have general sovereignty over it. However, in the contiguous zone New Zealand may exercise the control necessary to prevent and punish infringement of its customs,

fiscal, immigration or sanitary laws and regulations within its territory or territorial sea.²

- 29 Customs has a range of powers in domestic legislation that it can exercise in the contiguous zone including powers to board and search craft, seize goods, search people, and detain craft, weapons and other instruments of crime. Some adjustments to Customs' powers in this zone are included in the Customs and Excise Bill to address some inconsistencies in the current legislation.
- 30 In effect, this proposal will mean that a broader range of powers, currently available to be exercised in the territorial sea, will also be available in the contiguous zone – provided the powers are exercised in accordance with article 33 of UNCLOS.

International waters beyond the contiguous zone

- 31 The international waters beyond the contiguous zone are made up of the exclusive economic zone (EEZ) (the area from 12 to 200 nautical miles offshore), the high seas beyond that, and the EEZs of other states.
- 32 There is no distinction between the EEZ and the high seas under the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Drug Trafficking Convention). The powers proposed in this paper could be used within New Zealand's EEZ, on the high seas, or in the EEZ of another state. In practice, however, the proposed powers are most likely to be used in international waters in New Zealand's region.
- 33 Under UNCLOS, vessels sailing in international waters are subject to the exclusive jurisdiction of their flag state (i.e. the state whose flag they are entitled to fly), save in exceptional cases provided for under UNCLOS or other treaties such as:
- 33.1 a state may use a warship or other government ship to interdict a foreign vessel in international waters with the permission of the flag state (where there is one); and
- 33.2 a coastal state may use its warships or military aircraft to undertake "hot pursuit" from the territorial sea or contiguous zone out into international waters beyond the contiguous zone where a foreign vessel is suspected of having violated the laws and regulations of the coastal state.

New Zealand's obligations to suppress the illicit traffic in narcotic drugs and psychotropic substances

- 34 The international legal framework for the suppression of illicit traffic in narcotic drugs is found in UNCLOS and the Drug Trafficking Convention. New Zealand has ratified both of these Conventions.
- 35 Under Article 108 of UNCLOS, all parties have an obligation to cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by vessels in international waters contrary to international conventions.

² See Article 33 of UNCLOS.

- 36 The Drug Trafficking Convention elaborates on this general obligation. Under Article 17, where a party to the Convention has reasonable grounds to suspect that a vessel flagged to another party is engaged in illicit traffic of drugs, it may request authorisation from the flag State to take appropriate measures concerning the vessel. This authorisation can include the following actions: boarding the vessel, searching the vessel and, if evidence of involvement in illicit trafficking is found, taking appropriate action with respect to the vessel, persons and cargo on board.
- 37 Hot pursuit under Article 111 of UNCLOS may also be used to suppress drug trafficking operations. Hot pursuit must be commenced when the vessel that is believed to have violated the laws of the coastal state is within internal waters, the territorial sea or the contiguous zone, and may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.
- 38 Further, Article 111(4) of UNCLOS permits pursuit of a “mothership” that has not itself entered the territorial sea or contiguous zone if one of the mothership’s boats has done so, or the mothership is working with other craft as a team. In this context the mothership has a “constructive presence” in the territorial sea or contiguous zone and can be pursued and interdicted.
- 39 The Drug Trafficking Convention obliges parties to establish criminal offences in their domestic law in respect of certain conduct (e.g. the importation or exportation of narcotics and psychotropic substances). It also obliges the parties to establish jurisdiction over those offences when they are committed in their territory or on board a vessel flying their flag. New Zealand has given effect to these provisions via the Misuse of Drugs Act.
- 40 The Drugs Trafficking Convention permits (but does not oblige) parties to establish jurisdiction over offences committed by their nationals. New Zealand has given effect to this provision with the enactment of section 12C of the Misuse of Drugs Act, which allows New Zealand citizens and persons present in New Zealand to be prosecuted in New Zealand for drug offences they have committed overseas.
- 41 The Drugs Trafficking Convention also permits (but does not oblige) parties to establish jurisdiction over offences committed on board vessels that are interdicted with the consent of the flag state given pursuant to article 17(4) of that Convention. New Zealand has not implemented this provision into its domestic law. Although section 12C of the Misuse of Drugs Act applies to certain offences committed overseas, it was not designed to prosecute offending on vessels operating in international waters.
- 42 Australia and the United Kingdom have legislation that provides for the power to interdict vessels in international waters that are suspected of involvement in drug smuggling. These provisions provide relevant precedents for the powers proposed in this paper.

Proposal: legislative amendment to enable Customs officers to take enforcement action in international waters and prosecute offenders


- 43 Legislative amendment is needed to provide clarity to Customs officers’ powers to interdict drug trafficking vessels outside the contiguous zone. The absence of specific legislative powers creates uncertainty as to how Customs and other

agencies can exercise the rights and obligations contained in UNCLOS and the Drug Trafficking Convention. The lack of clear powers in New Zealand's domestic law creates uncertainty, and renders enforcement actions and any subsequent prosecutions vulnerable to legal challenge.

- 44 Cabinet agreed in August 2017 to extend certain statutory powers of New Zealand Customs officers to board, search and take necessary enforcement action against vessels in international waters beyond the contiguous zone where there are reasonable grounds to suspect that a vessel is involved in an attempt to smuggle illicit drugs into, or out of, New Zealand.
- 45 I am seeking confirmation of this decision.
- 46 In addition, I further recommend that the Misuse of Drugs Act 1975 be amended to provide offence provisions in respect of people on board vessels in international waters (including in the contiguous zone) that are involved either directly or indirectly in the illicit cross-border importation and exportation of controlled drugs and precursor substances. I propose that the new offences are treated as analogous to existing "dealing" offences under the Misuse of Drugs Act, and I recommend that the same penalties apply.
- 47 The proposed changes will:
- 47.1 extend the framework for Customs' powers in the contiguous zone to international waters beyond this zone;
 - 47.2 establish clear jurisdiction under the Misuse of Drugs Act over offences committed at any point of international waters, including within the contiguous zone.
- 48 Implementation of this proposal will mean that Customs can take the initiative to act with the greatest effect both operationally and strategically by intervening earlier rather than having to wait until drugs are brought closer to New Zealand's shores. The option of using these powers will become part of the toolkit for responding to illicit drug smuggling in international waters including when a mothership operation is detected. This option will be assessed against other intervention options and will take into account the availability of NZDF assets, as well as health and safety considerations. These powers would only be exercised where it is determined to be the most effective tactical approach.
- 49 Customs has the legislative mandate to prevent smuggling by sea, but in practice, major drug operations are usually undertaken jointly with Police, and Defence assets are required to support maritime interventions. The new powers which would be inserted into the Customs and Excise Act would be able to be delegated to Police and Defence personnel. For the avoidance of doubt, it will be necessary in drafting legislation to make clear that the new powers do not limit the exercise of maritime powers in other contexts (e.g. terrorism responses).

This approach is consistent with international law and is limited to drug trafficking

- 50 A key consideration is ensuring consistency with New Zealand's international legal obligations. A domestic legislative framework that implements the relevant provisions of UNCLOS and the Drug Trafficking Convention will:

- 50.1 provide greater transparency about what actions are permitted, to inform operational planning, decision-making and activity;
- 50.2 provide a clear mandate where the support of other agencies is required; and
- 50.3 minimise the risk of successful challenge to the admissibility of evidence given in New Zealand courts.
- 51 The exercise of powers in international waters beyond the contiguous zone would be limited to the suppression of drug trafficking. Officials considered whether there is scope to extend the proposal to other prohibited or restricted goods. However, as the presenting risk is responding to drug smuggling, this has been prioritised.
- 52 Section 6(a) 

Threshold for exercising the powers

- 53 The threshold for exercising the proposed powers in a given case will be:
- 53.1 where the applicable international legal conditions have been satisfied (which may include obtaining prior flag state consent); and
- 53.2 there is **reasonable cause to suspect** that:
- i. a drug smuggling offence under the Misuse of Drugs Act 1975 (as amended) is being committed; and
 - ii. the vessel to be interdicted has been, is being, or intended to be involved in, or connected to, the facilitation of illicit drugs crossing New Zealand's border.

Enforcement and other powers to apply

- 54 Cabinet previously agreed that the powers that may be applied in international waters beyond the contiguous zone correspond with those that apply in New Zealand's contiguous zone.
- 55 These powers relate to boarding, searching, and detaining craft, questioning and searching persons, securing evidence and seizure of goods, and arrest of offenders, as set out in Part Four of the Customs and Excise Bill (with appropriate adaptations and modifications). These powers are consistent with the actions that may be taken under Article 17(4) of the Drug Trafficking Convention.
- 56 The circumstances of each situation (including any conditions imposed by a foreign flag state) will determine how powers are exercised.

Providing jurisdiction over vessels in international waters that are involved in illicit drug trafficking into and out of New Zealand

- 57 Under current legislation, an offence occurs when the drug is unlawfully imported or exported from New Zealand. Existing provisions relating to extraterritorial offences under section 12C do not provide clear jurisdiction in international waters. Therefore,

I recommend providing jurisdiction and offence provisions that will apply before importation and after exportation to the people onboard vessels in international waters that are involved directly or indirectly in these activities and who facilitate the smuggling of drugs across the border. This type of involvement in drugs smuggling should be treated in the same way as if it had happened within New Zealand. It should be analogous to comparable provisions under the Misuse of Drugs Act which relate to:

- 57.1 dealing and unlawful importation and exportation (for example sections 6 and 12AB); and
- 57.2 the supply of equipment and materials to be used in the production of controlled drugs (section 12A).
- 58 This change is needed to support a full enforcement regime in international waters so that law enforcement agencies can intervene at an earlier point in smuggling operations than is envisaged under current legislation.
- 59 This would mean that a person would commit an offence if:
- 59.1 they are on any vessel in international waters; and
- 59.2 they are in possession of a controlled drug, or are otherwise knowingly involved in the carrying or concealment of these items on this or any other vessel³; and
- 59.3 where it is intended that the drug is to be imported, or has been exported, to or from New Zealand.
- 60 An analogous approach also means that the same penalties should also apply. The offences related to each type of offence are set out in the table below.

Type of offence	Maximum penalty
Import or export of controlled drugs classified as: <ul style="list-style-type: none"> • Class A (eg methamphetamine) • Class B (eg hashish or MDMA (ecstasy)) • Any other controlled drugs (eg cannabis fruit, plant, and seed or coca leaf). 	Life in prison 14 years 8 years
Import or export of precursor substances (such as pseudoephedrine), with the intention to use these substances to produce or manufacture controlled drugs under section 6(1)(b) of the Misuse of Drugs Act.	7 years
Supply of equipment and materials to be used in the production of controlled drugs under section 6(1)(b) of the Misuse of Drugs Act.	7 years

- 61 Customs will work with relevant agencies to confirm the legislative design as part of drafting. The focus will be on making the least change necessary to the Misuse of Drugs Act to ensure the policy objectives can be achieved. It may be possible to implement this change solely by clarifying extraterritorial jurisdiction over existing offences, or by specifying that existing offences apply to drug smuggling in international waters. The creation of an entirely new offence will only be considered

³ This includes, for example, situations where the shipment of illicit drugs has been (or is yet to be) transferred to the vessel.

if the other options do not adequately address the identified legal risks and prosecutorial jurisdiction issues.

Application to all types of vessels

- 62 This framework should specify the authorisations required in relation to different types of vessels, in a manner consistent with the Drug Trafficking Convention. This will include, for example, meeting New Zealand's obligations under the Drug Trafficking Convention to seek the consent of the flag state and complying with any conditions imposed by the flag state in giving that consent.
- 63 Cabinet previously agreed that the legislation apply to New Zealand vessels, foreign vessels, and stateless vessels.

Evidence of other prohibited items or activities found during a search

- 64 There may be circumstances where evidence of other customs, immigration or biosecurity offending is identified during a search of a vessel. However, Customs will not have any powers to seize the goods or take any other enforcement actions unless there is a specific international legal basis for doing so (and, if applicable, the flag State has given separate authorisation).⁴
- 65 In managing this risk, Customs will share relevant intelligence, where possible, about potential offences with the relevant authorities. If the vessel continues to its destination, enforcement agencies will be able to take action once the vessel enters waters where the jurisdiction of the destination state can be exercised.
- 66 Customs works closely with international and domestic law enforcement partners to support enforcement actions at sea. One of the features of the new regime is the ability to delegate Customs officers' powers. This will enable personnel from other agencies, such as Police and NZDF, to be authorised to exercise these powers where a multi-agency response is necessary. The proposal which was previously agreed to is deliberately limited to drug trafficking, as opposed to other customs-related offending or other maritime threats such as people smuggling because the presenting risk is drug smuggling.

Legislative implications

- 67 I recommend a separate omnibus bill, the "Maritime Powers Extension Bill" to amend the Customs and Excise Act 2018 (once enacted) and the Misuse of Drugs Act 1975.
- 68 I have recommended that this Bill should be passed in 2018 (Category 2) – ideally at the same time as the new Customs and Excise Bill comes into force on 1 October 2018. This will ensure that Customs has these powers available at the start of the summer, when international movements of small craft are at their highest.

⁴ This would include, for example, people smuggling activities under the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organised Crime.

Consultation

69 The following departments have been consulted: Department of the Prime Minister and Cabinet (Policy Advisory Group and Security and Intelligence Group), Ministry of Business, Innovation and Employment (Immigration), Ministry of Defence and New Zealand Defence Force, Crown Law Office, Ministry of Foreign Affairs and Trade, Ministry of Justice, Ministry of Health, Ministry for Primary Industries, Ministry of Transport, and the New Zealand Police.

Implications

70 This proposal has no implications in the following areas:

Financial Implications	Not Applicable
Gender Implications	Not Applicable
Disability Implications	Not Applicable

Human rights and Bill of Rights implications

71 Aspects of this proposal do raise issues that are potentially inconsistent with the Bill of Rights Act. This includes:

71.1 s21 – freedom to be secure against unreasonable search and seizure

71.2 s22 – right to be free from arbitrary arrest and detention.

72 I consider that the proposed powers are not unreasonable. Any impacts on human rights will be mitigated by:

72.1 establishing a clear threshold of “reasonable cause to suspect” before any actions are taken

72.2 limiting the scope to drug smuggling offences that have a nexus with New Zealand

72.3 consistency with international law, including the requirement to seek the consent of the flag state.

73 A final view as to whether the proposed amendments are consistent with the New Zealand Bill of Rights Act will be possible once the legislation has been drafted. Officials from the Ministry of Justice and Customs will work together to ensure that any issues are identified and managed appropriately.

Regulatory Impact Analysis

74 A regulatory impact statement (RIS) has been prepared and is attached.

75 The Customs’ Regulatory Impact Statement Panel has reviewed the RIS and considers that the information and analysis summarised in the RIS meets the quality assurance criteria.

Publicity

- 76 This paper and the accompanying Regulatory Impact Statement will be published at the time that the Bill is introduced to the House. Some material may be withheld in accordance with the provisions of the Official Information Act 1982.

Recommendations

- 77 The Minister of Customs recommends that the Committee:

- 1 **note** that the absence of a specific legislative framework limits Customs' ability to respond to identified drug smuggling activities in international waters beyond the contiguous zone
- 2 **agree** to confirm Cabinet's decisions on 21 August 2017:
 - 2.1 to give Customs the statutory power to board, search and, if evidence of offending is found, take necessary enforcement actions in respect of vessels in international waters beyond the contiguous zone in line with those powers that apply within New Zealand's contiguous zone;
 - 2.2 that the threshold for exercising the proposed powers in a given case contain the following elements (and subject to drafting by Parliamentary Counsel):
 - a. the applicable international legal conditions have been satisfied (which may include obtaining prior flag state consent); and
 - b. there is reasonable cause to suspect that:
 - i. an offence has been, is being or will be committed under sections 6, 12A or 12AB of the Misuse of Drugs Act 1975 [or otherwise as amended], and that the vessel to be interdicted has been, is being or will be used to facilitate (assist in the commission of) that offence (or an attempt or conspiracy to commit such an offence); and
 - ii. the vessel to be interdicted has been, is being, or intended to be involved in, or connected to, the facilitation of illicit drugs crossing New Zealand's border;
 - 2.3 that Customs' powers in international waters beyond the contiguous zone apply to New Zealand flagged vessels, foreign vessels, and stateless vessels;
 - 2.4 that the scope of Customs' powers in international waters beyond the contiguous zone be limited to what is consistent with New Zealand's international legal obligations under the UN Convention on the Law of the Sea and the United Nations Convention on the Suppression of Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988;
- 3 **agree** to amend the Customs and Excise Act 2018 (when enacted) to give effect to these decisions under recommendation 2;

- 4 **agree** to amend the Misuse of Drugs Act 1975 to provide jurisdiction and offences for smuggling controlled drugs, precursors or equipment and material in international waters (including the contiguous zone) which will apply to situations where:
 - 4.1 an individual is on any vessel in international waters; and
 - 4.2 they are in possession of a controlled drug, precursor substance or other equipment, material and substances used in the production of drugs, or are otherwise knowingly involved in the carrying or concealment of the drug on this or any other vessel; and
 - 4.3 it is intended that the drug is to be imported into, or has been exported from, New Zealand;
- 5 **agree** that offending in international waters should be treated as analogous to the relevant offences under section 6, 12A and 12AB of the Misuse of Drugs Act and that the same penalties should apply;
- 6 **note** that where evidence of other customs, immigration or biosecurity offending is identified when exercising powers in international waters beyond the contiguous zone, Customs will not have the power to take any enforcement action, unless authorised separately;
- 7 **agree** that the Parliamentary Counsel Office be issued drafting instructions to implement the proposals set out in these recommendations;
- 8 **invite** the Minister of Customs to report back to the Cabinet Legislation Committee with a draft Bill to seek approval to introduce to the House.

Authorised for lodgement

Hon Meka Whaitiri
Minister of Customs