



To: Hon Kelvin Davis, Minister of Corrections

Impact analysis for proposed legislative amendment to section 139 of the Corrections Act 2004

Date	16 April 2020	Decision needed by	17 April 2020
B number	B4016	Priority	High

Recommendations

Note that on 8 April 2020 you agreed to progress a legislative amendment to section 139 of the Corrections Act 2004, to allow Visiting Justices to hear disciplinary offences via audio-link when in person hearings or video-links are impracticable [B4011 refers].

Note that COVID-19 Ministers have been delegated authority to approve minor matters for inclusion in the COVID-19 Omnibus Bill.

Agree to an expanded proposal that will allow matters to be heard via audio-link when in-person hearings or video links are impracticable, during epidemics as well as other situations that impact practicability.

Agree to exercise your delegated authority to enable the progression of the amendment to section 139 of the Corrections Act 2004 relating to Visiting Justices to be included in the COVID-19 Omnibus Bill.

Authorise the Parliamentary Counsel Office to make minor and technical changes to the Corrections Act 2004 to achieve the legal intent of this proposal relating to Visiting Justices through the COVID-19 Omnibus bill.

Note that an impact assessment has been included in this paper because a Cabinet paper is not required.

Consultation

Justice Social Development Police Health Other:

Key comments: Visiting Justice co-ordinator

Contacts for telephone discussion (if required)

Name	Position	Contact number	First contact
Topia Rameka	Deputy Chief Executive, Māori	s9(2)(a)	<input checked="" type="checkbox"/>
Emma MacDonald	General Manager Policy		<input type="checkbox"/>
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Key messages

- On 8 April you approved the progression of a legislative amendment to the Corrections Act 2004 for Visiting Justices to hear disciplinary charges by audio-links when a video-link or in-person hearing is impracticable during an epidemic.
- Corrections has now received clarification that the COVID-19 Bill can include amendments that are necessary during an epidemic (as above), but that also have wider application.
- We seek your approval for an expanded proposal that applies in situations where in-person hearings are impracticable, including, but not limited to, epidemics (as above).
- Subject to your approval, the Visiting Justice proposal will be included in a COVID-19 Omnibus Bill.
- Ministers have been delegated the authority to approve proposals for minor legislative changes that will form part of the Omnibus Bill
- The Visiting Justice proposal has been categorised as a minor amendment that will “mitigate problems with legislative compliance due to physical presence requirements and other technological reasons.”

Proposal

1 The purpose of this paper is to:

- seek your approval for a slightly wider legislative amendment that will apply in situations where in-person hearings and video links are impracticable, including the COVID-19 pandemic.
- seek your approval to exercise your delegated authority to include a legislative change to section 139 of the Corrections Act 2004 relating to Visiting Justices in the COVID-19 Omnibus Bill; and
- set out an impact assessment for the Visiting Justice proposal.

Background: Cabinet has given delegated authority for Ministers to approve minor COVID-19 legislative proposals

- 2 Cabinet approval is normally required for any legislative proposal. However, Cabinet has given Ministers authority to approve minor COVID-19 legislative changes. Given that a Cabinet paper is not required, the anticipated impacts of this minor legislative change are set out in Appendix One.
- 3 We have identified that there are also a limited range of situations outside of an pandemic where in-person hearings or video links may not be practicable. One example is an adverse weather event that limits road access to a prison and impacts the use of technology (such as audio-visual link) within the prison. The use of this power would still be extremely limited, because an in-person hearing or video link will be practicable in almost all situations.

Consultation

- 4 As signalled previously, consultation with the Visiting Justice Liaison Officer and Royal Federation of New Zealand Justices' Associations indicated that Visiting Justices' preference is to hear all matters by video link where practicable. They will only resort to telephone conferences when it is impracticable to hear a matter by video link or in person, and where they consider that the matter is appropriate for a telephone conference.
- 5 The Judiciary has also been consulted and has indicated that it is supportive of this proposal.

Next steps

- 6 Following your confirmation that you intend to exercise your delegated authority, we will provide drafting instructions to the Parliamentary Counsel Office by 17 April 2019. The Omnibus Bill will be introduced to Parliament on 28 April 2019.

Proactively Released

Recommendations

7 It is recommended that you:

- a) **Note** that on 8 April 2020 you agreed to progress a legislative amendment to section 139 of the Corrections Act 2004, to allow Visiting Justices to hear disciplinary offences via audio link when in person hearings or video links are impracticable [B4011 refers]. **YES/NO**
- b) **Agree** to an expanded proposal that will allow matters to be heard via audio-link when in-person hearings or video links are impracticable, during epidemics as well as other situations that impact practicability. **YES/NO**
- c) **Note** that COVID-19 Ministers have been delegated authority to approve minor matters for inclusion in the COVID-19 Omnibus Bill. **YES/NO**
- d) **Agree** to exercise your delegated authority to enable the progression of the amendment to section 139 of the Corrections Act 2004 relating to Visiting Justices to be included in the COVID-19 Omnibus Bill. **YES/NO**
- e) **Authorise** the Parliamentary Counsel Office to make minor and technical changes to the Corrections Act 2004 to achieve the legal intent of this proposal relating to Visiting Justices through the COVID-19 Omnibus Bill. **YES/NO**
- f) **Note** that an impact assessment has been included in this paper because a Cabinet paper is not required. **YES/NO**



Topia Rameka
Deputy Chief Executive Māori



Hon Kelvin Davis
Minister of Corrections

Date signed:

17 / 04 / 2020

Minister's comments

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Appendix One: The impact assessment for the proposed changes

The proposed change is minor and constrained

- The legislative proposal to allow Visiting Justices to conduct disciplinary hearings by audio link will be limited to situations where video link or in-person hearing is impracticable.
- The constraints on the use of audio links will place significant limits on the use of this legislative amendment unless the COVID-19 situation evolves and makes in-person hearings or video links more difficult.¹ Visiting Justices will utilise existing telephone infrastructure, which means that there will not be any significant financial implications.

Implications for human rights and legal rights

- Visiting Justices cannot impose a criminal conviction and the rights that apply to criminal hearings do not apply to this proposal.² However, people facing disciplinary charges have the right to a fair hearing under the Bill of Rights Act 1991.
- The Visiting Justice proposal will require a Visiting Justice to hear any disciplinary offence by audio link. Instead, the proposed amendment gives the Visiting Justice the option to do so when other options are not practicable.
- A Visiting Justice always has an implicit power to adjourn a hearing and to take account of natural justice considerations (i.e. whether the person will get a fair hearing). This gives a Visiting Justice the discretion to determine whether an audio link is appropriate. But, it's also important to note that Visiting Justices are not required to observe the evidence rules that apply in courts, provided that the person has an adequate opportunity to be heard.
- A final safeguard is that prisoners can seek a judicial review in the High Court of any Visiting Justice decision.

Implications for order and safety

- If Visiting Justices are not able to hear cases in a timely manner law and order in prisons will be impacted negatively. The deterrent effect of the disciplinary charges process would potentially be undermined impacting the safety of people in prison and staff.

We have also considered the security and appropriateness of our phone systems

- Prison phone calls are subject to a high level of rigour to protect the safety and security of people in the community and in prison and require pre-approvals or a set of protocols to be followed. Visiting Justices are classified as statutory visitors and are dealt with according to a set of protocols.
- If there is any uncertainty around the identity of the person on the audio-link, appropriate steps will be taken to verify their identity. Corrections' operational guidance also requires staff to provide hearing venues that support integrity and impartiality.

¹ Currently, there are approximately 58 hearings each day, but only a small proportion are expected to be heard by audio-link.

² The courts have previously noted the rights that apply in criminal hearings do not apply to disciplinary hearings heard by Visiting Justices and Hearing Adjudicators.

The only alternative option is to retain the status quo

- An alternative option is to retain the status quo and only allow hearings face-to-face or by video-link.
- However, this option has implications for order and safety, because other prisoners and staff are impacted by incidents and penalties have a deterrent effect. It is important that the corrections system can respond fairly but effectively to disciplinary offences, and that hearings are not impacted by significant delays.
- By the same measure, the framing of this proposal recognises that the use of audio-links should be minimised, to mitigate the risk that they will become the default option.

Impacts on specific groups

- This legislative amendment will not alter who will come before a Visiting Justice, or the type of conduct that constitutes a disciplinary offence. The constraints on the use of audio links detailed above mitigate the risk of disproportionate impacts. Additionally, the proposed change only applies to the mode of hearing and does not alter any other aspect of the legislative framework.
- An audio format is not always appropriate for people with disabilities. We anticipate that a reasonably significant volume of hearings will still proceed by video link or face-to-face. This mode of hearing can be prioritised for people who require a visual format.
- For disciplinary hearings, interested parties are likely include the prisoner, anyone who witnessed the incident and legal representatives. While this proposal will accommodate natural justice considerations, some interested parties may have perceptions that altering the procedure has led to implications for them. In this respect, prisoners can seek a judicial review of the Visiting Justice's decision if they perceive that there is a substantial issue.

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