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Chair
Justice and Electoral Committee
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Customs and Excise (Joint Border Management Information Sharing and Other Matters) Amendment Bill

Introduction

1 This submission is made by the Legislation Advisory Committee (LAC).

2 The LAC was established to provide advice to the Government on good legislative practice, legislative proposals, and public law issues. The LAC has produced and updates the Legislation Advisory Committee Guidelines: Guidelines on the Process and Content of Legislation (LAC Guidelines) as appropriate benchmarks for legislation. The LAC Guidelines have been adopted by Cabinet.

3 The terms of reference of the LAC include:

(a) to scrutinise and make submissions to the appropriate body on aspects of Bills introduced into Parliament that affect public law or raise public law issues:

(b) to help improve the quality of law-making by attempting to ensure that legislation gives clear effect to government policy, ensuring that legislative proposals conform with the LAC Guidelines, and discouraging the promotion of unnecessary legislation.

4 The Bill had its First Reading on 15 September 2010. The closing date for submissions was 8 October 2010, a little over 3 weeks later. Although the LAC meets at regular intervals, the very short timeframe did not allow the LAC to

consider the Bill before submissions closed. The LAC did, however, consider the Bill at its meeting on 15 October 2010. It has a number of concerns about the Bill which it wishes to place before the committee. These concerns relate to administrative penalties, petty offences, and the provisions for information sharing.

Administrative penalties

5 Clause 13 replaces section 128 of the Act with new sections that update the existing administrative penalty framework by increasing minimum and maximum penalties and providing for penalties to be linked to the nature of the compliance failure. The minimum is increased from $50 to $200 and the maximum from $10,000 to $50,000.

6 The new provisions do not carry forward the right that a person on whom a penalty is imposed to state why they should be exempt from the penalty before it is imposed. Under the Bill, the issue of a penalty notice triggers the obligation to pay and even though a person can request a review of the chief executive's decision, they must pay first and only get a refund if the review is successful.

7 The LAC considers that the ability to put forward reasons why a penalty should not be imposed is an important safeguard against the imposition of a potentially significant amount by way of penalty unilaterally and without consideration of factors that may be directly relevant both to amount and to whether a penalty should be imposed at all. At present under section 130 a person has the opportunity to satisfy the chief executive that, among other things, he or she formed a view on the facts relevant to the entry which, while incorrect, was reasonable on the information available or that he or she acted in good faith on the basis of information supplied by someone else on which it was reasonable to rely. These are matters within the knowledge of the person who made the entry. It should not be necessary for the person to have to go through the process of review and appeal to establish facts that would entitle the person to a refund. The same considerations apply to the other factors listed in section 130 that, if established, result in a refund.

8 The amount of a penalty varies depending on whether the error or omission occurred because the person "did not take reasonable care" (up to 20% of the unpaid duty or excess drawback) or was "grossly careless" (up to 40% of the unpaid duty or excess drawback) or the error or omission was made "knowingly" (up to 100% of the unpaid duty or excess drawback). Consideration by the chief executive of whether to impose a penalty and, if so, what category of penalty applies, are matters that should be informed by information the person can put in front of the chief executive and which the chief executive should consider.

9 Although these are only administrative penalties and a person who pays is not liable to prosecution, the amounts of the penalties can be very substantial. It is not satisfactory from a public law perspective to say that because there is no conviction involved we will not give you the right to say anything. The notion

of "pay now, argue later" is fundamentally incompatible with principles of natural justice.

Petty offences

10 Clause 23 amends section 223 of the Act relating to petty offences. Section 223 currently allows the chief executive to accept a payment not exceeding $500 instead of prosecution for an offence relating to goods where the value of the goods is less than $1000 or the amount of duty payable is less than $1000 or instead of prosecution for certain minor offences where the maximum penalty is a fine not exceeding $1000.

11 The Bill extends the regime to all non-imprisonable offences under the Act where the chief executive is satisfied the offending is minor. The amendments appear to lift the maximum amount from the current $500 to up to one-third of the maximum applicable fines, that is, $5,000 for individuals and $25,000 for companies. The Regulatory Impact Statement says that front line staff will deal with these offences.

12 The LAC is concerned that there are no processes in the existing provisions or the amendments to guide assessment by Customs staff as to what is an appropriate penalty. The legislation contains no safeguards around the exercise of the discretion although large sums of money and more serious offences may be involved.

13 The new regime does not appear to balance the expedient objective of dealing with offences at low cost against the principle that a publicly accountable criminal justice system should be responsible for imposing substantial sanctions. Perversely, while the offending has to be minor the penalties can be substantial.

14 The regime has similarities with infringement offences. However, under most infringement offence regimes the amount of the fee is prescribed by regulation and specified in the infringement notice so that the offender knows in advance what he or she is up for. In the case of the petty offence regime under the Bill, the amount of the penalty will be determined by a Customs staff member in each individual case. It could well become a matter of negotiation between the staff member and the offender. The Ministry of Justice guidelines regarding infringement offences make it clear that legislation is required to enable detailed provisions regarding the offences, fees, and forms to be established in regulations (see Ministry of Justice Guidelines for New Infringement Schemes (July 2009)). There do not appear to be comparable safeguards under the Bill in this regard. The regime has many of the features of an infringement offence scheme without some of the key safeguards.

15 The section does not appear to give any right of appeal against the decision of Customs staff on the amount to be paid. While this accords with a process entered into voluntarily, it would be preferable for there to be a statutory requirement for operational guidelines regarding both the decision to seek monetary penalties as well as the penalties themselves.

Information sharing

16 Clause 24, new section 282B, provides for the exchange between agencies of information, including information about individuals. New section 282B(2) provides that "an accessing agency may, for the purpose of this section, access any border information held by a holder agency if the access is authorised by regulations made under this Act". "Border information" is defined in new section 282B(3) to include, without any obvious limitation, information about "goods, persons or craft".

17 The regulation-making power is contained in new section 286A, subsection (1) of which provides that these regulations can specify any agency or class of agencies as an "accessing agency" or a "holder agency", and can specify "*any information or any class of information held by a holder agency* as border information available to an accessing agency".

18 The LAC is concerned at the breadth of this power, and the lack of precise definition of it. As a general rule the limits of a delegation should be clearly defined. Here the lack of tight definition could effectively lead to the creation of a large bank of information about individuals to which a large number of agencies could have access. The risks would be considerable. Those risks are not confined to the possible spread of inaccurate information about people, or to confusion between individuals of the same or similar names, real though those issues are.

19 The main risk is a lessening of the trust of citizens in government when they perceive that information they supplied to one agency for a particular purpose is accessible by other agencies. Allegations of "surveillance society" and "police state" can all too easily arise. Citizens will then be less ready to supply information to government for other purposes.

20 The fundamental principles of the Privacy Act 1993 are at stake too.

21 The need to protect our borders against terrorist and criminal activity and biosecurity hazards goes without saying, but the projected regulation-making power goes well beyond this. It would be hard to conceive of a wider power to collect and share information about people.

22 LAC submits that, at the very least, types of information to which the regulation-making power applies should be narrowed to information necessary for a "border protection purpose" as that term is defined in new section 282D, that is to say information which has a biosecurity-related purpose or a customs-related purpose.

23 LAC submits also that the range of agencies which may have access to the information should likewise be clearly narrowed to those which have border-related functions. Perhaps new section 282B(1), which states the purpose of section 282B, was intended to perform such a narrowing function, but it is submitted that it does not do so sufficiently clearly.

Sir Geoffrey Palmer SC
Chair
Legislation Advisory Committee