

**In Confidence**

Office of the Minister for Corrections  
Cabinet Legislation Committee

**Corrections Amendment Regulations 2023**

**Proposal**

- 1 This paper seeks authorisation to submit the Corrections Amendment Regulations 2023 (the Amendment Regulations) to the Executive Council.

**Executive Summary**

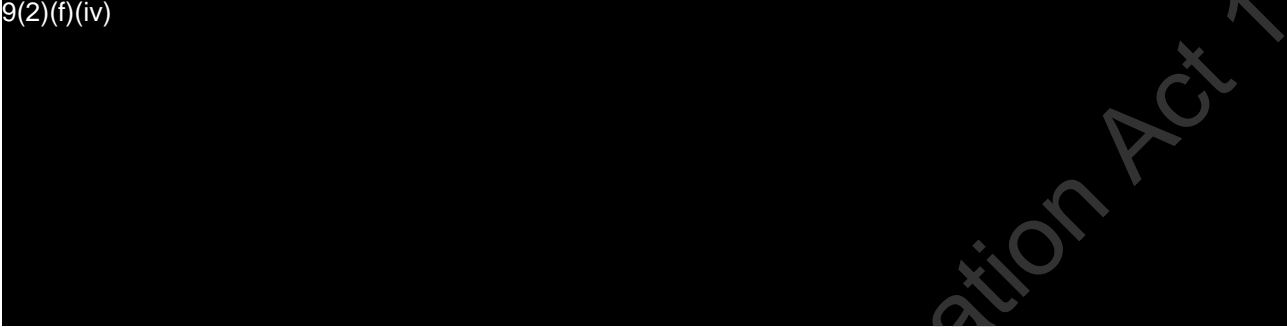
- 2 In December 2022 and March 2023 Cabinet agreed to a range of policy changes in order to improve safety and operational outcomes in prisons, which require changes to the Corrections Regulations 2005 (the principal Regulations) [SWC22-MIN-0244 and SWC-23-MIN-0009 refer]. This included:
  - specifying in greater detail the procedures that staff must follow before, during, and after the use of non-lethal weapons **[rec 2]**
  - increasing access to privacy screening and control over lighting for prisoners on cell confinement and segregated to assess or ensure their mental health (mental health segregation) **[recs 3.1 and 3.2]**
  - enabling specialist corrections officers working at height such as on prison roofs to use speed cuffs (rigid-bar handcuffs) on a case-by-case basis **[rec 3.3]**
  - clarifying an existing Regulation to make it clearer that mixing young and adult prisoners should only occur if it is in the young prisoner's best interests **[rec 3.4]**
  - ensuring a range of factors can be considered when determining prison accommodation for gender diverse prisoners by removing a rigid reliance on birth certificates **[recs 3.5 to 3.7]**

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- 3 In addition to the policy approvals previously agreed to by Cabinet, I also propose reordering the matters listed in Regulation 65C(3) relating to what the chief executive must consider when reviewing prison accommodation for gender diverse prisoners **[rec 7]**. This will improve the clarity and accessibility of Regulation 65C(3). I consider this change a minor and technical amendment that aligns with Cabinet's existing policy approvals, but seek specific approval of this change for the avoidance of doubt **[rec 5]**.

- 4 My officials met with representatives from the Office of the Ombudsman and the Human Rights Commission to discuss the drafting for the regulatory amendments relating to non-lethal weapons. Not all of the feedback from the Office of the Ombudsman and the Human Rights Commission was incorporated into the draft Amendment Regulations, but I am confident in the advice my officials have provided that some suggestions are not practical in the prison environment.

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### **Policy decisions already made by Cabinet**

*Cabinet agreed to the policy intent in 2022 and 2023 after public consultation*

- 6 In August 2022, Cabinet agreed to public consultation on a series of regulatory and non-regulatory proposals designed to improve outcomes in the Corrections system [SWC-22-MIN-0137 refers] **[rec 1]**.
- 7 Following public consultation and further analysis from Corrections, in December 2022 and March 2023, I asked Cabinet to agree to a series of policy changes to be incorporated into the principal Regulations as these will better enable Corrections' operations [SWC-22-MIN-0244 and SWC-23-MIN-0009 refer] **[recs 2 and 3]**.
- 8 The Amendment Regulations give effect to these policy approvals by amending the principal Regulations **[rec 6]**.

*The Regulations restrict the use of speed cuffs to at-height emergency situations and should mitigate against the risk of harm*

- 9 As noted in my previous Cabinet paper on the proposed amendments, speed cuffs may be more likely to cause injuries to prisoners than general use handcuffs. That is why the Parliamentary Counsel Office were directed to draft the provisions for speed cuffs with strict parameters around their use. The Amendment Regulations clearly state that the prison manager may only direct the use of speed cuffs by specialist staff to respond to an emergency at-height situation. I am satisfied that the drafting will restrict the use of speed cuffs as the prison manager must authorise their use on a case-by-case basis.

*The Amendment Regulations give Corrections sufficient time to retrofit privacy screening and in-cell light switches*

- 10 Increasing prisoners' access to privacy and control over lighting in prison cells for prisoners on cell confinement or mental health segregation requires

infrastructure changes. It will take until July 2028 to implement the changes [rec 11]. This timeframe is pragmatic and enables Corrections to first complete a feasibility study in the 2023/24 financial year on the most suitable options for infrastructure change before embarking on a multi-year programme of work across a varied and aging prison network.

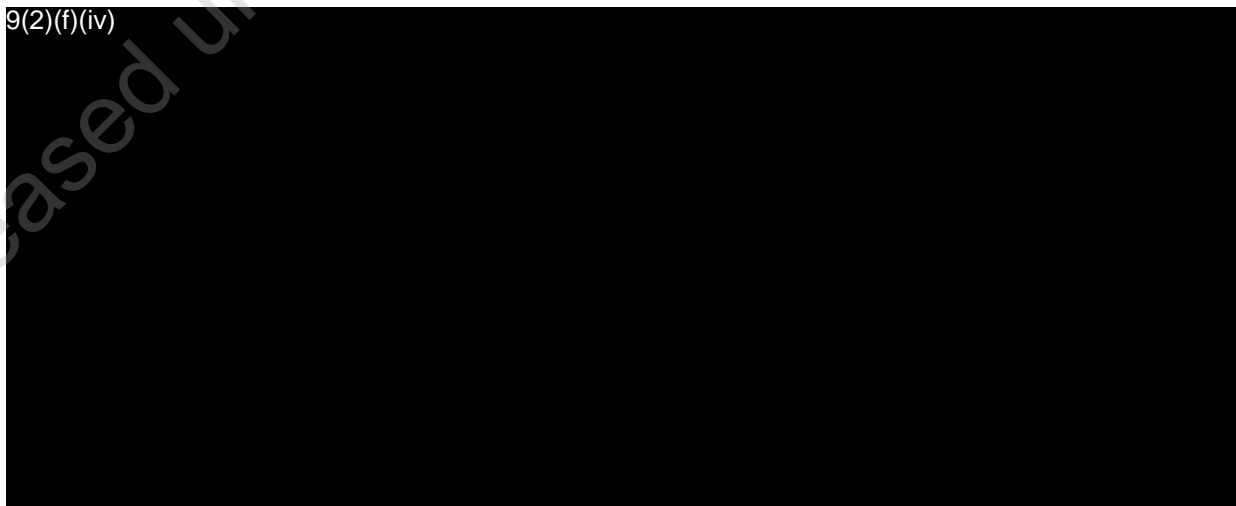
- 11 This is the one regulatory amendment that carries implementation costs as the infrastructure changes are estimated to cost between \$800,000 and \$3 million, which would be spread over multiple years. This will be covered within baselines.

### **Additional policy approvals sought in this paper**

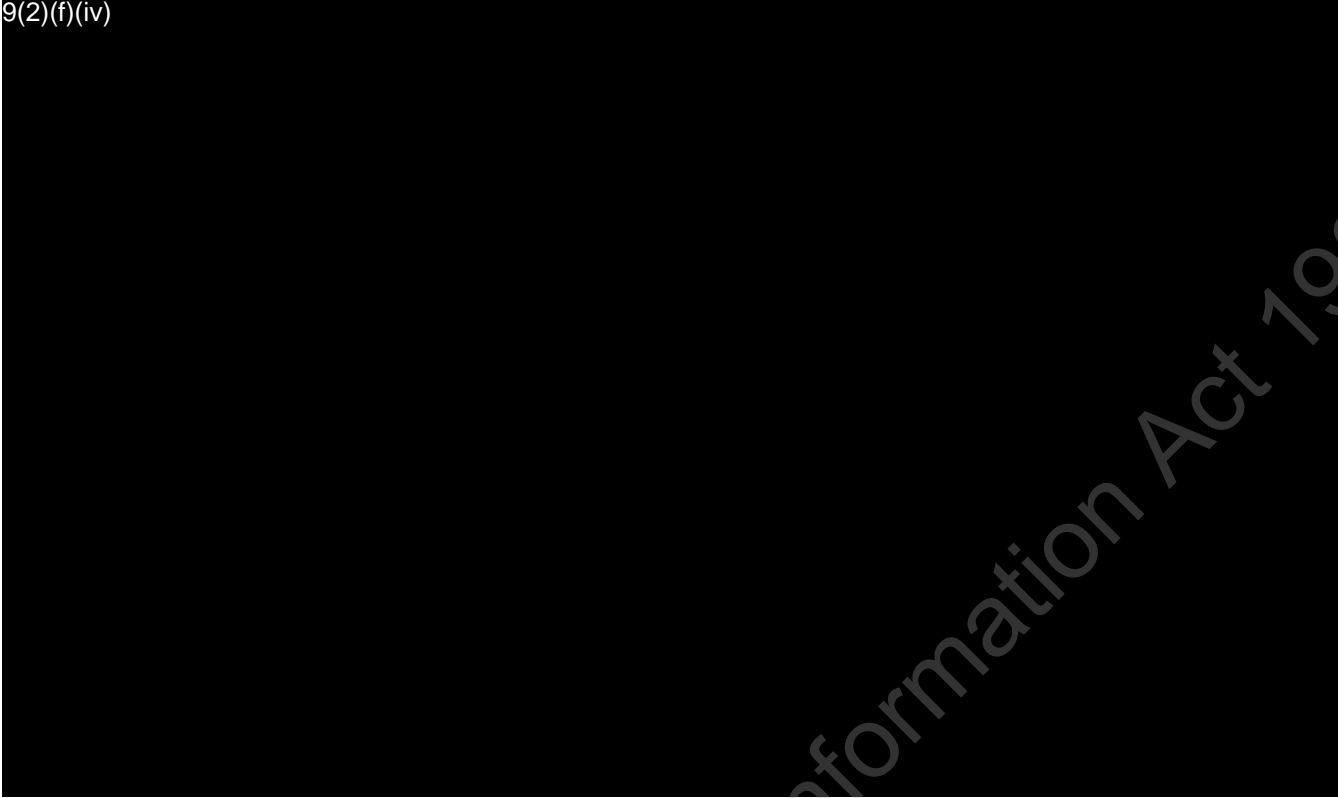
#### ***I propose one additional change to reorder the matters listed in Regulation 65C(3) to improve the accessibility of the Regulations***

- 12 Previously when I sought Cabinet's approval to amend what is called the birth certificate rule, I emphasised that accommodation decisions for gender diverse prisoners should be based on a range of factors. This includes the wellbeing and safety of the prisoner involved, the safety of all prisoners, and the prisoner's birth certificate if it is presented. In practice, this involves revoking Regulations 65(3) and 65E(2)(a) and inserting a prisoner's birth certificate (if presented) into a list of matters in Regulation 65C(3) that the chief executive must consider when reviewing whether a prisoner should be accommodated in a men's or women's prison.
- 13 I propose reordering Regulation 65C(3) to ensure that the matters the chief executive must consider fall within four distinct groupings and flow on clearly from each other. The groupings include: inputs from the gender diverse prisoner (and the impact on their safety and wellbeing), inputs and advice from Corrections staff, the impact on the wider prison population (including prison security), and the impact of the determination on the gender diverse prisoner [rec 7].
- 14 I consider this change falls within the scope of Cabinet's decision authorising me to make further decisions on minor and technical matters, and should improve the accessibility and clarity of this Regulation.

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### Timing and 28-day rule

- 20 The Amendment Regulations will come into effect on 6 July 2023, 28 days after being notified in the New Zealand Gazette [rec 11].
- 21 However, there are provisions in the Amendment Regulations relating to pre-existing cells used for prisoners on cell confinement and mental health segregation. These provisions will give Corrections until 6 July 2028 to retrofit privacy screens and lighting into these cells as this change is expected to take four to five years to implement across the prison network.

### Compliance

- 22 I consider that the Amendment Regulations have been drafted taking into account the following:
- the principles of the Treaty of Waitangi as the Amendment Regulations give greater transparency about what measures Corrections must take when using non-lethal weapons and should help improve prisoner safety and prison security during at-height incidents
  - the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993 as the parameters in the Regulations on the use of non-lethal weapons and speed cuffs will help support prisoner safety and prison security, while ensuring they will only be used when it is reasonable to do so
  - the principles and guidelines set out in the Privacy Act 2020

- relevant international standards and obligations
- the Legislation Guidelines (2021 edition), which are maintained by the Legislation Design and Advisory Committee.

## Regulations Review Committee

- 23 I do not consider there are grounds for the Regulations Review Committee to draw the Amendment Regulations to the attention of the House of Representatives as a standing order requirement

## Certification by Parliamentary Counsel

- 24 The draft Amendment Regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

## Impact Analysis

- 25 Two separate Regulatory Impact Statements (RIS) were prepared to facilitate Cabinet decision making in December 2022 and March 2023 when policy decisions were sought, and were considered by Cabinet when policy approval was given to amend the principal Regulations.
- 26 A joint quality assurance panel made up of members from Corrections, Oranga Tamariki/Ministry for Children, the Ministry of Justice, and New Zealand Police reviewed the RIS from December 2022, and assessed the majority as meeting the quality assurance criteria, with the exception of two of the miscellaneous sections. However, these two miscellaneous sections are not relevant to the Amendment Regulations.
- 27 A joint quality assurance panel made up of members from Corrections and New Zealand Police reviewed the RIS from March 2023 and assessed that it met the quality assurance criteria. The panel noted that the proposal to support specialist teams working at height by enabling the use of speed cuffs was not publicly consulted on. However, targeted consultation was carried out, including with the Corrections Association of New Zealand, the Public Service Association, the Human Rights Commission, and the Office of the Ombudsman. This was considered sufficient to meet the quality assurance criteria.
- 28 The Human Rights Commission and Office of the Ombudsman have now noted that they consider that staff provided only initial feedback, and were not formally consulted on the proposals relating to speed cuffs. The RIS panel was asked to review their quality assurance statement in paragraph 27. In light of this feedback and has now revised its assessment of the RIS to a partially meets on the basis that the section on supporting specialist teams working at height by enabling the use of speed cuffs does not meet the consultation criteria. The panel noted that while all other sections of the RIS did meet the quality assurance criteria, this means that the RIS partially meets the quality assurance criteria overall.

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- 29 A partially meets satisfies Treasury's requirements for RIS used by Cabinet for decision-making.
- 30 In addition, my officials have worked with the Parliamentary Counsel Office to amend the drafting for the Amendment Regulations relating to speed cuffs to incorporate further feedback that was provided by the Office of the Ombudsman who suggested that necessary protections should be stated in the Amendment Regulations.
- 31 The Treasury exempted the proposal relating to the destruction of electronic copies of prisoner mail from the RIS requirement because it was determined to have no or only minor impacts on businesses, individuals, and not-for-profit entities.

### Publicity

- 32 The public will be notified of the Amendment Regulations in the New Zealand Gazette.
- 33 Corrections will also publish the changes to the Amendment Regulations on its website when the changes come into force.

### Consultation

- 34 Agencies consulted on the text of the Amendment Regulations and this Cabinet paper included the Ministries of Education, Justice, Social Development, Health, Women, Pacific Peoples, Ethnic Communities, and Foreign Affairs and Trade, the Department of Internal Affairs, Inland Revenue, the New Zealand Police, Oranga Tamariki/Ministry for Children, Te Puni Kōkiri, Te Arawhiti, New Zealand Customs Service, the Public Service Commission, the Office of the Privacy Commissioner, the Department of the Prime Minister and Cabinet, the Crown Law Office, and the Treasury.
- 35 During agency consultation, Crown Law asked that the Amendment Regulations relating to speed cuffs clearly align with the Mandela Rules for mechanical restraints, particularly that the restraints are used no more restrictively than necessary. I am satisfied that the new provisions are strictly drafted and should comply with the Mandela Rules. Speed cuffs will only be used when necessary for at-height emergency situations by specialist staff trained in their use, with the prison manager needing to authorise them on a case-by-case basis.

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*The drafting of the provisions for non-lethal weapons reference a High Court judgment and feedback from the Ombudsman and Human Rights Commission*

- 37 I requested Cabinet's agreement to changes relating to the use of non-lethal weapons in response to the 30 June 2022 High Court judgment in *Cripps v Attorney-General*, which highlighted some gaps in the current legislative framework around non-lethal weapons.
- 38 The judgment contained a prescriptive, but not exhaustive, list of conditions to help ensure the use of the MK-9 (with extension wand) is consistent with the humane treatment of prisoners. I have used this judgment as a useful reference to strengthen processes for the authorisation and use of all existing non-lethal weapons generally, not just for the use of the MK-9 (with extension wand). I also note that the strengthening of processes must be balanced against operational practicality, and the maintenance of prisoner safety and prison security.
- 39 I do not intend to pursue all of the court's proposed conditions as some are not practical for Corrections to implement. For example, I do not consider it reasonable for Regulations to prescribe the strength of pepper spray that must be used. This is because Corrections does not manufacture its own pepper spray and it is possible that at any point in time the manufacturer could adjust the strength of its products. If this situation was to arise, Cabinet would need to authorise new Regulations to that effect, which could have a perverse effect on safety across the prison network, as until new Regulations were made officers may not be able to defend themselves with individual carry pepper spray.
- 40 In addition to referencing the High Court judgment, to help ensure the amendments effectively capture Cabinet's policy intent, I asked my officials to consult representatives from the Office of the Ombudsman and the Human Rights Commission on the draft provisions regarding the procedures that must be followed before, during, and after the use of non-lethal weapons.
- 41 Following discussion with these organisations, my representatives worked with the Parliamentary Counsel Office to give effect to many of their suggestions. Some of the key changes included:
- reframing the provisions to clarify the circumstances where nonlethal weapons may be used in response to cases of passive resistance
  - specifying what is meant by adequate training to use batons or pepper spray (e.g., officers must have sufficient understanding of the use of force framework, human rights obligations, de-escalation techniques, and decontamination techniques and processes)
  - clarifying that before issuing pepper spray in response to a planned use of force the prison manager must be satisfied that a registered health professional has been consulted on the proposed use

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- clarifying that when pepper spray is used an officer must monitor the prisoner.
- 42 While much of the Human Rights Commission and the Office of the Ombudsman's feedback was incorporated into the drafting of the Amendment Regulations, there were some suggestions that my officials did not think were practical to include. For example, the Human Rights Commission and Office of the Ombudsman suggested that many of the new provisions should cross-reference the use of force framework that is stated in the Act. I do not consider this necessary because the use of non-lethal weapons is governed by the use of force framework in subpart 4 of the Act, including a clear regulation-making power for non-lethal weapons. Inserting cross-references to some parts of the legislation may also reduce the clarity and accessibility of the regulations themselves.
- 43 The Ombudsman and the Human Rights Commission believe that the Amendment Regulations do not comply with the relevant international standards and obligations, in particular because they continue to permit:
- the use of pepper spray in confined spaces
  - the use of pepper spray against individuals who have been identified as high risk
  - the use of restraints following the deployment of pepper spray.
- 44 I am advised that these changes are not practical to implement in the prison environment and note that prison cells themselves may be a confined space, and pepper spray may need to be used in such locations as it offers the tactical option that is least likely to cause longer term injuries to prisoners and staff compared to other uses of force. I would also note that trained officers in many other comparable jurisdictions are authorised to use pepper spray in the prison environment where necessary. While medical assessments are made prior to a planned use of pepper spray and that is provided for in the Amendment Regulations, corrections officers who spontaneously use pepper spray to manage a volatile situation could not practically have time to seek advice about the potential health impacts on affected prisoners as staff need to make split second decisions about how to lawfully respond to keep prisoners and staff safe.
- 45 In addition, mechanical restraints may be required for a non-compliant prisoner in some situations to protect officers and other prisoners, even after pepper spray has been used on that prisoner.
- 46 Legislative safeguards are provided by the requirement that officers may only use non-lethal weapons when reasonably necessary in the circumstances, and may not use more force than is reasonably necessary.



## Proactive release

- 47 I intend to proactively release a copy of this paper and RIS within the 30 business days timeframe set out by Cabinet. Any information that may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

## Recommendations

I recommend that the Cabinet Legislation Committee:

- 1 **note** that in August 2022 Cabinet approved the release of the discussion document, *Consultation on options to improve rehabilitation, reintegration, and safety outcomes for the corrections system* [SWC-22-MIN-0137 refers];
- 2 **note** that following public consultation and further analysis, in December 2022, Cabinet invited the Minister of Corrections to issue drafting instructions to the Parliamentary Counsel Office to amend the Corrections Regulations 2005 to include information about the procedures that must be followed before, during, and after the use of each type of non-lethal weapon, that helps to ensure that they are used in a way that is compatible with the humane treatment of prisoners [SWC-22-MIN-0244 refers];
- 3 **note** that in March 2023, Cabinet invited the Minister of Corrections to issue drafting instructions to the Parliamentary Counsel Office to amend the Corrections Regulations 2005 to give effect to the decisions below, where Cabinet agreed to [SWC-23-MIN-0009 refers]:
  - 3.1 enable privacy screens and in-cell light switches to be included as the default features in cells for prisoners segregated to assess or ensure their mental health or those undergoing the penalty of cell confinement as the default, with the option to not provide these features where justified for safety reasons;
  - 3.2 support the above decision and give the Department of Corrections and Serco sufficient time to phase in any necessary infrastructure changes across the prison network;
  - 3.3 enable the use of speed cuffs (rigid-bar handcuffs) by specialist officers when general use handcuffs are not practicable when responding to at-height incidents;
  - 3.4 clarify that the Department of Corrections may approve the mixing of young prisoners and adult prisoners only if it is in the best interests of the young prisoner;
  - 3.5 ensure that decisions that determine whether a gender diverse prisoner is accommodated in a men's or women's prison are not based solely on a prisoner's birth certificate;

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- 3.6 ensure that when the Department of Corrections is determining whether a gender diverse prisoner is accommodated in a men's or women's prison, they may consider a prisoner's birth certificate, if the prisoner provides it, alongside other relevant factors;
- 3.7 ensure that when a review occurs under regulation 65C, the Department of Corrections' chief executive must consider the prisoner's birth certificate, if the prisoner provides it, alongside the other factors set out in Regulation 65C(3);

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- 4 **note** that in December 2022 Cabinet authorised the Minister of Corrections to make further decisions on minor and technical matters, including any consequential amendment, in line with the policy decisions agreed by Cabinet [SWC-22-MIN-0244 refers];
- 5 **note** that in March 2023 Cabinet authorised the Minister of Corrections to make further decisions on minor and technical matters, including any consequential amendments, in line with the policy decisions agreed by Cabinet [SWC-23-MIN009 refers];
- 6 **note** that the Corrections Amendment Regulations 2023 will give effect to the decisions above;
- 7 **agree** to reorder the matters listed in Regulation 65C(3) so that the matters fall within four distinct groupings: inputs from the gender diverse prisoner (and the impact on their safety and wellbeing), inputs and advice from staff at the Department of Corrections, the impact on the wider prison population (including prison security), and the impact of the determination on the gender diverse prisoner;

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- 9 **agree** to the Corrections Amendment Regulations 2023;
- 10 **authorise** the submission of the Corrections Amendment Regulations 2023 to the Executive Council;

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- 11 **note** that the Corrections Amendment Regulations 2023 will come into force on 6 July 2023, but that there are provisions for the Regulations relating to privacy screens and in cell lighting to enable the Department of Corrections to phase in the necessary infrastructure changes by July 2028.

Authorised for lodgement

Hon Kelvin Davis

Minister of Corrections

Released under the Official Information Act 1982