



BRIEFING

Debt Recovery at the Border

Date:	14 May 2021	Priority:	Medium
Security classification:		Tracking number:	2021-3205

Action sought		
	Action sought	Deadline
Hon Chris Hipkins Minister for COVID-19 Response	Agree not to pursue further work on stopping people at the border for unpaid MIQ fees	21 May 2021
	Agree that this briefing is proactively released with any appropriate withholdings under the Official Information Act 1982	

Contact for telephone discussion (if required)				
Name	Position	Telephone	1st contact	
Kara Isaac	General Manager, MIQ Policy	Privacy of natural persons		✓
Privacy of natural persons	Policy Manager, System and Strategy, MIQ			
	Principal Policy Advisor			

The following departments/agencies have been consulted
Inland Revenue, New Zealand Customs Service, the Ministry of Justice, the Ministry of Social Development, New Zealand Police.

Minister's office to complete:

- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



BRIEFING

Debt Recovery at the Border

Date:	14 May 2021	Priority:	Medium
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Purpose

To provide you with further advice about the proposal to intercept people with unpaid Managed Isolation and Quarantine (MIQ) fees at the border.

Executive summary

On 1 April 2021, we provided you with information on Managed Isolation and Quarantine (MIQ) fees collection and debt recovery. We advised that there is currently no legal basis to apprehend people at the border with unpaid fees, and that it is not an offence to not pay an MIQ fee. There would need to be consideration of New Zealand Bill of Rights Act implications of stopping people at the border, especially if detaining people is perceived to be disproportionate the level of outstanding debt. You indicated that you wished to receive further advice on the legislative and operational requirements for detaining people with unpaid MIQ fees at the border.

The Customs and Excise Act 2018 provides a general power for Customs to detain people arriving in and departing from New Zealand. To detain someone for law enforcement purposes a Customs officer must have reasonable grounds to believe that the person has either:

- a. broken New Zealand law and is liable under warrant for arrest; or
- b. is leaving New Zealand in contravention of an order of a court; or
- c. is liable to be prosecuted for an offence punishable by imprisonment..

To use Customs' powers would require that an offence for attempting to leave the country with unpaid MIQ fees is created in primary legislation that carries a penalty of imprisonment. The main considerations in establishing such an offence include:

- Whether you are comfortable that an offence punishable by imprisonment is a proportionate response to trying to leave the country with unpaid debts generally worth \$3,100.
- The likelihood of enforcement will determine the effectiveness of the offence as a deterrent. There are however a range of factors that reduce the likelihood of enforcement. In particular: the costs of tracking and prosecuting the case and the high likelihood that the offence would not be deemed insufficiently serious, relative to other offences, for INTERPOL to load a border intercept alert for these offences.
- Whether the offence is consistent with existing practices. No precedent exists for stopping people at the border for debts of a similar size. Where people are currently stopped at the border for student loans or liable parent contributions the level of debt is much higher. There has also been extensive efforts made to recover the debts. Other debts of a more similar size, such as those owed to District Health Boards rely on civil debt recovery mechanisms.
- The Ministry of Justice advises that the use of criminal sanctions is disproportionate to the non-payment of MIQ fees.
- Whether stopping people for unpaid MIQ fees is a justifiable limit on freedom of movement in the New Zealand Bill of Rights Act 1990. It is MBIE's view that currently it would be difficult to

justify these limitations because there is no clear evidence that stopping people would recover significant debt that would otherwise not be possible to recover. Nor have other possible solutions or actions been exhausted, including use of debt collection agencies or other options that do not require an offence.

If you wish to pursue further policy work on stopping people at the border, we will provide you with a briefing outlining the next steps for this work. We consider that this work could potentially be included as part of the ongoing MIQ fees review. Because the costs of creating an offence provision and potential impacts on human rights are likely to outweigh any potential revenue recovered, we recommend that you do not pursue further policy work on stopping people at the border.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

- a **Note** that to stop people at the border would require that an offence is created in primary legislation, that carries a penalty of imprisonment.

Noted

- b **Note** MBIE considers it unlikely that an offence for attempting to leave New Zealand with unpaid MIQ fees would be considered a justifiable limitation on rights enshrined in the New Zealand Bill of Rights Act 1990.

Noted

- c **Note** that an offence punishable by imprisonment is likely to be considered neither proportionate to nor consistent with other penalties for debt of a similar size.

Noted

- d **Note** that MBIE considers that the cost of stopping people at the border for unpaid MIQ fees is likely to be higher than the amount recovered.

Noted

- e **Note** that MBIE continues to progress work on fees collection and debt recovery.

Noted

EITHER

- f **Agree** that MBIE pursue work on creating an offence for not paying an MIQ debt.

Agree / Disagree

OR

- g **Agree** that MBIE does not pursue any further work to create an offence for not paying and MIQ debt (recommended).

Agree / Disagree

h **Agree** that this briefing is proactively released with any appropriate withholdings under the Official Information Act 1982.

Agree / Disagree



Kara Isaac
General Manager, MIQ Policy
MIQ, MBIE

13.5.21.

Hon Chris Hipkins
Minister for COVID-19 Response

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Background

1. On 1 April 2021, we provided you with information on Managed Isolation and Quarantine (MIQ) fees collection and debt recovery [2021-2242 refers]. In that briefing we advised that we had not been able to issue invoices for about 23 percent of rooms because we had inadequate information to confirm the liability of fees. As at 21 March 2021, invoices totalling \$3.9 million (or 8 percent) were overdue. We informed you that we would begin the process to pursue MIQ debt.
2. We also advised that there is currently no legal basis to apprehend people at the border with unpaid fees, and that it is not an offence to not pay an MIQ fee. There would need to be consideration of New Zealand Bill of Rights Act implications of stopping people at the border for offences related to unpaid MIQ fees, especially if detaining people is perceived to be disproportionate the level of outstanding debt. You indicated that you wished to receive further advice on the legislative and operational requirements for detaining people with unpaid MIQ fees at the border.
3. As of 30 April 2021, \$5.6 million of MIQ fees were overdue, which was 24 per cent of all invoices that were at least 90 days old. Of this, \$900,000 (291 invoices) was more than 90 days overdue – that is 4 per cent of fees remain unpaid 90 days after their due date. The average value of these invoices is \$3,125 with the vast majority being for \$3,100.
4. The Ministry of Business, Innovation and Employment (MBIE) has completed quality assurance on these invoices that are more than 90 days overdue and is planning to begin referring these invoices to a debt collection agency by the end of May.
5. MBIE is currently part way through a project to improve the collection of fees [briefing 2021-3261 refers]. The aims of this project are to automate to the maximum extent possible the invoicing process, and to address the time to issue invoices. We will provide you with updates in the weekly report.

Current powers to stop people at the border

Customs has powers to stop people at the border if they have committed an offence

6. Section 208 of the Customs and Excise Act 2018 provides powers for Customs to detain people arriving in and departing from New Zealand. To detain someone for law enforcement purposes¹, a Customs officer must have reasonable grounds to believe that the person has either:
 - a. broken New Zealand law and is liable under warrant for arrest; or
 - b. is leaving New Zealand in contravention of an order of a court; or
 - c. is liable to be prosecuted for an offence punishable by imprisonment.
7. Customs relies on various alert processes to intercept people at the border. These processes are discussed in more detail in **Annex One**.

¹ Section 208 1(b), of the Customs and Excise Act 2018 is reproduced in annex one

Non-payment of MIQ fees is not currently an offence

8. For Customs to use their powers the person to be detained must be liable for arrest under warrant or be liable for an offence punishable by imprisonment. Creating an offence would require amending the COVID-19 Public Health Response Act 2020 (the Act).
9. A range of factors would need to be considered before an offence is created. These include:
 - a. whether the proposed penalty is proportional to that for other similar offences;
 - b. whether the offence is likely to be enforced;
 - c. whether the offence is consistent with existing practices;
 - d. any implications that creating an offence would have on human rights; and
 - e. whether all alternative mechanisms for recovering debt had been implemented.
10. By creating an offence for failing to pay MIQ fees, and therefore creating a mechanism by which a warrant for arrest can be issued, the government would be signalling that non-payment of a \$3,100 or \$5,520 debt is criminal and requires significant punishment (including a criminal conviction).
11. The Ministry of Justice advises that the use of criminal sanctions could be viewed as disproportionate to the non-payment of MIQ fees. Given that the average debt for MIQ costs that is unpaid at 180 days is \$3,250, there are strong arguments against this action carrying a term of imprisonment.
12. Furthermore there is a real likelihood that a criminal offence along with a conviction, and a further financial sanction may be disproportionately applied to those that are already facing financial hardship.

An offence provision would only be effective if implemented

13. For an offence to be a deterrent there needs to be a high chance of “being caught”. Therefore, it is important that if an offence of this nature is created that it is consistently enforced. There are however a range of factors that reduce the likelihood of enforcement. Most importantly:
 - a. the cost for MBIE of pursuing a case through the courts, to obtain the court order preventing travel;
 - b. the operational overhead of finding and tracking people to know when they are likely to leave the country; and
 - c. the high likelihood that the offence would not be deemed insufficiently serious, relative to other offences, for INTERPOL to load a border intercept alert for these offences.
14. The Ministry of Justice advises that creating offences that are not enforced can undermine the purpose of the law.
15. Stopping people at the border may motivate returnees to pay overdue MIQ fees, but these benefits must be weighed against the costs of creating and enforcing an offence
16. For returnees that refuse to pay on principle, enforcement measures and consequences for refusing to pay may be necessary. Evidence from other similar situations suggests that the expectation that they will be stopped at the border incentivises people to pay debts that they might otherwise default on.

17. For example, Inland Revenue has processes in place to stop people at the border for overdue student loan and liable parent contribution payments and the Ministry of Justice is able to stop people at the border for unpaid court fines. Both Inland Revenue and the Ministry of Justice advise that media coverage of people being arrested at the border can have a substantial impact on customer behaviour. Such arrests result in a spike of phone calls from customers questioning whether they are likely to be stopped. However, neither organisation estimate the benefit of this incentive in terms of revenue recovered.
18. Inland Revenue processes are described in **annex two** and Ministry of Justice processes are described in **annex three**.

Stopping people at the border is not likely to be cost effective

19. Considering the cost and process required to respond to like offences the cost of stopping people at the border is likely to exceed the amount recovered – including repeated notices, applications for a warrant where there is evidence of intention to leave, issuing of a warrant and enforcement actions.
20. As noted above, the average amount owed for MIQ invoices that are more than 90 days overdue is \$3,125 compared to the usual minimum debt of \$5000 pursued by Credit Consultants. This may suggest that more extreme actions, such as creating an offence and potentially stopping people at the border for this level of debt would be out of step with the usual level of intervention for debts of this magnitude.

Bill of Rights considerations

21. Section 18(3) of the New Zealand Bill of Rights Act provides that everyone has the right to leave New Zealand. Preventing a person from leaving New Zealand would be a limitation of this right. Any limitation on this right must be demonstrably justifiable.
22. To be a justifiable limitation would require that:
 - a. there is a clear link between recovering debt and stopping people at the border
 - b. the action is the least freedom limiting needed, meaning that there are no other solutions and all other avenues have been exhausted
 - c. the proposal is proportionate to the objective of recovery of debt to the Crown.
23. MBIE currently has no evidence to support any contention that unpaid overdue MIQ fees debt owed by people leaving the country is a major issue and that stopping people would recover debt that would otherwise not be possible to recover. People may still pay their fees from overseas so we cannot conclude that leaving the country with unpaid debts is an issue.
24. This contrasts with unpaid student loan obligations, or liable parent contributions, where Inland Revenue must demonstrate that they have not been able to recover the debt from the person overseas in order to obtain a court order preventing the person leaving the country until they have made arrangements for payment. In both these situations the warrant for arrest is for the offence of attempting to leave the country in contravention of a court order not to do so until arrangements have been made to pay the debt.
25. The low level of average MIQ debt means it is unlikely that this restriction could be considered proportionate in the case of MIQ fees.

Stopping people at the border would not be consistent with the way other debts of a similar size are managed

26. We understand that there are no other precedents for stopping people at the border for debts of a similar size. Inland Revenue advises that stopping people leaving New Zealand is a last resort enforcement measure. It also notes that the average overdue amount is typically higher than the average unpaid MIQ costs.² Ministry of Justice is only able to intercept people who owe court fines of more than \$5,000. These amounts are substantially higher than MBIE's average unpaid MIQ invoice (\$3,100).
27. With regard to debt collection practices for other Crown debts of a similar magnitude. District Health Boards are also engaged in debt collection activities for debts of a few thousand dollars owed by non-residents for treatment in public hospitals. They rely on civil debt collection practices and use debt collection agencies for debt collection. A sizeable proportion of debt is written off.

Operational implications of stopping people at the border

28. Maintenance of the law
29. Maintenance of the law

Other mechanisms to pursue unpaid MIQ debt

MBIE's fees collection and debt recovery processes are still in development and other options for debt recovery may be possible

30. Debt recovery is the final step in the process for fees collection. MBIE is currently implementing improvements to its fees collection processes and is planning to begin to referring outstanding debt to collection agencies by the end of May.
31. We expect that the amount of fees collected will increase as implementation progresses.
32. We anticipate that debt collection will be effective in recovering unpaid MIQ debt. MBIE also expects that the fact that debt that has been referred to a collection agency will have an adverse effect on the individual's credit rating will incentivise returnees to pay their MIQ fees. We do not consider that other measures to recover unpaid debt are necessary at this time.

Pursuing unpaid debt through the courts remains an option

33. Section 321 of the Act provides that MBIE may pursue debts to the Crown through the courts. However, the cost of pursuing debt through the courts is substantial and pursuing debt in this

² The average overdue amount for overseas-based student loan holders is around \$19,000.

way would cost more money than it would recover in most cases. It is still however an option that may be pursued for larger debts.

Other agencies have mechanisms to recover debt that do not require creating an offence

34. The Act does not provide for alternative mechanisms to recover MIQ debt without using the court processes. However for some Government agencies, alternative methods for recovering fees, debts and overpayments are provided in the agencies' primary legislation.
35. For example, regulations made under section 444 of the Social Security Act 2018 allow the Ministry of Social Development (MSD) to issue a debtor's payer with a written deduction notice that requires the debtor's payer to deduct the amount due to MSD from the debtor's pay. MSD must take all other reasonably practicable steps to recover this debt before issuing a deduction notice, but is not required to go through the District Court.
36. MSD advise that they currently pursue debt through this process for debts in excess of \$500. Before MSD deduct money from a person's wages, they will attempt to contact them three to four times (via phone, email, reminder letter and final warning letter) allowing them time to make a repayment arrangement. If no repayment is forthcoming, and they have not contacted MSD about their ability to repay, MSD will then consider a deduction from wages.
37. Given the costs involved with setting up such a system, we do not recommend implementing a similar process. This is something MBIE could consider in the future if both debt collection and pursuing debt through the courts proved ineffective.

Recommendations

38. If you wish to pursue further work on stopping people at the border we will provide you with a further advice outlining next steps, including potential legislative vehicles for amending the Act and advice on the nature of the offence, and the penalty it could carry.
39. However we do not recommend that you create an offence in order to stop people at the border for unpaid MIQ fees. It is unlikely that such an offence would be considered a justifiable limitation of rights under the New Zealand Bill of Rights Act. Creating a criminal offence carrying a penalty of imprisonment is likely to be considered neither proportionate to nor consistent with other penalties for debt of a similar size.
40. It is MBIE's view that currently it would also be difficult to justify limitations of rights because there is no clear evidence that stopping people would recover debt that it would not otherwise be possible to recover. Nor have other possible solutions or actions been exhausted, including use of debt collection agencies or other options that do not require an offence.

Annexes

Annex One: Customs' border alert processes

Annex Two: Inland Revenue's processes for stopping people with overdue student loan repayments and liable parent arrears

Annex three: Ministry of Justice's process for stopping people with overdue court fines

Annex One: Customs processes for detaining people at the border

The Customs and Excise Act 2018 provides information-sharing provisions with specified Government agencies

41. Sections 306-310 of the Customs and Excise Act 2018 allow for information matching with IR) for the purposes of the Student Loan Scheme 2011 (Section 306) and the Child Support Act (Section 307), with the Ministry of Social Development (MSD) for benefit and debt recovery (308-309) and with the Ministry of Justice for recovering unpaid court fines (310). These information matching provisions allow for “silent” (or monitor only) border alerts to be generated.

42. Maintenance of the law

43.

44.

The Customs and Excise Act provides powers to detain people at the border

45. Section 208 of the Customs and Excise Act 2018 specifies the cases where Customs can stop people for public health and infringement offences: The relevant Section is reproduced here

S 208 Cases requiring investigation for public health or law enforcement purposes

(1) This section applies to a person in a designated place if—

(a) the person—

- (i) has arrived in New Zealand; or
- (ii) is departing from New Zealand; and

(b) a Customs officer has reasonable cause to suspect that the person—

- (i) is liable to be detained under any enactment because of an infectious disease; or
- (ii) is liable to arrest under warrant; or
- (iii) is, in attempting to depart from New Zealand or in attempting to remove any other person from New Zealand, contravening, or about to contravene, any enactment or an order of a court; or
- (iv) is liable to be prosecuted for an offence punishable by imprisonment; or
- (v) has contravened any of the following enactments:

(A) the [Biosecurity Act 1993](#);

(B) the [Human Assisted Reproductive Technology Act 2004](#);

(C) the [Misuse of Drugs Act 1975](#);

(D) the [Passports Act 1992](#);

(E) the [Terrorism Suppression Act 2002](#);

(F) the [Trade in Endangered Species Act 1989](#):

(G) regulations under the [United Nations Act 1946](#); or

(vi) is endangering, or threatening to endanger, the life, health, or safety of a person or group of persons.

- (2) The Customs officer may direct the person to remain in the designated place for the purpose of obtaining the attendance of, or making inquiries of, a constable, a bailiff, or an employee or agent of a department of State who is authorised, in respect of a matter specified in subsection (1)(b), to do any of the following:
 - (a) question the person:
 - (b) ascertain or determine the status of the person:
 - (c) detain the person:
 - (d) arrest the person.
- (3) A person to whom this section applies must comply with a direction of a Customs officer given under this section.
- (4) A direction under this section ceases to have effect 4 hours after it is given.

Annex Two: Inland Revenue processes

Inland Revenue's process for recovering outstanding overseas student loan repayment obligations

46. Inland Revenue tries to contact overseas based customers who are behind on their student loan repayments before the Commissioner issues a final demand for payment.
47. If a customer with a final demand notice arrives in New Zealand, Inland Revenue will try to contact the person to arrange payment or set up a repayment arrangement. If neither contact can be made nor a satisfactory repayment arrangement reached, the Commissioner may apply to the District Court for a warrant for the arrest of the person under section 162B of the Student Loan Scheme Act 2011 (SLS Act).
48. Section 162A of the SLS Act makes it an offence for overseas-based borrowers not to make reasonable efforts to pay, or enter into arrangements to pay, overdue loan repayments by the date notified by the Commissioner. Under this provision, the failure to repay must be done so knowingly.
49. Section 162B of the SLS Act allows for the arrest of liable persons who have an offence under section 162A if they are about to leave or attempt to leave New Zealand. The aim of this process is to encourage the liable person to take reasonable steps to pay, or enter arrangements to pay, the overdue student loan repayments.
50. Applying to have people stopped at the border prior to them leaving New Zealand is a last resort enforcement measure. Inland Revenue makes numerous attempts to contact the borrower, issues a final demand for repayment arrears and considers a number of other factors (like the person's ability to pay) before asking for a warrant for the arrest of a person.

Inland Revenue's process for recovering outstanding liable parent arrears

51. Section 189 of the Child Support Act 1991 allows for orders to be made for enforcement of child support arrears. Section 280K of the Act allows for the exchange of information Customs and IR. The Commissioner of Inland Revenue may supply identifying information about liable parents who owe child support debt to Customs.
52. Inland Revenue has information match systems with both Customs and the Department of Internal Affairs, which resulted in 1,996 contact records matched in 2017-18 and 913 successful contacts. It is able to reduce or write off penalties for parents who work with Inland Revenue to make payments.
53. Inland Revenue follows a similar process to that outlined above and attempts to contact liable parents numerous times by email and phone. Inland Revenue notes that this contact is often sufficient to motivate a parent to make an arrangement to repay child support debt.
54. Receiving parents will often provide evidence to Inland Revenue that a liable parent is about to leave New Zealand. Inland Revenue is then able to get flight numbers from airlines and is then able to apply for a warrant for arrest through the family court.

Annex Three: Ministry of Justice's processes for recovering unpaid court fines

Ministry of Justice's process for recovering unpaid court fines

55. Section 310 of the Customs and Excise Act 2018 applies to fines defined under section 79 of the Summary Proceedings Act 1957, section 19 of the Crimes Act 1961 and section 43 or 45 of the Misuse of Drugs Act 1978. Ministry of Justice is able to issue warrants to arrest people who are in serious default of their fine repayment obligations. Ministry of Justice defines "serious default" owing more than \$5,000 in unpaid fines or owing any amount of reparation, where a warrant to arrest the person in default has been issued.
56. Each day, Ministry of Justice sends Customs details of serious fine defaulters to create intercept alerts in the Customs system. Intercept alerts result in the traveller being detained at the airport and Police are then called to attend to take further action (such as arranging payment of the fines or making an arrest).