Proactive Release

Date: 14 November 2019

The following Cabinet paper and related Cabinet minute have been proactively released by the Minister of Foreign Affairs:

Asia-Pacific Economic Cooperation (APEC 2021) Bill: Approval for Introduction

Some parts of this information release would not be appropriate to release and, if requested, would be withheld under the Official Information Act 1982 (the Act). Where this is the case, the relevant sections of the Act that would apply have been identified. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Key to redaction codes:

- 9(2)(g)(i): to protect the free and frank expression of opinions by departments; and

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Cabinet

Minute of Decision

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Asia-Pacific Economic Cooperation (APEC 2021) Bill: Approval for Introduction

Portfolio Foreign Affairs

On 11 November 2019, following reference from the Cabinet Legislation Committee (LEG), Cabinet:

1 s9(2)(f)(iv)

2 noted that the Asia-Pacific Economic Cooperation (APEC 2021) Bill ensures the necessary legal powers to effectively provide security for the Asia-Pacific Economic Cooperation forum (APEC) events;

3 noted that the powers proposed in the Asia-Pacific Economic Cooperation (APEC 2021) Bill are temporary and will expire at the conclusion of the last event linked to the hosting of APEC in 2021;

4 noted that on 4 March 2019, Cabinet agreed to amend the Defence Act 1990 to enable the New Zealand Defence Force to provide specialist support to the APEC 2021 security operation, with the constabulary powers necessary to undertake any functions and training required [CAB-19-MIN-0048];

5 approved enabling the decision referred to in paragraph 4 through the Asia-Pacific Economic Cooperation (APEC 2021) Bill, rather than amending the Defence Act 1990;

6 noted that on 4 March 2019, Cabinet agreed to amend the Arms Act 1983 to enable carriage of weapons by foreign protection officers, subject to approval by the Commissioner of Police and subject to conditions the Commissioner may impose [CAB-19-MIN-0048];

7 approved enabling the decision referred to in paragraph 6 through the Asia-Pacific Economic Cooperation (APEC 2021) Bill, rather than amending the Arms Act 1983;

8 noted that on 4 March 2019, Cabinet agreed to create the following powers for both the New Zealand Police and New Zealand Defence Force for the purpose of restricted air space management:

8.1 the ability to deploy preventative measures to secure APEC 2021 venues, accommodation and transport; and

8.2 the ability to either seize, destroy or bring under control unmanned aerial vehicles posing a threat to the security or safety of APEC 2021, through mechanical, cyber or other electronic means;

[CAB-19-MIN-0048]
approved the limitation of the powers referred to in paragraph 8 to the New Zealand Police only;

noted that on 4 March 2019, Cabinet agreed, for the purpose of restricted air space management, to create a power for New Zealand Police, New Zealand Defence Force and Aviation Security Service to prevent an aircraft taking off if it were believed that the craft was to be used to disrupt an APEC 2021 event [CAB-19-MIN-0048];

approved the limitation of the powers referred to in paragraph 10 to the New Zealand Police only;

noted that on 4 March 2019, Cabinet agreed to enable the New Zealand Police to create maritime safety and security areas to manage the water areas surrounding hotels or other locations, and maritime transit corridors, located on or adjacent to Auckland harbour [CAB-19-MIN-0048];

approved enabling the New Zealand Police to create maritime safety and security areas to manage the water areas surrounding hotels or other locations, and maritime transit corridors as and where required for APEC security and the safety of attendees and the general public;

noted that APEC security staff will not be subject to full accountability mechanisms that apply to the New Zealand Police as previously indicated as they will not be subject to the Independent Police Conduct Authority;

noted that APEC security staff will still be accountable under the New Zealand Police code of conduct, their own employment agreement disciplinary arrangements and, if necessary, appropriate criminal sanction;

approved the Asia-Pacific Economic Cooperation (APEC 2021) Bill [PCO 21839/4.9] for introduction, subject to the approval of the government caucuses and sufficient support in the House;

agreed that the Asia-Pacific Economic Cooperation (APEC 2021) Bill be introduced as soon as practicable;

agreed that the government propose that the Asia-Pacific Economic Cooperation (APEC 2021) Bill be:

18.1 referred to the Foreign Affairs, Defence and Trade Committee for consideration, to be reported back to the House by 1 April 2020;

18.2 enacted by the end of June 2020, to come into force on 1 July 2020;

noted that the Minister of Foreign Affairs will issue a press release once the Asia-Pacific Economic Cooperation (APEC 2021) Bill has been introduced.

Michael Webster
Secretary of the Cabinet

**Hard-copy distribution:**
Prime Minister
Deputy Prime Minister
Office of the Minister of Foreign Affairs
Chair, Cabinet Legislation Committee

Asia-Pacific Economic Cooperation (APEC 2021) Bill: Approval for Introduction

Proposal
1. This paper seeks approval for the introduction of the Asia-Pacific Economic Cooperation (APEC 2021) Bill (the Bill).

Background
2. From December 2020 the New Zealand Government will host the Asia-Pacific Economic Cooperation (APEC) forum. As well as a year-long series of meetings of officials, international chief executives and senior Ministers, New Zealand will see 21 world leaders together in New Zealand during the week of 8 to 14 November 2021.

3. Hosting APEC will be of significant public interest and we are expecting a high level of international media coverage. It is important that we host a high-quality APEC year where all world leaders and attendees feel safe, secure and welcome. As well as working to promote public support of the events, we will need to ensure we demonstrate to the world our democratic principles, including freedom of expression for those who may wish to demonstrate during certain APEC events.

4. Legislative change is required to ensure the necessary legal powers to effectively provide security for the APEC events. Not addressing security risks or threats could result in harm to individuals and property and/or disruption or cancellation of APEC events. This would result in both international and domestic reputational damage and lost opportunity.

5. The legislation will be temporary for the purposes of APEC 2021 only and all provisions of the Bill will expire on 21 November 2021. The Bill is specifically designed for APEC 2021 and is not intended to establish a general precedent, especially for future agency policy development in these areas.

Policy Decisions
7. The Bill will implement the following Cabinet policy decisions [CAB-19-MIN-0048 dated 4 March 2019 refers]:

7.1. enable members of the New Zealand Armed Forces to provide specialist support to the APEC 2021 security operation, while being fully integrated into the New Zealand Police operation and under New Zealand Police control, with the constabulary powers necessary to undertake any functions and training required;
7.2. create a legislative framework to enable the Commissioner of Police to designate enforcement officers with limited powers for fixed periods to provide APEC 2021 security;

7.3. permit certain foreign protection officers to carry otherwise restricted weapons, subject to approval by the Commissioner and to any conditions the Commissioner may impose;

7.4. create temporary powers, and associated offences, for the purposes of:
   7.4.1. securing APEC 2021 accommodation, venues, and other sites
   7.4.2. road closures for APEC 2021 security purposes
   7.4.3. road closures for APEC 2021 motorcades
   7.4.4. securing maritime areas to manage the water areas surrounding hotels or other locations, and maritime transit corridors;

7.5. provide legislative powers to intervene and respond effectively and appropriately to risks posed by aircraft; and

7.6. enable the New Zealand Police and, subject to approval by the Commissioner, foreign protection agencies to import, use, and export wireless electronic countermeasures (W-ECM) technology during APEC 2021 events.

Contentious Aspects of the Bill

8. Aspects of the Bill could be contentious because it deals with creation of security powers within the context of New Zealand’s engagement in global free trade. It also places limitations on rights contained in the New Zealand Bill of Rights Act 1990 (BORA). These issues are ones on which people hold strong and divergent views.

9. BORA and privacy issues are discussed further in the Compliance section below. The following issues are discussed in the Departmental Disclosure Statement that accompanies this paper:
   9.1. Specialist NZDF support to the security operation;
   9.2. Use of wireless electronic countermeasure technology;
   9.3. Enabling the carriage of weapons by foreign protection officers; and
   9.4. Securing airspace.

Need for a Bill

10. The policy cannot be implemented without legislative change.

Outstanding Policy Issues

11. There are no outstanding policy issues.
Minor Issues that Require Confirmation.

12. To implement the policies regarding NZDF support and enabling carriage of weapons by foreign protections officers Cabinet agreed to amend the Defence Act 1990 and the Arms Act 1983 respectively. Based on advice from Parliamentary Counsel Office (PCO) the policy is now implemented through a standalone Bill and those amendments will no longer be necessary. This approach:

12.1. ensures that all provisions are read in light of the stated purposes of the Bill;
12.2. allows PCO to ensure that the Bill provisions take precedence over any other Act in case of inconsistency or interpretation issues;
12.3. is simpler from a drafting and interpretation standpoint; and
12.4. is a more accessible and transparent approach, in terms of having the policy and legal framework in one place.

13. Cabinet agreed that the powers linked to airspace enforcement were to be available to the NZDF as well as the NZ Police. After further operational analysis it was determined that the original approach was not deemed necessary and that for air space enforcement it is logistically possible to operate with NZDF assisting Police, if necessary, rather than acting independently. The Bill now limits the powers to NZ Police alone.

14. This also acknowledges the overarching intent of the security operation that it be Police led. It helps avoid any overt presence of military forces which would give visitors and New Zealanders a perception of a more threatening or high risk environment than is the reality. This change has been agreed by the NZDF and NZ Police.

15. Powers linked to airspace enforcement that were to be available to the Aviation Security Service (AVSEC) have also now been limited to Police alone. AVSEC will still be able to assist NZ Police if requested to do so. This change has been agreed by the Civil Aviation Authority and NZ Police.

16. The ability to create maritime safety and security areas was originally linked to Auckland harbour, with the focus on the Waitematā Harbour. The Bill has been drafted to enable these areas to be created where required for security or safety purposes. This now enables the ability to be used, for example, in the Manukau Harbour to enable protection of the environs of Auckland International Airport or at another location should a world leader choose to visit places outside Auckland.

17. The Cabinet paper outlined that APEC security staff would be held to all the accountability mechanisms that apply to the New Zealand Police. Further consultation has resulted in agency agreement that it is not appropriate for them to be subject to the full Independent Police Conduct Authority accountabilities that apply to Police employees.

18. APEC security staff are effectively exercising a third party function; they will be acting under the lawful instructions and direction of a constable and will comply with the Police code of conduct. In terms of accountability, should behaviour warrant it, their
authority can be revoked and their behaviour will be reported to their employer who can take appropriate action if required. They will also be subject to any criminal sanctions if their actions meet such thresholds. Further, the IPCA can investigate the supervising constable’s actions to see whether they amount to misconduct or neglect of duty in respect of their instructions and directions to the security staff member.

Impact analysis

19. A Regulatory Impact Assessment (RIA) was prepared for the original Cabinet decisions. A new or amended RIA is not required for this Bill as the proposals outlined in this paper were considered in that RIA and officials’ advice is unchanged.

Financial Implications

20. There are no financial implications directly associated with this paper.

Legislative Implications

21. The proposals outlined in this paper are to be given effect in the Asia-Pacific Economic Cooperation (APEC 2021) Bill.

22. s9(2)(f)(iv)

Compliance

23. The Bill complies with:

23.1. the disclosure statement requirements (a disclosure statement has been prepared and is attached to this paper);

23.2. the Human Rights Act 1993; and

23.3. relevant international standards and obligations.

Treaty of Waitangi implications

24. No issues have been identified in the Bill that may have implications for the rights and interests of Māori protected by the Treaty of Waitangi and therefore officials have assessed that the Bill does not have implications for the principles of the Treaty of Waitangi.

25. The government has and will continue to engage meaningfully with a wide range of Māori participants to ensure that New Zealand, among other things, delivers an authentic and impactful APEC programme, showcases the Māori economic success story, promotes a policy dialogue on indigenous economic empowerment within APEC and makes a legacy contribution to Māori Crown relations.

Compliance with New Zealand Bill of Rights Act 1990

26. The regime will engage rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (NZBORA). Specifically freedom of movement (s.18), freedom of
expression (s.14) and the right to be secure from unreasonable search and surveillance (s.21).

27. The Ministry of Foreign Affairs and Trade has significantly analysed and tested the rights implications of the APEC 2021 Bill, and considers any limits on rights under the regime to be demonstrably justified in a free and democratic society (s.5).

28. The Bill has been developed with a range of safeguards to ensure that where it limits rights it does so no more than the minimum necessary, and in proportion to the importance of its objectives. These safeguards include, but are not limited to:

28.1. the legislation having a short shelf life to address the unique and complex needs of APEC 2021 specifically with no application outside the event;

28.2. search and surveillance powers connecting to many of the safeguards in the Search and Surveillance Act 2012 which has been found to be NZBORA compliant; and

28.3. electronic counter measures being used for extremely short periods of time (minutes) with no right to disclose private communications.

29. The Ministry of Justice will conduct the formal and fuller assessment of the Bill’s consistency with the NZBORA prior to its introduction.

Compliance with the Legislation Advisory Committee Guidelines on the Process and Content of Legislation (2018 edition)

30. The Legislation Design and Advisory Committee reviewed key aspects of the legislative proposals during the development of the policy. The Committee understood the policy objective behind the proposals but wished to emphasise that the powers being created need to be understood as being both unusual and temporary powers. In particular, the Committee was concerned that the powers should not be considered as an appropriate precedent more generally.

31. The Legislation Design and Advisory Committee also considered the Bill’s policy and design during the drafting process. The Committee supports the decision to progress the amendments as a single APEC Bill. They consider it will assist with ensuring accessibility of the powers available for APEC 2021 and reflects the extraordinary, temporary and non-precedent setting nature of these powers. The Committee was happy that the issues brought to it by the department have been resolved.

Comment from the Privacy Commissioner and agency response

32. Subsequent to consultation with the Office of the Privacy Commissioner, he required that the following comment be included in this paper:

33. “I recognise the security implications of the APEC event and acknowledge the safeguards in the Bill to help address incursions into individuals’ human rights and privacy. However, I remain concerned about the extent of the authority to surveil that is to be given to Police to exercise without any ex ante independent judicial oversight and authorisation. While the ability to jam signals might be justified, and has only limited privacy implications, powers that are intended to authorise limited and
justified activities should themselves be limited. The proposal does not differentiate between the ability to interfere with signalling of remote devices, and the widespread interception of the personal information of law abiding New Zealanders. In my view, in their current proposed form, the powers are disproportionate and unjustified, and create the potential for significant privacy intrusions. The singular nature of the international event is insufficient to justify such sweeping and unsupervised powers to intercept signals and communications.\"  

34. The Ministry of Foreign Affairs and Trade, in conjunction with New Zealand Police and the Ministry of Business, Innovation and Employment – Radio Spectrum Management note the points raised by the Privacy Commissioner.  

35. However, the use of wireless electronic countermeasure (W-ECM) devices is a vital element contributing to the security of APEC 2021, which is supported by this package of security legislation. In particular W-ECMs give the security operation more ability to respond to risk caused by incursions into secure airspace and to prevent or respond to explosive devices.  

36. The majority of W-ECM use that could be in place during APEC 2021 does not require interception of personal communication or private information. The most likely W-ECM use during APEC 2021 will be preventative measures and will involve jamming of signals across the radio spectrum and be linked to protection of venues, accommodation, motorcades and other key facilities such as airports. Jamming does not collect or use any data.  

37. The technology would need to scan the radio spectrum to identify potential threats and to identify the devices that are controlling potential or actual threats / risks to security to be able to counter any risk. Scanning also assists in identifying systems that we will need to make sure stay online, such as emergency services radio.  

38. This scanning activity may intercept and collect elements of personal communications such as the name of a device and location, but the W-ECMs will have no access to data in apps, emails etc. As an analogy we may be able to see the letterbox, its address and name, but not what is in it. This is no greater privacy intrusion than what a person does when they look for the Wi-Fi at a cafe or airport.  

39. Using W-ECMs to respond to a threat could involve the interception and viewing of private communications. This is because it will be necessary to intercept a signal and decrypt information held in its data packets in order to identify the controlling device and counter it (for example sending out a counter signal to take control of the device (such as a drone that can then be landed safely). This activity will often take place across the same frequency as mobile phones as they use the same frequency range as many drone control devices and can be used to detonate explosive devices.  

40. The legislation places significant limitations on:  

40.1. who can use W-ECM devices (must be authorised by the Commissioner of Police);  

40.2. why W-ECM devices can be used (to counter potential and actual risks to security at APEC events and protected persons);
40.3. for how long W-ECM devices can be used (specified period of time linked to an APEC event that expire at the end of each event period); and

40.4. where W-ECM devices can be used (linked to APEC security areas, airspace or secure transport routes).

41. The legislation also places obligations on the disclosure, storage and disposal of any private or personal information by specifying:

41.1. Disclosure of such information is limited to where it is required for the purposes of exercising a power or for a prosecution under this legislation, if authorised by another Act or to the Commissioner of Police or the Radiocommunications Secretary for the purposes of post use reporting.

41.2. The authorised W-ECM user must securely store any information received via a W-ECM and protect it by such security safeguards as is reasonable in the circumstances to take.

41.3. The authorised W-ECM user must securely dispose of that information as soon as it is no longer required for the purposes of this Act. This would be at the end of each meeting period throughout the hosting year as authorisations are only in force for these specific periods and cannot be carried over to later periods.

42. The Australians have taken a similar approach in their legislation to the use of W-ECMs by law enforcement, by giving blanket approval for their use for the purposes of bomb disposal activities (since 2010) and addressing risks posed by unmanned aircraft and unmanned aircraft systems (for a renewable period of 2 years from April 2019).

Consultation

43. The New Zealand Police, New Zealand Defence Force, Ministry of Defence, Ministry of Transport, Civil Aviation Authority, Aviation Security Service, Maritime New Zealand, New Zealand Transport Agency, and Ministry of Business, Innovation and Employment – Radio Spectrum Management have been consulted throughout the drafting of this Bill and their comments and advice incorporated where appropriate. This was to ensure that agencies with responsibilities created by the Bill can implement and operationalise the draft legislation as intended.

44. The Ministry of Justice was consulted during the drafting of this Bill and advice on the screening, searching and offence provisions was incorporated where appropriate.

45. Along with the above agencies the following agencies received the consultation draft of the Bill; The Department of Prime Minister and Cabinet (National Security Policy), Department of Prime Minister and Cabinet (Policy Advisory Group), The Treasury, New Zealand Security Intelligence Service, Government Communications Security Bureau, New Zealand Customs Service, the Office of the Privacy Commissioner and the Visits and Ceremonial Office at the Department of Internal Affairs.

46. Consultation has occurred with the government caucus and other parties represented in Parliament.
On 4 March 2019 Cabinet agreed that the proposed Asia-Pacific Economic Cooperation (APEC 2021) Act will be binding on the [CAB-19-MIN-0048 refers].

The Bill does not create a new agency.

The Bill does not involve the allocation of decision making powers between the executive, the courts, and tribunals.

There are no regulations associated with this Bill.

The Bill does not create other legislative instruments.

The Bill does not contain a new definition of Minister or Department.

The Act will come into force on 1 July 2020.

While the APEC hosting year does not commence until December 2020, and Leaders’ Week is not until November 2021, the Act is required to be in force from July 2020 to enable specialist training and other required exercises to take place.

I intend to release this paper and the originating policy approval Cabinet paper, considered by Cabinet on 4 March 2019, and related Cabinet decisions, on the Ministry of Foreign Affairs and Trade’s website.

This is subject to consideration of any deletions that would be justified if the information had been requested under the Official Information Act 1982. Because of the nature of these papers, I am expecting redactions due to the maintenance of security and international relations considerations.
Recommendations

The Minister of Foreign Affairs recommends that the Committee:

1. note that the Asia-Pacific Economic Cooperation (APEC 2021) Bill ensures the necessary legal powers to effectively provide security for the APEC events;

2. note that the powers proposed in the Asia-Pacific Economic Cooperation (APEC 2021) Bill are temporary and will expire at the conclusion of the last event linked to the hosting of APEC in 2021;

3. note that on 4 March 2019 Cabinet agreed to amend the Defence Act 1990 to enable the New Zealand Defence Force to provide specialist support to the APEC 2021 security operation, with the constabulary powers necessary to undertake any functions and training required [CAB-19-MIN-0048];

4. approve enabling the policy referred to in recommendation 4 through the Asia-Pacific Economic Cooperation (APEC 2021) Bill, rather than amending the Defence Act 1990;

5. note that on 4 March 2019 Cabinet agreed to amend the Arms Act 1983 to enable carriage of weapons by foreign protection officers, subject to approval by the Commissioner of Police and subject to conditions the Commissioner may impose [CAB-19-MIN-0048];

6. approve enabling the policy referred to in recommendation 6 through the Asia-Pacific Economic Cooperation (APEC 2021) Bill, rather than amending the Arms Act 1983;

7. note that on 4 March 2019 Cabinet agreed to create the following powers for both the New Zealand Police and New Zealand Defence Force for the purpose of restricted air space management:

   8.1. the ability to deploy preventative measures to secure APEC 2021 venues, accommodation and transport; and

   8.2. the ability to either seize, destroy or bring under control unmanned aerial vehicles posing a threat to the security or safety of APEC 2021, through mechanical, cyber or other electronic means [CAB-19-MIN-0048];

8. approve the limitation of the powers referred to in recommendation 8 to the New Zealand Police only;

9. note that on 4 March 2019 Cabinet agreed, for the purpose of restricted air space management, to create a power for New Zealand Police, New Zealand Defence Force and Aviation Security Service to prevent an aircraft taking off if it were believed that the craft was to be used to disrupt an APEC 2021 event [CAB-19-MIN-0048];
11. **approve** the limitation of the powers referred to in recommendation 10 to the New Zealand Police only;

12. **note** that on 4 March 2019 Cabinet agreed to enable the New Zealand Police to create maritime safety and security areas to manage the water areas surrounding hotels or other locations, and maritime transit corridors, located on or adjacent to Auckland harbour [CAB-19-MIN-0048];

13. **approve** enabling the New Zealand Police to create maritime safety and security areas to manage the water areas surrounding hotels or other locations, and maritime transit corridors as and where required for APEC security and the safety of attendees and the general public;

14. **note** that APEC security staff will not be subject to full accountability mechanisms that apply to the New Zealand Police as previously indicated as they will not be subject to the Independent Police Conduct Authority;

15. **note** that APEC security staff will still be accountable under the New Zealand Police code of conduct, their own employment agreement disciplinary arrangements and, if necessary, appropriate criminal sanction;

16. **approve** the Asia-Pacific Economic Cooperation (APEC 2021) Bill for introduction;

17. s9(2)(f)(iv)

18. s9(2)(f)(iv)

18.1. s9(2)(f)(iv)

18.2. s9(2)(f)(iv)

19. **approve** the Ministry of Foreign Affairs and Trade to publish a copy of this paper and the originating policy approval Cabinet paper, and related Cabinet decisions, considered by Cabinet on 4 March 2019, on its website;

20. **approve** the Ministry of Foreign Affairs and Trade to have a copy of the originating policy approval Regulatory Impact Assessment, dated November 2018, published on the Treasury’s website;

21. **approve** the Minister of Foreign Affairs and Trade to issue a press release once the Asia-Pacific Economic Cooperation (APEC 2021) Bill has been introduced into the House.

Authorised for lodgement

Rt Hon Winston Peters
Minister of Foreign Affairs