

Regulatory Impact Statement: identifying offenders attempting to unlawfully leave New Zealand

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the Ministry of Justice. It provides an analysis of options for obtaining biometric information (e.g. photographs) necessary to identify offenders unlawfully attempting to leave New Zealand. This objective reflects the Government's interest, which arose from the recent case of prisoner Phillip John Smith/Traynor, in precluding international travel as a means for offenders to avoid remaining subject to a sentence or criminal order.¹

The offenders who fall within the scope of this analysis are those subject to a sentence or criminal order that involves their management in the community by a probation officer. It excludes prisoners², unconvicted citizens (including people on bail who have not already been prohibited from leaving New Zealand by the court), patients managed under mental health or intellectual disability legislation (who are the subject of a related Regulatory Impact Statement) and people subject only to civil orders.

The analysis takes for granted that attempts by these offenders to leave New Zealand, without the approval of a probation officer, are inconsistent with their obligations under the relevant sentences and orders and are therefore unlawful. The Government intends to make this explicit in legislation where it is not already so.

In approximating the impact of options, the analysis also assumes that:

- an authority to obtain biometric information would be exercised by the Department of Corrections in respect of all applicable offenders; and
- the systems and processes used by border control agencies to identify people who are not entitled to international travel will continue to prioritise offenders according to their relative degree of flight risk (assuming those systems and processes will not have materially changed by the time legislative options are effective).³

The number of options analysed and the rigour of analysis undertaken reflects the straightforward nature of the problem and legislative impediments to addressing it.

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¹ The Government is developing a number of other policies as a result of official commentary on the incident involving Phillip John Smith/Traynor. This Regulatory Impact Statement is therefore concerned with one issue among others for which Statements are being prepared (by the Ministries of Health, Transport and another business unit in the Ministry of Justice).

² The Corrections Act 2004 already provides the authority at issue in this paper to obtain biometric information and was used in the case of prisoner Phillip John Smith/Traynor.

³ This means the regulatory options would have little or no direct resource implications for border control agencies.

Executive summary

1. Offenders under the supervision of a probation officer in the community are expected to remain in New Zealand for the purpose of complying with any directions of the probation officer and conditions of the sentence or order, unless their absence has been approved by the probation officer. To mitigate the risk of these offenders undermining the integrity of their sentence or order by leaving the country, it is necessary that border control agencies be able to identify them.
2. Customs currently uses photographs of offenders to verify their identity when attempting to unlawfully leave New Zealand. In future, other biometric information might be used. An authority to obtain biometric information (including photographs) is currently lacking for some offenders in the community, which limits the detection of offenders at New Zealand's borders.
3. Three options have been identified for obtaining this information:
 - by consent where the information is not available under existing statutory powers, which we expect would be ineffective;
 - by a coercive power to obtain the information by force if necessary, which could be effective, but is excessive and inconsistent with the regime for supervising offenders in the community; and
 - by an obligation on the offender to cooperate with the collection of the information (e.g. the taking of photographs), which would be effective, and consistent with the nature of their other obligations under conditions of the sentence or order.
4. The Ministry of Justice prefers the last of these options as a result of the analysis summarised in this paper, which would require amendments to the Sentencing Act 2002 and the Parole Act 2002.

Status quo and problem definition

Expectation that offenders remain in New Zealand for the purpose of serving a sentence or order

5. International travel is inconsistent in principle with the obligations of offenders serving a sentence or criminal order that involves their management in the community by a probation officer. With the exception of offenders only serving a sentence of community work,⁴ offenders in the community must be available to their probation officer in order to comply with any directions or other conditions of the sentence or order. This implicitly limits their right to leave New Zealand, unless the probation officer judges that an exception can be made in the circumstances. The volumes and types of offenders this expectation applies to are as follows⁵:

Sentence	Number of offenders on a given day	Criminal order	Number of offenders on a given day
Home detention	1,630	Extended supervision	230

⁴ This is because the minimum requirement of the sentence is to complete 100 hours every six months, which is consistent with periods overseas.

⁵ These are rounded figures from the Final Report (June 2015) of the *Multi-Agency Review of Phillip Smith Traynor Incident*. Offenders are only counted once where subject to more than one of these sentences or orders. They are counted against the more serious of the sentences or orders.

Community detention	1,450	Parole	2,340
Intensive supervision	2,430	Release from a short prison sentence with conditions	2,670
Supervision	6,500	Post-detention conditions (served after home detention)	1,180
Total: 18,430			

6. Although remaining in New Zealand (unless otherwise approved) is not expressly required by the relevant sentences and orders, agencies have taken steps to prohibit and prevent attempts to leave the country in view of the flight from New Zealand of prisoner Phillip John Smith/Traynor in November 2014. The consequent Multi-Agency Review of the incident and Government Inquiry have both recommended that this expectation be made more explicit in the Parole Act 2002 and the Sentencing Act 2002.⁶ The Government has accepted this recommendation, among others, in its response to the Inquiry.
7. Between November 2014 and October 2015, 52 offenders were positively identified attempting to leave New Zealand. Of them, eight offenders were attempting to travel without approval and were intercepted. However, five of these offenders subsequently returned to the border with written approval to leave New Zealand.
8. Attempts by these offenders to travel overseas without approval threatens the integrity of sentences and criminal orders and the maintenance of the law (i.e. where made to avoid accountability for further offending).

The means to enforce prohibitions on leaving New Zealand are often not available

9. Legislative settings are not conducive in every case to the detection of offenders attempting to leave New Zealand without the approval of a probation officer.
10. The current processes rely heavily on the availability of photographs of applicable offenders. Between November 2014 and October 2015, around 11,000 offender identities were included in the Customs database.⁷ The Department of Corrections requests the inclusion of the offender's identity by providing Customs with the offender's biographic details (i.e. their full name (including any known aliases) and date of birth). A border alert is then generated in the event that those biographic details match (or very nearly match) those of a person attempting to leave New Zealand. Over 75 percent of alerts are generated by ordinary citizens, as opposed to offenders included in the database. Border officials therefore need to be provided with a photograph of the offender by the relevant agency (in this case by the Department of Corrections) in order to satisfy themselves that they have positively identified the applicable offender.
11. The Department of Corrections may only take photographs of *prisoners* under the Corrections Act 2004. In other cases, the only other possible opportunity to obtain a photograph of the offender, under current legislative settings, is where they were taken into Police custody and photographed before conviction (under section 32 of the

⁶ This recommendation was made in the Final Report of the *Multi-Agency Review* and by the *Government Inquiry into matters concerning Phillip John Smith/Traynor*.

⁷ Border alerts were not placed on offenders serving a low-tariff sentence, including a sentence of supervision, and offenders in respect of whom Corrections did not have a useful photograph.

Policing Act 2008). However, not all offenders have been photographed under this authority (e.g. where Police is not the prosecuting agency). Moreover, the photograph of the offender needs to be recent enough to account for changes in their appearance.

Objective

12. The policy objective is to provide the means to prevent offenders being managed in the community from leaving New Zealand without the approval of a probation officer.

Options and impact analysis

13. The information necessary to fulfil the policy objective is biometric (i.e. pertaining to physical characteristics that uniquely identify the offender) and would need to be provided to agencies responsible for border control. The biometric information currently used is a photograph of the offender. The estimated cost to the Department of Corrections of setting up capability to obtain photographs of offenders in the community across all probation sites is \$0.200 million.⁸⁹ In future, other forms of biometric information (e.g. fingerprints) may be used to identify offenders attempting to leave New Zealand without permission.¹⁰
14. The Ministry has identified one non-regulatory and two regulatory options for obtaining this information:
- Option 1 (non-regulatory) – obtain missing biometric information by consent
 - Option 2 (regulatory) – extend the existing power to obtain biometric information by force if necessary in respect of prisoners (under section 41 of the Corrections Act 2004) to offenders under supervision in the community
 - Option 3 (regulatory) – place a statutory obligation on offenders being managed in the community by a probation officer (by making it a standard condition) to cooperate with efforts to collect biometric information.

Tabular analysis of options

Option for obtaining biometric information	Effectiveness in facilitating enforcement of restrictions	Disadvantages/risks
<i>Option 1: under existing powers or by consent</i>	Ineffective , as many offenders are unlikely to consent to provide biometric information for the detection of potential further offending.	There may also be some legal risks in the long-term with over-relying on photographs obtained under existing powers. Arguably, offenders cannot give consent to the collection of biometric information freely, given that probation officers are in a position of power.

⁸ Costs are approximate and based on the technology already used to obtain photographs of offenders in prison across 104 probation sites. These costs may reduce based on advances in use of existing technology. These costs do not include the use of obtaining future biometric data such as fingerprints.

⁹ Because this estimated cost is common to all the options in the following analysis, it has not been used to discriminate between them in the analysis.

¹⁰ Bodily samples (e.g. DNA) would not be obtained for this purpose.

Option for obtaining biometric information	Effectiveness in facilitating enforcement of restrictions	Disadvantages/risks
<p><i>Option 2: by a coercive power similar to section 41 of the Corrections Act</i></p>	<p>In order to be effective, would require an associated power to arrest.</p> <p>Otherwise, there is no way (in the community) to forcibly compel the offender's cooperation if necessary.</p> <p>Could be exercised more than once (e.g. over the course of a 10-year extended supervision order).</p>	<p>Potential arrest and use of force would be:</p> <ul style="list-style-type: none"> • excessive • unnecessary for the purpose of obtaining information (given option 3) • novel and inconsistent with the existing regimes for managing offenders in the community, which use penalties (for a breach of conditions) rather than force to deal with non-compliance. <p>Therefore may be considered an unreasonable search of the person.</p>
<p><i>Option 3: by an obligation (standard condition of the sentence or order)</i></p>	<p>Effective:</p> <p>Offenders are highly unlikely to refuse to cooperate given the possibility of prosecution for a breach of conditions.</p> <p>However, cooperation cannot be guaranteed.</p> <p>Could be exercised more than once (e.g. over the course of a 10-year extended supervision order).</p>	<p>Involves the collection of personal information and arguably constitutes a search of the offender.</p> <p>A very small number of offenders may be prosecuted for not cooperating with this procedure, and therefore breaching the relevant condition of their sentence or order, with associated costs to the criminal justice system.</p>

Consultation

15. As well as contributing to the Multi-Agency Review of the Phillip Smith Traynor (AKA Phillip Smith) Incident, the following agencies have been consulted on a draft of this Regulatory Impact Statement:

The Department of Corrections, New Zealand Police, Ministry of Health, Department of Internal Affairs, New Zealand Customs Service, Ministry of Business, Innovation and Employment, Ministry of Transport, New Zealand Transport Agency, the Treasury and the State Services Commission.

16. The Department of the Prime Minister and Cabinet has been informed.

Conclusions and recommendations

17. As a result of the analysis summarised above, the Ministry of Justice prefers Option 3, which is to make cooperation with efforts to collect biometric information a standard condition of the applicable sentences and orders. Although a coercive power would also be effective, Option 3 is less onerous on the offender and would fulfil the objective of providing information necessary to identify offenders at New Zealand's borders in manner that is:

- proportionate to the flight risks posed; and
- consistent with the statutory regime and established practices for managing offenders under sentences and orders in the community.

18. The preferred option would require amendments to the Sentencing Act and the Parole Act introducing, as a standard condition of all sentences and orders involving

management by a probation officer, an obligation on the offender to submit to the collection of biometric information at the direction of a probation officer.

Implementation plan

19. It will be for the Department of Corrections to develop the procedures necessary to obtain the necessary biometric information from offenders in the community. At this point, implementation is likely to involve the use of cameras to photograph offenders during their induction to the community-based sentence or order (and subsequently if necessary). The associated capital costs to the Department of Corrections are estimated to be around \$0.200 million. The Department has existing information management solutions for the storage of these photographs. It also has established practices for responding to non-compliance in the event that offenders do not cooperate with the collection of photographs. Any costs arising from prosecutions in these cases are likely to be negligible and managed within baselines.

Monitoring, evaluation and review

20. Agencies involved in the enforcement of travel restrictions on offenders will continue to monitor the number of attempts to leave New Zealand without approval. The Department of Corrections will keep records of the biometric information obtained from offenders in the course of its administration of the applicable sentences and orders. No further review of the proposals is planned.