

Regulatory Impact Statement: Preventing special patients, restricted patients and special care recipients, from leaving New Zealand without permission

Agency Disclosure Statement

This Regulatory Impact Statement (RIS) has been prepared by the Ministry of Health (the Ministry).

It provides an analysis of options for how to identify and prevent mental health special and restricted patients from unlawfully leaving New Zealand. This RIS also considers how this issue applies to special care recipients with intellectual disabilities.

The Ministry has used the best available information in preparing and determining the implications of the options. This information is generally considered to be of good quality, as the nature and (relatively small) size of the population these proposals would apply to are known. The Ministry's recent experience of implementing a range of operational initiatives focussed on preventing special and restricted patients from leaving New Zealand has also contributed to the analysis.

The processes that would change as a result of the proposals are both regulated (either through the Mental Health (Compulsory Assessment and Treatment) Act 1992 and/or in operational policy and guidance) and subject to significant centralised oversight by the Ministry of Health.

The proposals rely heavily on co-operation from other government agencies such as the NZ Customs Service and NZ Police with whom a memorandum of understanding has been signed.

Dr John Crawshaw

Director of Mental Health

Executive summary

The Government and society have an interest in ensuring that special and restricted patients detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Act) remain where they can receive the most appropriate monitoring and treatment. In almost all instances, this will be New Zealand.

This issue was highlighted by the recent case of prisoner Phillip Smith/Traynor's unauthorised departure from New Zealand, and associated inquiry processes. That incident raised similar issues to those that were identified when a special patient on leave left New Zealand without approval in 2014, and did not return.

This RIS takes it for granted that attempts by special and restricted patients to leave New Zealand, without approval, are unlawful. Such attempts are inconsistent with their obligations under the relevant sentences and orders (which include, as a condition of unescorted leave, that they not leave New Zealand). The Government intends to make this explicit in legislation.

In addition to this change, options have been considered to address three areas of vulnerability in the Act. The preferred options are to:

- modernise the existing legislative provision for taking photographs of special and restricted patients, and allow the taking of photographs and other biometric information without consent
- confirm in legislation that the biographical and biometric information obtained can be provided to other agencies for identification purposes, and
- extend the power to retake and return to hospital a special or restricted patient who is reasonably believed to have breached his or her conditions of leave.

The preferred options are intended to provide a strong legislative underpinning for new operational policies and processes that have already been introduced, or are in the process of being implemented.

While a similar approach could be applied to people with intellectual disabilities detained under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, this group presents a low flight risk, and providing for the enforcement of travel restrictions is likely to be of limited benefit.

Status quo and problem definition

Current situation

The Mental Health (Compulsory Assessment and Treatment) Act 1992 is predicated on patients residing where they can receive the most appropriate monitoring and treatment. In almost all instances, this will be New Zealand. There may be rare cases where a person's treatment and rehabilitation needs may best be met overseas.

Special patients and restricted patients are mental health patients who are compulsorily detained under court orders requiring them to stay at one of five forensic mental health units. The two groups of patients can be defined as follows:

- Special patients are people receiving assessment and treatment under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and who have been charged in the criminal justice system.¹ There are around 400 special patients in New Zealand at any one time.
- Restricted patients are not subject to the criminal justice system but are detained by a court order because of the special difficulties they present from the danger they pose to others. There are only four psychiatric inpatients currently designated as restricted patients.

Special patients who are found not guilty by reason of insanity, as well as restricted patients, are eligible for unescorted short leave or ministerial long leave. Special patients found by the court to be unfit to stand trial are eligible for unescorted short leave but not ministerial long leave. Unescorted short leave can also be given to sentenced prisoners who require treatment for a mental disorder in a forensic mental health unit, but this rarely happens in practice. Prisoners on remand or those subject to a sentence of life imprisonment or preventive detention are not eligible for leave in the community.

There are strict arrangements for granting leave from forensic mental health units. Leave can be an important tool in integrating special patients back into the community and providing a less restrictive environment over time.

There are currently 16 special patients deemed suitable for ministerially-approved long leave and 38 on unescorted short leave in the community.

The conditions of the written warrant that approves ministerial long leave include a prohibition on international travel. Despite this prohibition, in October 2014 a special patient on ministerial long leave departed New Zealand on an Indian passport, and did not return.

There are similarities between the issues raised by this special patient's departure, and those surrounding the prisoner Philip Smith/Traynor's unauthorised departure from New Zealand a few weeks later. Due to these similarities, the issue of how to mitigate the risk that special and restricted patients may travel overseas without permission was incorporated into the multi-agency review of the Philip Smith/Traynor incident and, later, the independent Government inquiry into the same issue.

¹ There are five main categories of special patient defined in section 2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992:

- persons found unfit to stand trial and made a special patient under section 24(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 (the CP(MIP) Act)
- persons found not guilty by reason of insanity and made a special patient under section 24(2)(a) of the CP(MIP) Act
- persons found guilty of a charge and both sentenced to a term of imprisonment and detained as a special patient under section 34(1)(a)(i) of the CP(MIP) Act
- remand or sentenced prisoners who require treatment for a mental disorder in a forensic facility under section 45 or 46 of the Act
- persons remanded for a court report, or pending trial or sentencing, under section 23, 35, 38(2)(c) or 44(1) of the CP(MIP) Act or section 184T(3) of the Summary Proceedings Act 1957.

While those review and inquiry processes took place, the Ministry considered and implemented a range of new operational policies and processes to manage the risk that special and restricted patients might depart New Zealand and travel overseas.

We considered the existing levers available at each point in the process that special patients pass through (from the original charge, conviction and court order, through to if someone breaches conditions of leave and is successful in travelling overseas). The extent to which these operational levers could be relied on would determine what legislative changes might ultimately be required.

The operational initiatives implemented included:

- the completion of flight risk assessments for individual patients
- requesting that patients on long leave surrender their travel documents
- the development of a new national process to respond when patients are absent without leave
- border alerts on all patients on long leave and unescorted short leave
- collecting identification information, including photographs, from patients – with their consent
- Memoranda of Understanding with other agencies involved in identifying and detaining patients seeking to leave the country.

These operational initiatives are extensive, and represent a significant step up in the measures in place to prevent patients travelling overseas without approval. On their own, they go quite some way to mitigating the risk that patients will be successful in travelling overseas.

However, alongside the process of introducing operational changes, the Ministry simultaneously undertook an assessment of areas of continuing vulnerability, where legislation would provide a more robust basis to effect these operational initiatives or where risks were unlikely to be mitigated through operational solutions. This analysis is integrated into the 'Options and Impact Analysis' section later in this RIS.

Problem definition

The event that sparked the Government's responses to date (a special patient who left the country while on ministerial long leave), raises closely associated issues about patients being at large in the community without authorisation (even when they do not try to leave New Zealand).

These associated issues (such as the lack of good quality photographs of patients suitable for identification purposes, and lack of explicit processes for finding and retaking patients) were highlighted in the recent escape of a special patient from a forensic mental health unit.

We have, therefore, defined the problem as being twofold:

- how to prevent special and restricted patients from being in the community without permission, and, if necessary, retake special patients who escape, are absent without leave (AWOL), or who do not return (or do not intend to return) from leave and

- how to manage the risk of special and restricted patients departing New Zealand without permission.

The Mental Health (Compulsory Assessment and Treatment) Act 1992 lacks a number of features necessary to mitigate these flight risks:

- There is no explicit statutory prohibition on special and restricted patients travelling internationally, although such travel is a breach of the conditions of unescorted leave, and therefore unlawful (unless expressly approved).

The Government intends to make this prohibition explicit in legislation through amending the Mental Health (Compulsory Assessment and Treatment) Act 1992 to expressly provide that a special or restricted patient may not leave, attempt to leave, or prepare to leave New Zealand without the permission of the Minister of Health or the Director of Mental Health. This will provide legislative certainty and a clear mandate for all participating agencies to take the steps necessary to prevent special and restricted patients from travelling overseas without permission. This issue is not considered further in this RIS.

- Up to date photographs of special and restricted patients are not always available and cannot be taken without their consent; nor can other biometric information that may be necessary in the future to identify them.
- There is no explicit authority to share identity information with other agencies in order to mitigate risks including that of a special or restricted patient leaving New Zealand without permission.
- The process for retaking into detention a special or a restricted patient who has breached his or her leave conditions is cumbersome and the provisions lack clarity.

The last three issues, and the options available to resolve them, are considered in the 'Options and Impact Analysis' section below. In addition, the Ministry has considered the application of any proposals to people with intellectual disabilities subject to the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

None of the proposals in this RIS are intended to apply to the larger group of mental health inpatients who are *not* special or restricted patients. These proposals are limited to those individuals who are detained under court orders and/or present the greatest risk to others.

Objectives

The overall objective of the proposals is to provide a legislative and operational framework that minimises the risk that special and restricted patients can depart New Zealand, or be at large in the community, without permission.

The following detailed evaluation criteria have been applied to both the operational initiatives already implemented or underway, and the legislative proposals in this RIS.

Evaluation criteria

1. Least restrictive approach and proportionality of response

Mental health legislation is underpinned by a principle of least restrictive intervention. In line with this, the Ministry has applied a risk-based approach – to the types of

interventions that may be required, the circumstances in which they apply and the people they may apply to.

2. Preventative focus

Overall, a strong preventative approach is recommended. This supports patient wellbeing and the smooth operating of New Zealand's forensic mental health units. There are also limited levers available to the Government should a special patient successfully exit the country.

3. Efficiency, efficacy and practicality

The system needs to be able to respond to and cope with proposed changes. A significant consideration is the practicality of any proposals and limits on system capacity at New Zealand's border.

4. Maintenance of patient rights

Any proposed changes need to be considered within the context of patient rights as defined in the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Bill of Rights Act 1990 and New Zealand's international obligations.

5. Future focused

The proposals need to be fit for purpose both now, and into the future.

Options and impact analysis

A. Improving availability of identification information

Name at birth, alternative names, and date of birth as well as a clear photograph are the core identity information currently needed for special and restricted patients should they escape, go AWOL or attempt to leave the country. The name/s and date of birth are required to place border alerts. The photograph is needed within five minutes of an alert being triggered for traveller identification by Customs NZ (in order to avoid holding up innocent travellers and flights). In the future, there may be system changes that require other biometric information.

Mental health services do not routinely take photographs of patients. In response to the Smith/Traynor incident the Ministry of Health requested that forensic mental health units now take photos of all special and restricted patients. These would be valuable for safety and security purposes, as well as identification in a natural disaster or other emergency. However, consent is required, and if a person refuses to have their photo taken there is no power of compulsion for them to comply.

There are three options available:

Option 1: Retain status quo (take photographs by consent)

The recent move to taking photographs of special and restricted patients has shown a high degree of compliance with this policy by patients. As at 6 October 2015, only seven (of over 400) special and restricted patients had declined to give consent for having their photograph taken. However, five of these seven are patients who are already on ministerial long leave or

unescorted short leave in the community. This represents almost 10% non-compliance by patients living in, or regularly accessing, the community.

Having a photograph on file has been made a condition of having unescorted short leave or ministerial long leave granted. Access to leave is an influential incentive for encouraging patients to consent to having their photograph taken. The Ministry is currently considering how it responds to those five patients who were already on leave when this condition was applied, and who have not consented to having their photograph taken.

Back up processes are also being put in place to request photographs from NZ Police in emergency situations (such as when someone escapes or goes AWOL and there is no photo on file). However, there are limitations to the circumstances in which photos can be shared, the currency of those photos and the availability of photos for restricted patients (as they have not been charged with an offence).

Option 1 is the least restrictive of the options available. It has already proven to be quite successful. However, access to identity information is the most fundamental component of the Government's approach to preventing special and restricted patients from leaving New Zealand. An up-to-date, good quality photo is imperative in order for Customs to place a border alert, to identify patients in the community and to confirm identity at the border within the strictly limited time frame required.

The underlying risk is that those patients who do not consent to having their photograph taken, may be those at the greatest risk of escaping, going AWOL or breaching conditions.

This option is not future focused. It is not possible to predict whether patients would continue to show a high degree of compliance with future requests for new biometric data (for example if fingerprints, scanning or other biometric identifiers began to be used at the border).

Option 2: Modernise the existing legislative provision for taking photographs of special and restricted patients, and allow the taking of photographs and other biometric information without consent (PREFERRED OPTION)

The Mental Health (Compulsory Assessment and Treatment) Act 1992 already includes a historical provision for any patient in a psychiatric security institution to be photographed, if required by the Director. However, the term 'psychiatric security institution' dates from the time of institutional care. None of New Zealand's five forensic mental health units is currently designated as a psychiatric security institution.

The existing provision that allows the taking of photographs could be modernised, and de-linked from the reference to psychiatric security institutions. Modernising this provision would include permitting the collection of biometric information other than photographs. While this information is not required now, it may be needed as new forms of identification technology are adopted.

A firm obligation on patients to have their photo or other biometric information taken is likely to lead to almost full compliance with the policy. If a patient continues to not comply over an extended period, identity information may be obtained legally from other sources, which could include closed circuit television footage.

This approach laid out in Option 2 would utilise the opportunity to update and future-proof an existing legislative provision. It does not impact significantly on existing patient rights, as the current legislative provision does not require patients to consent to having their photograph taken. The high level of compliance with the current approach to taking photographs also suggests that patients largely accept the need to provide identifying information.

It is a proportionate response to the presenting issue, and supports the preventative approach being taken.

Option 3: As for option 2, but also allow the use of reasonable force in order to take identifying information

Section 122B(3) of the Mental Health (Compulsory Assessment and Treatment) Act 1992 allows the use of such force as is reasonably necessary in the circumstances for the purposes of assessing and treating a patient. However, the Ministry's view is that this would not include the routine taking of photographs for administrative purposes.

Using force to take a patient photograph could undermine the purposes of their detention, that is, their treatment and rehabilitation. It raises human rights implications and would be unlikely to be a proportionate response to the presenting issue.

The Ministry does not recommend that the situations in which reasonable force can be used be expanded to ensuring that patients comply with a request to have their photograph or other identifying information taken.

B. Providing an explicit authority for agencies to share identity information

The grounds for sharing information between agencies will vary depending on: the agency and the legislation they are operating under; the direction of information sharing; the information being shared and the circumstances.

In some situations, the basis for sharing information is relatively clear and easy to justify. In others it is not as clear-cut.

Two options have been considered:

Option 1: Retain status quo (rely on existing provisions to share identity information)

The usual justification for disclosing personal information about special patients, in the circumstances that the Ministry is likely to do so (ie in the case of a patient escaping, going AWOL, breaching leave conditions or preparing to leave the country), is that it is necessary for the purposes of:

- avoiding prejudice to the maintenance of the law [Information Privacy Principle 11(e)(i)] and
- preventing or lessening a serious threat to public safety [Information Privacy Principle 11(f)(i)].

Sharing information with agencies such as the NZ Customs Service, the Department of Corrections, the Department of Internal Affairs and NZ Police is permissible on these grounds.

In fact, for the maintenance of the law, border alerts have been placed on special and restricted patients currently on ministerial long leave and those on unescorted short leave, with a condition of leave that they do not travel overseas. A memorandum of understanding has also been agreed between the Ministry of Health, NZ Police and the NZ Customs Service, for the purpose of preventing overseas travel by special and restricted patients.

Protection of their private health information is very important to mental health patients. Identification information such as photographs will become part of a patient's health record. During the implementation of the new processes for taking photographs and other identity information, some concerns were raised about the potential for sharing that information with other agencies, such as Police. Explicit operational policies and arrangements, such as memoranda of understanding, are useful for ensuring that information is shared appropriately and correctly.

Option 2: Confirm in legislation that the biographical and biometric information obtained can be provided to other agencies for identification purposes (PREFERRED OPTION)

In most circumstances, agencies should be able to share the information required to manage the risk of special and restricted patients being at large in the community without permission or attempting to leave the country. They should be able to do this within existing legislative provisions and with supporting operational processes.

However, there would continue to be some limitations and uncertainty, and there is an acknowledged risk that agencies could be operating at the margin of what their legislation allows.

The processes being put in place for special and restricted patients rely heavily on the health sector 'piggybacking' on the systems and processes managed by other agencies.

For the avoidance of doubt - given the complexity of the intersecting systems - confirmation should be provided in legislation that agencies can share biographical (such as alternative names) and biometric (such as photographs) information about special and restricted patients.

This would support a strong preventive approach, enable agencies to move quickly and with confidence in their ability to share essential information, and provide protection from future challenges. It would be proportional to the presenting situations and the risks they raise.

C. Streamlining the process for retaking into detention a special or restricted patient who has breached, or may breach, his or her leave conditions

The Mental Health (Compulsory Assessment and Treatment) Act 1992 includes a number of provisions relating to the taking, retaking and detaining of a special patient.

Section 53 of the Act provides for retaking a special patient who has escaped or who fails to return on the expiry or cancellation of their leave. The retaking can be undertaken by the Director of Mental Health, the Director of Area Mental Health Services, a duly authorised officer, a constable or any person to whom the charge of that patient has been entrusted.

Section 122B of the Act authorises a person who is exercising a specified power in an emergency to use such force as is reasonably practicable. These powers extend to taking and retaking a person, detaining a person and entering premises.

Together, these provisions provide for a robust process for retaking a patient who escapes or fails to return from leave.

However, the consequences of someone breaching their leave conditions (such as the prohibition on overseas travel) are not explicit in the Act.

Two options have been considered:

Option 1: Retain status quo (rely on existing provisions for retaking special and restricted patients who breach leave conditions)

Because the consequences of breaching leave conditions are not explicit, the general provisions within the Act for cancelling leave apply.

The process for retaking someone who breaches their ministerial long leave conditions requires a written direction (in his or her own hand) from the Director of Area Mental Health Services in order for the patient to be temporarily returned to hospital. There can be a time delay in getting this written direction. The patient can then be detained for no more than 72 hours, unless their leave is cancelled by the Minister within that time period.

This process may be adequate to respond to the majority of breaches of leave conditions (eg if a patient is believed to be using drugs). However, the elongated process for retaking someone who breaches their leave conditions does not anticipate the time constraints that exist should a special or restricted patient attempt to cross New Zealand's border. It can leave agencies that would be required to detain a patient at the border in an uncertain legal position.

Continuing the status quo is not efficient and effective in responding to the risk of special and restricted patients attempting to leave New Zealand.

Option 2: Extend the power to retake and return to hospital a special or restricted patient who is reasonably believed to have breached his or her conditions of leave (PREFERRED OPTION)

The Ministry is in the process of establishing a national incident protocol for when a special patient has escaped or is absent without leave, which sets out processes and responsibilities of all the parties involved, including the mental health service and Police.

A legislative provision that clearly links a breach of leave conditions to the ability to immediately retake and return that person to hospital would provide greater clarity and certainty for the range of individuals and agencies that may be involved in retaking a patient, and assure a more timely process when urgency is required.

Provision could also be made for retaking a special or restricted patient where there are reasonable grounds to believe they may breach their leave conditions, even though they have not done so yet. A suitable person (eg the Director of Area Mental Health Services) would need to be satisfied that retaking of the special or restricted patient would be in the interests of the patient or the public.

This second provision would allow early prevention and intervention where a patient is suspected of planning to breach their leave conditions, for example, when they are found to have made arrangements to travel overseas. The question of whether the patient's leave should continue or be cancelled as a result of the breach of conditions would then be considered according to the existing statutory process.

The approach laid out in Option 2 provides an alternative pathway for responding to higher risk and more urgent breaches of leave conditions. It allows for proportionate, efficient, and effective responses to the risk presented, while maintaining existing processes for considering the impact on the patient, and others, of continuing or cancelling their leave arrangements. It provides clarity and certainty to the range of agencies and individuals that may be asked to respond to a breach of conditions, such as the NZ Customs Service.

D. Application of proposals to offenders with intellectual disabilities under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003

The Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (ID(CCR) Act) authorises the provision of compulsory care and rehabilitation for people with an intellectual disability who have been charged with, or convicted of, an imprisonable offence.

For the purposes of this RIS we are primarily considering special care recipients with intellectual disabilities as they present the highest risk in terms of safety of the individual and the public and so are most similar to special and restricted patients under the Mental Health (Compulsory Assessment and Treatment) Act 1992.²

Most of the areas of vulnerability identified under the Mental Health (Compulsory Assessment and Treatment) Act 1992 also apply to the ID(CCR) Act:

- an implicit, but not explicit, expectation that special care recipients cannot travel internationally
- limited provision for collection of photographs and biometric data
- lack of specific provision for sharing data between agencies.

The ID(CCR) Act does contain additional provisions (over and above those in the Mental Health (Compulsory Assessment and Treatment) Act 1992) to take and detain care recipients. The Police have additional powers (granted by warrant, or in an emergency, without a warrant) to enter and search places where they expect an escaped care recipient may be, and to use reasonable force if required to retake them.

There are, however, a number of key differences that mitigate the identified areas of vulnerability:

- The number of people under the ID(CCR) Act is small. There are approximately 120 care recipients at any one time, around 15 of whom are special care recipients.
- It is relatively common for intellectual disability services to take photographs of clients for their files, which could be used to identify recipients by authorities. As all care recipients under the ID(CCR) Act will have been charged, the Police should also have photographs on file for them.
- The Minister may authorise long leave (the length of which is not specified), and set conditions of leave, for special care recipients. In practice, this provision is rarely

² Special care recipients are high risk recipients who have committed very serious crimes and are subject to the criminal justice system. They are required to always receive care and rehabilitation in a secure facility.

used, as special care recipients are highly unlikely to be granted extended periods of leave. Only one period of Ministerial leave has been approved since the Act came into force in 2004, and that was in April 2007.

- The Director-General may authorise short-term leave, and set terms and conditions of leave for special care recipients, of no more than 7 days. In practice, special care recipients will be under very restricted arrangements. For instance, where leave is approved, it will mostly be very short term (eg a period of a few hours for medical appointments or to visit family) and will always be supervised. Since the Act came into force, only one special care recipient has been granted overnight leave (supervised), as part of the process of their legal status being lowered.
- Special care recipients are likely to have limited personal and financial ability to access travel documents, and a low number will have valid passports. Those at the supervised end of the spectrum may have more ability to access these documents, but as they are supervised, the risk of them doing so is less.

It would be possible to make similar changes to the ID(CCR) Act as are being considered for the Mental Health (Compulsory Assessment and Treatment) Act 1992. However, there are a number of mitigating factors that exist in the way the ID(CCR) Act already operates, including that: special care recipients are not likely to have unescorted access to the community; there are additional powers to take and detain care recipients should they escape, and that photographs will be available from the service or Police.

Consultation

These proposals arise out of several extensive review and independent inquiry processes. The nature and terms of reference of those processes largely determined the consultation opportunities that were available.

Consultation on these issues, with multiple government agencies, was undertaken during the cross-government *Multi-agency Review of the Phillip Smith Traynor (aka Phillip Smith) Incident*. The final report of this Review was provided to Ministers on 30 June 2015.

Discussions and analysis undertaken as part of the Multi-agency review contributed to the development and implementation of a number of operational steps to prevent special patients leaving New Zealand. As agencies investigated the extent of what could be achieved operationally, they also raised concerns about having a clear legislative mandate for any steps they may be required to take, and clarified the legislative changes to the Mental Health (Compulsory Assessment and Treatment) Act 1992 that would provide a more robust and complete platform for these operational initiatives. We have sought their advice on what their legislation may or may not allow, and how we can link with their systems and processes

Over this period, the Ministry of Health also prepared operational guidance about taking photographs and other identifying information from special patients, with their consent. Consultation on these proposals took place with the Directors of Area Mental Health Services and the Office of the Privacy Commissioner, and the proposals were modified to incorporate their comments. This guidance was also provided to District Inspectors for their information.

The *Government Inquiry into Matters Concerning the Escape of Phillip John Smith/Traynor* reported in August 2015. The Inquiry team invited relevant statutory agencies and a range of

non-government parties to make submissions, and also interviewed 116 people (although in respect of issues around special and restricted patients, this did not appear to include people outside of the Ministry of Health).

The Inquiry indicated that the multi-agency review dealt lucidly and comprehensively with managing the risk of special patients leaving New Zealand and reached similar conclusions. It supported both the operational initiatives underway and making changes to the Mental Health (Compulsory Assessment and Treatment) Act 1992 to: place an explicit legislative restriction on special patients leaving New Zealand without express authority; provide legislative authority to take photographs and other biometric details of special patients without their consent, and give clearer and more extensive powers to retake a special patient who breaches leave conditions.

The following agencies have been consulted on a draft of this Regulatory Impact Statement: the Ministry of Justice, Department of Corrections, NZ Customs Service, NZ Police, Department of Internal Affairs, State Services Commission and Treasury.

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

Conclusions and recommendations

The following proposals would provide a legislative and operational framework that minimises the risk that special and restricted patients can depart New Zealand, or be at large in the community, without permission:

1. Modernise the existing legislative provision for taking photographs of special and restricted patients, and allow the taking of photographs and other biometric information without consent
2. Confirm in legislation that the biographical and biometric information obtained can be provided to other agencies for identification purposes, and
3. Extend the power to retake and return to hospital a special or restricted patient who is reasonably believed to have breached his or her conditions of leave.

A similar approach could be applied to people with intellectual disabilities detained under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003. However, this group presents a low flight risk, and providing for the enforcement of travel restrictions is likely to be of limited benefit.

Implementation plan

Interim steps were put in place after the Smith/Traynor incident to minimise the risk of unsanctioned overseas travel by special patients. These steps included border alerts, an assessment of patient flight risk, and travel restrictions in all unescorted leave provisions.

In recent months, sustainable operational solutions to prevent special and restricted patients from travelling overseas have been investigated and implemented. This has included developing interface agreements (such as through the preparation of Memoranda of Understanding) with agencies that are involved with preventing special patients from leaving New Zealand. Operational initiatives have also included the development and

implementation of guidance and systems for collecting identifying information about special patients, including photographs.

The proposed legislative changes will provide a legislative mandate for, and require compliance with, the processes that have already been implemented or that are being developed.

There will be no additional compliance costs for forensic mental health services. The Ministry of Health would, however, need to update the following documents to reflect that these operational requirements are also set down in legislation:

- the *Guidelines for Regional Forensic Mental Health Services: Special Patients and Restricted Patients*. These guidelines will incorporate and update interim guidance provided about: orientation of special patients (including that they must not seek to leave New Zealand without an exemption); the taking of photographs and other identifying information; and the retaking processes that will now apply to people who breach their leave conditions (including guidance about the circumstances where this should apply)
- Memoranda of Understanding with other agencies that have interface responsibilities for preventing special patients from leaving New Zealand.

Similarly, documentation and processes that support operation of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 would need to be revised if changes were made to that Act.

The proposed legislative changes will not reduce existing regulatory requirements, but will modernise and future-proof existing legislative provisions for taking identifying information such as photographs.

The Ministry of Health retains close centralised oversight of the management of special patients by forensic mental health services. This includes monitoring compliance with requirements (such as having a photograph on file of all special patients), and being advised of incidents such as patients escaping or attempting to leave New Zealand.

The Mental Health (Compulsory Assessment and Treatment) Act 1992 already contains enforcement and offence provisions, including the situations in which reasonable force may be used. The Ministry of Health is not proposing that these existing provisions (which include allowing the use of reasonable force if necessary to retake or detain a person) be extended to the taking of photographs and other identifying information.

Monitoring, evaluation and review

There are a number of mechanisms in the Mental Health (Compulsory Assessment and Treatment) Act 1992 which seek to support and monitor the way that services operate under the Act and the experience of patients. The Director of Mental Health has the power to undertake inspections under the Act. District Inspectors are also appointed to inquire into issues such as breaches of the Act or management of the service.

Customs and the Ministry of Health will share information on where people try to leave the country and are stopped at the border. There is a reportable events process in place that provides information on the number of people stopped at the border, including positive

identifications and false positives. Any breach of the requirement preventing travel or attempted travel overseas will be reported to the Director of Mental Health.

The annual report of the Office of the Director of Mental Health includes a section on special and restricted patients, and is likely to reflect on the steps taken to prevent these patients from leaving New Zealand.

The Guidelines for Regional Forensic Mental Health Services: Special Patients and Restricted Patients will provide guidance about the measures to be used to prevent, and respond to, the risk of special patients leaving New Zealand. These guidelines are regularly reviewed, consulted on and re-published.