

Regulatory Impact Statement

Customs and Excise Act Review: Biometric information

Agency Disclosure Statement

This Regulatory Impact Statement has been prepared by the New Zealand Customs Service (Customs).

It provides an analysis of options for Customs' use and management of biometric information.

The following is a constraint on the analysis:

- the analysis is qualitative and considers the benefits and risks of the status quo and alternative options. Expected outcomes cannot be predicted with certainty or quantified.

The impacts discussed in this paper are primarily on Customs as the enforcement agency and on suspected offenders. The impacts on suspected offenders are related to criminal behaviour and are therefore not considered to be relevant measurable impacts, apart from where they increase or reduce the likelihood of detecting criminal offending.

The preferred option is not assessed as imposing any additional compliance costs on business or compliant travellers – that is it would not require these parties to supply additional or new information. It will, if adopted, require minor, one-off changes to Customs' procedures.

Signed by Michael Papesch on 8 September 2015.

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8 September 2015

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Executive Summary

- 1 The regulatory impact analysis in this paper has contributed to, and informed, the advice provided to Cabinet on Customs' uses and management of biometric information under the Act.
- 2 The primary objective behind the proposed changes in this analysis is to ensure that the Act provides a transparent framework on biometric information that enables the facilitation of legitimate travel and the detection of people travelling with false or altered passports, and people subject to travel restrictions. This objective is achieved if Customs has the powers available to adequately detect and respond to border activity, if those powers are clear and consistent and if this can be met within current fiscal baselines.
- 3 Other proposals are made in relation to Customs' use of biometric information, however the impacts of these proposals are only administrative on Customs and there are no additional responsibilities on third parties which means that a regulatory impact analysis is not applicable to those proposals.

Objectives

- 4 The objective is for Customs to have the ability to efficiently facilitate legitimate travel and effectively detect and respond to people travelling with false or altered passports, and people subject to travel restrictions.
- 5 In reviewing how biometric information is covered by the Act, gaps have been identified that prevent this objective from being realised now, and in the future.
- 6 To ensure the primary objective is met, the following criteria have been identified to assess the options in this paper against. If these criteria are met for the individual options, then the objective is likely to be achieved:
 - efficiency: maximum benefits are delivered at lowest cost (a high cost option will be considered unfavourably)
 - effectiveness: the desired outcomes are achieved
 - responsiveness: system can accommodate change over time and situations which are not currently evident
 - transparency: powers and obligations are clear, easy to understand and publically available
 - legitimacy: legislation is consistent with other international conventions, treaties etc
 - feasibility: the legislation facilitates implementation and is administratively feasible
 - proportionality: change is proportional to the need for change. Rules, penalties, and processes are in proportion with the size of offences and risk and incentivise voluntary compliance.

- 7 The following table explains the key used in the analysis of the criteria:

Rating	Explanation
✓	The criterion is met
?	Not enough information or evidence to determine whether the criterion is met
~	The criterion is neither met nor not (neutral)
✗	The criterion is not met

Authority to use and request biometric information from people crossing the border

Status quo and problem definition

- 8 The use of biometric information is currently the most reliable and efficient way of verifying the identity of people Customs interacts with. Biometric matching (comparing a biometric image embedded in a passport with a biometric image generated from a person at the time of arrival or departure) is widely used and accepted internationally as a more effective and reliable method of verifying identity than a human visual comparison of a person against their passport photograph. As an example, an Australian man recently used his brother's passport to depart Australia to fight for a terrorist organisation in Syria. The visual check did not establish that this person was using someone else's passport. A biometric check would have more likely shown that he did not match the passport he was presenting, and he would therefore have been prevented from departing.
- 9 The Act currently allows a Customs officer to require certain information from a person crossing the border in order to establish that person's identity, including any prescribed document that the officer may specify. This includes a passport and the information contained therein, but the Act does not currently explicitly state that biometric information is included in this authority.
- 10 The Act also authorises a Customs officer to direct a person crossing the border to remain in a designated place until they have been processed for arrival or departure in accordance with the Immigration Act 2009.
- 11 When Customs is processing people crossing the border, the Immigration Act provides the clear authority to collect biometric information from all travellers on arrival to establish or verify their identity to check they may enter New Zealand, and foreign passport holders on departure to verify their identity and confirm they have departed. However, in order to act upon border intercept alerts, Customs also needs to be able to use the biometric information of New Zealanders on departure.
- 12 Customs maintains border intercept alerts for a number of agencies, such as the Department of Corrections and the Police. If a person who is subject to an intercept alert attempts to enter or leave New Zealand, Customs can hold the person until Police attend to arrest them.

- 13 Efficient and reliable identity verification is critical to the proper working of border intercept alerts. People subject to such an alert are identified at the border through automated matching of biographical information supplied by the authorising agency against passport data. When a match is made, Customs officers intervene at the passport control point to verify whether the person indicated by the alert match is the person subject to the alert. [REDACTED]
- 14 For identity verification, Customs has to contact the authorising agency each time there is an alert match to get a photograph of the person subject to the alert, and then visually check whether the person at passport control is the same person.
- 15 Because biometric information is not explicitly included in the types of information Customs can require from a traveller, for both processing purposes and to act upon border intercept alerts, Customs does not currently use the most reliable and efficient means to undertake its functions.
- 16 While the Act implicitly provides Customs with the authority to use biometric information, the Act does not clearly set out Customs' purposes for using this information.
- 17 The problems identified by Customs are:
- the Act is not explicit on Customs' uses of biometric information for its own role in identifying persons of interest for law enforcement, national security, border protection or public health purposes
 - the Act does not currently support Customs to make the most efficient use of biometric information or for the foreseeable future, in verifying identity and detecting unlawful travel documents, or acting on border alerts in particular because the Immigration Act does not include the authority to use biometric information from departing New Zealanders.

Options and impact analysis

- 18 We have considered the following options for addressing this problem:
- explicitly include biometric information in the Act as it currently stands (clarification of status quo)
 - include biometric information in the Act, and require provision of biometric information from all people crossing the border
 - include biometric information in the Act, and authorise Customs officers to request a person crossing the border to undergo an identity check using biometric information only when there are grounds for suspicion about whether the person presenting is the same person as in their passport, or is a person of interest.
- 19 The table below assesses the three options against the relevant criteria. The criteria are given equal weight in this analysis.

Relevant criteria	Status quo	Option one	Option two (preferred)
Efficiency	✘	✘	✔
Effectiveness	✘	✔	✔
Responsiveness	✘	✔	✔
Transparency	✘	✔	✔
Legitimacy	✔	✘	✔
Feasibility	✔	✘	✔
Proportionality	✔	✘	✔

Analysis of options

- 20 Option two is the preferred option because it clarifies Customs' uses for biometric information, and also provides for Customs to be able to provide greater assurance around identity at the border where there is suspicion about whether a person crossing the border matches their passport, or is a person of interest. Requesting a traveller to undergo a biometric identity check would be restricted by the officer satisfying a threshold for doing so.
- 21 The Privacy Commissioner has said that for transparency and accountability, Customs should have its own explicit authority to use biometric information. Other agencies that use biometric information (for example, Police, and Immigration) have explicit provisions on biometric information in their legislation.
- 22 Use of automated border processing using biometric information by a person crossing the border would remain voluntary. This is in line with privacy expectations.
- 23 If the status quo is retained, the legislation would continue to lack clarity around Customs' use of biometric information. Clearer authority and transparent legislation assist Customs to enforce the law and people to understand what can be expected of them at the border. Without authority to request biometric information in certain circumstances from a person crossing the border, Customs could potentially be prevented from identifying a person of interest or preventing the departure of someone not authorised to depart New Zealand. A gap would remain in being able to use biometric information from New Zealanders on departure.
- 24 Option one would amend the Act to explicitly include biometric information as information Customs may use, and require all travellers to provide this information at the border.
- 25 This option would allow for Customs to use the most efficient and reliable way of verifying the identity of people crossing the border, but since the majority of travellers comply with requirements, are not of interest to law enforcement, and

their biometric information is already held by other departments as the authoritative sources of identity in New Zealand, it is not reasonable or necessary for Customs to have such a power.

- 26 There are concerns over privacy and proportionality of the power versus the risk it intends to mitigate if provision of biometric information is made mandatory for all travellers. There are human rights issues for people who cannot provide biometric information – i.e. children, people with disabilities. Not all passports are currently suitable or of a high enough standard to be used with automated processing systems at present either.
- 27 There would also be an issue of how compulsion might be enforced. In addition, existing provisions in the Act relating to completion of immigration processing (section 32B), and investigation of cases for law enforcement, national security, and public health purposes (section 32C) provide the means for a person to be directed to remain under Customs' control for set periods of time to allow for appropriate action to be taken, including further steps to verify identity.
- 28 Option one would also require significant investment in more SmartGate kiosks and booths.

Impacts

- 29 Option two has the following impacts:
 - a person crossing the border who a Customs officer has a reasonable cause to suspect may not match their passport, or is travelling on an altered passport, or is a person of interest for law enforcement, national security or public health reasons, may be requested to undergo an identity check using biometric information
 - the Act will be aligned with other agencies who manage biometric information in that it will explicitly include provisions on how Customs can use biometric information
 - increased clarity for Customs officers and for people crossing the border on Customs' authority to use biometric information
 - no fiscal implications.
- 30 None of the options completely address the problem as they do not provide the capability to require a person crossing the border to provide biometric information. However, option two is Customs' preferred option and we consider that it is the most effective way to achieve clarity in the Act while providing Customs with a clearer authority to provide assurance over identity at the border.

Recommended option: explicitly provide for Customs' uses of biometric information in the legislation, including that Customs may request a person crossing the border to undergo an identity check using biometric information.

Customs' storage and disposal of biometric information

Status quo and problem definition

- 31 Customs needs to store biometric information for as long as required to:
- assess risk
 - effectively monitor or intercept people of interest
 - test its biometric identity systems for quality assurance purposes.
- 32 The legislation currently does not specify a storage period for biometric information, nor what will be done with this information once it is no longer required. It is good legislative practice and contributes to trust and confidence of the people Customs deals with if its legislation is clear and transparent.

Options and impact analysis

- 33 We have considered the status quo (ie biometric information used by Customs may be kept for as long as the purpose for which it was collected remains, as provided for under the Privacy Act) and two additional options for addressing this problem:
- option one: authorise storage of biometric information used by Customs for a maximum fixed period
 - option two: explicitly authorise storage of biometric information used by Customs for as long as the purpose for which it was collected remains, aligning storage with current legislation.
- 34 The table below assesses the three options against the relevant criteria. The criteria are given equal weight in this analysis.

Relevant criteria	Status quo	Option one	Option two
Efficiency	✓	✓	✓
Effectiveness	✓	✗	✓
Responsiveness	✓	✓	✓
Transparency	✗	✓	✓
Consistency	✗	✓	✓
Feasibility	✓	✓	✓
Proportionality	✓	✓	✓

Analysis of options

- 35 Aligning Customs' storage of biometric information with current legislation is preferred. Option two would amend the Act to specifically provide for Customs' storage of biometric information for as long as the purpose for which it was

collected still exists, after which it should be disposed of. This option would align the Act with the Immigration Act 2009 which contains a provision noting that biometric information collected under that Acts should be treated in accordance with the Privacy Act 1993. The Policing Act 2008 contains provisions noting that biometric information should no longer be kept after the purpose for which it was collected no longer remains. An explicit provision on storage is more transparent than relying on the Privacy Act.

- 36 Overseas, border agencies store biometric information for varying periods of time - for example, up to seven years in Australia, and to up to 75 years in the United States.
- 37 If the status quo is retained, no legislative changes would be made and Customs' storage of biometric information would not be transparent. Customs' Privacy Impact Assessments approved by the Privacy Commissioner only mention storage of biometric information for 90 days which is for systems testing purposes.
- 38 Customs would not have transparent authority to store biometric information generated from surveillance of people of interest subsequent to arrival and departure (for example, biometric information from people observed during a controlled delivery of drugs) to scan against people crossing the border in order to attempt to verify their identity. Customs would also not have transparent authority to store biometric information received from other domestic and overseas agencies in order to monitor or intercept people of interest who are crossing the border.
- 39 Under the preferred option, Customs will have to ensure storage capacity for any biometric information held, but this is not envisaged to be significant since Customs would not hold the biometric information of the majority of people crossing the border once they have been processed and risk assessed, because they present no further interest to Customs, wider law enforcement or national security. The Department of Internal Affairs and Immigration New Zealand are the authoritative sources of identity information of New Zealanders and non-New Zealanders in New Zealand respectively, and maintain the authoritative databases of biometric information used to issue passports and approve visas respectively.
- 40 Customs would continue to store biometric information for 90 days for quality assurance and to improve the functionality of its automated systems¹, for example by checking why people have been falsely declined. The biometric information of the youngest and oldest users of SmartGate can change during the timespan of their passports so Customs needs to be able to ensure people are not unduly disadvantaged from using SmartGate.
- 41 It is not proposed to include in the Act how biometric information will be disposed of, in order to avoid prescription when methods of disposal are changing as technology develops.

¹ As approved by the Privacy Commissioner in Customs' Privacy Impact Assessment for the SmartGate System, 16 November 2010

Impacts

- 42 Option one has the following impacts:
- no fiscal implications
 - alignment with existing New Zealand legislation on storage of biometric information
 - increased clarity for Customs and for people Customs holds the biometric information of on how long biometric information will be stored and that it will be disposed of after a fixed period.

Recommended option: provide in the legislation that Customs may store biometric information for as long as the purpose for which it was collected still exists, after which it must be disposed of.

Consultation

- 43 In February 2015, Customs released a public discussion paper with specific options for change identified. The paper sought views from the public on the problems and potential options for addressing these problems.
- 44 Customs received 89 submissions, of which four commented on the proposed changes to Customs' management of biometric information. Overall, these submissions recognised that a balance needs to be struck between government's expectation that all travellers are identified crossing the border, and the privacy expectations of those travellers.
- 45 The Ministry of Business, Innovation and Employment (Immigration New Zealand) has been extensively consulted in order for our legislation to be consistent with, and not duplicate, already existing legislation that relates to the collection and management of biometric information from travellers (the Immigration Act 2009).
- 46 The Ministry of Business, Innovation and Employment (Immigration New Zealand) has acknowledged that the definition of biometric information in the Immigration Act 2009 does not specify the standard of biometric information that can be required.
- 47 Business and other government agencies acknowledge there is a justified need for Customs in relation to biometric information. They suggest that we ensure the right balance is struck with information privacy and security expectations in relation to sharing and storage of such information.
- 48 Police support specific provision for biometric information in the Act and understands that Customs will be referring to the Immigration Act biometric provisions as a possible legislative example.
- 49 The Office of the Privacy Commissioner and the Ministry of Justice have noted that due to the special nature of biometric information (i.e. that it is a permanent unique

identifier), its collection and management needs to be carefully balanced with privacy and security expectations.

- 50 The following stakeholders have been involved in the development of the proposals via membership of a stakeholder reference group: Importer's Institute, NZ Shippers' Council Inc, Port CEO Forum, New Zealand Airports' Association, Business New Zealand/Export New Zealand, Board of Airline Representatives NZ Inc, International Container Lines Committee, Customs Brokers and Freight Forwarders Federation of NZ, and the Conference of Asia Pacific Express Carriers.

Formal departmental consultation

- 51 Formal departmental feedback was sought on a draft Cabinet paper and earlier version of the RIS on the proposed information and disclosure framework. The following agencies were consulted: the Ministry of Business, Innovation, and Employment; Department of Internal Affairs; Ministry of Justice; and the Office of the Privacy Commissioner.
- 52 These agencies provided substantive comments on the proposals, which have been taken into account in the final version of this RIS. Their comments concerned clearly outlining the Customs' purposes for biometric information that are not already covered in other legislation, in particular the Immigration Act 2009.

Conclusions and recommendations

	Problem	Options	Conclusion
1	Use and request biometric information	Status quo: make no legislative changes.	Preferred
		Option one: authorise Customs to require that every person crossing the border must undertake an identity check using biometric information.	
		Option two: clarify Customs' uses of biometric information and authorise that a Customs officer may request that a person crossing the border undertakes an identity check using biometric information.	
2	Storage and disposal of biometric information	Status quo: make no legislative changes.	Preferred
		Option one: allow for Customs to store biometric information for a fixed period after which it must be disposed of	
		Option two: allow for Customs to store biometric information for as long as the purpose for which it was collected still remains, after which it must be disposed of	

Implementation

- 53 The recommended proposals, if agreed to by Cabinet, will be given effect by legislation replacing the Customs and Excise Act 1996. A Bill will be introduced to Parliament in 2016 and Customs will continue to work with other agencies to ensure that implementation requirements are identified and given effect in the Bill, and the subsequent Regulations.

- 54 Customs officers will need training and updated procedures to assist in the implementation of amended powers. This will be incorporated into an overall training package taking into account the wide-ranging changes as part of the entire review of the Act. The training and procedural requirements will be specifically identified over the next year in preparation for the enactment of the new Act. Customs will also identify all publicly available material and fact sheets that will need to be amended in preparation for this enactment.
- 55 Customs is setting up a team of officials specifically tasked with developing an implementation plan as part of this review of the Act. This team will identify, in more detail, the areas requiring implementation, including the establishment of an education campaign so that traders and travellers understand their rights and obligations. The work of this implementation team will feed into other areas of Customs' business that will undertake specific implementation tasks, such as the renewal of some bilateral Memoranda of Understanding.

Monitoring, evaluation and review

- 56 As part of the implementation of the proposed changes, Customs will implement additional monitoring and evaluation mechanisms to ensure the benefits of the changes are being realised. In areas where no monitoring is currently done, we will be creating long-term processes that enable adequate information to be collected, for example recording searches of electronic devices and monitoring of enforcement in the maritime environment etc.
- 57 The proposals make little change to the scope of powers and are more focused on increasing transparency and consistency in the legislation. Appropriate review and evaluation processes will be established as part of the implementation programme for the entire Act review. This is likely to include a fixed review period where the outcomes will be measured where possible.