

In Confidence

Office of the Minister for Corrections
Cabinet Legislation Committee

Pepper Spray: Corrections Amendment Regulations 2022 Amendment Regulations 2022

Proposal

- 1 This paper seeks authorisation to submit the attached Pepper Spray: Corrections Amendment Regulations 2022 Amendment Regulations 2022 to the Executive Council.

Executive summary

- 2 The Pepper Spray: Corrections Amendment Regulations 2022 (Amendment Regulations) were developed to give effect to decisions Cabinet made on 26 October 2021 [CAB-21-MIN-4030 refers] and were gazetted on Thursday 24 February 2022 following Cabinet's approval of the drafting on Monday 21 February 2022 [CAB-22-MIN-0042 refers]. The Amendment Regulations will come into effect on 1 April 2022.
- 3 On 24 February 2022, following gazettal, a technical error relating to the maximum deployment distance of one pepper spray mechanism was identified in the Amendment Regulations. The Regulations recorded the maximum distance as six metres, when it should be seven metres. This error will prevent Corrections from using the pepper spray delivery mechanism currently issued in prisons for spontaneous use, unless the Amendment Regulations are corrected before they come into effect on 1 April.
- 4 This paper seeks to correct that technical error through the Corrections Amendment Regulations 2022 Amendment Regulations (Amendment Amendment Regulations). This will ensure that the original Amendment Regulations are fit for purpose and Corrections maintains access to pepper spray.

Policy: pepper spray

- 5 Pepper spray is a critical tool that allows corrections officers working in prisons to respond to complex and volatile situations that can arise, and is used as a last resort after de-escalation techniques have been exhausted. Pepper spray significantly minimises the risk of physical injuries more than other tactical options when force is required. It also enables violent situations to be controlled quickly, which further minimises harm to staff and people in prison.
- 6 On 26 October 2021, Cabinet [CAB-21-MIN-0430 refers] approved the policy intent of amending the Corrections Regulations 2005 (the Regulations) by:

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- 6.1 explicitly defining pepper spray delivery mechanisms by adding broad definitions that describe the key characteristics of the devices currently in use (MK-3, MK-9, and MK-9 with extension wand “Cell Buster”) and specify which mechanisms can be used in both spontaneous and planned use of force;
 - 6.2 introducing the requirement that only the prison manager or acting prison manager may:
 - 6.2.1 authorise the planned use of pepper spray, and
 - 6.2.2 authorise trained corrections officers to use pepper spray in spontaneous use of force incidents at the discretion of the corrections officer;
 - 6.3 stating that non-lethal weapons may not be used when that use would represent a use of force that is more than reasonably necessary in the circumstances, in keeping with the Corrections Act 2004.
- 7 Officials worked with the Parliamentary Counsel Office (PCO) to draft the Amendment Regulations. These were approved by Cabinet on 21 February 2022 [CAB-22-MIN-0042 refers] and will come into force on 1 April 2022.

A technical error was later identified due to inconsistent product information

- 8 On Thursday 24 February 2022, while preparing for the *Cripps v Attorney-General* litigation that references pepper spray use, officials noted inconsistencies in the product information provided by our supplier, SABRE, relating to one of the deployment mechanisms that Corrections uses.
- 9 Product information variously states that the maximum distance that pepper spray could be deployed from this mechanism is both six and seven metres. Further research and contact with the supplier on 25 February 2022 confirmed that the maximum distance for this product is seven metres.
- 10 The Regulation in question (123A(2)(a)) describes a deployment mechanism that is the equivalent of the MK-3, which corrections officers carry on their person daily and use to manage spontaneous use of force incidents in prisons. It is a critical tool for staff that assists them in de-escalating volatile situations and keeping themselves safe.
- 11 The Amendment Amendment Regulations will solve this technical error so that the original Amendment Regulations provide a clear regulatory framework to support the safe and lawful use of pepper spray.

Timing and 28-day rule

- 12 I seek to waive the 28-day rule to ensure that the Amendment Amendment Regulations come into effect before 1 April 2022. This will ensure that the Amendment Regulations are correct when they come into effect on 1 April.

Compliance

- 13 The Amended Regulations comply with:

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- 13.1 the principles of the Treaty of Waitangi;
- 13.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;
- 13.3 the principles and guidelines set out in the Privacy Act 2020;
- 13.4 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

Regulations Review Committee

- 14 There are no grounds for the Regulations Review Committee to draw the Amendment Regulations to the attention of the House of Representatives under Standing Order 327.

Certification by Parliamentary Counsel

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

Impact Analysis

- 16 A Regulatory Impact Statement (RIS) was not prepared alongside this Cabinet paper.
- 17 A RIS was developed when policy decisions were sought from Cabinet on 26 October 2021, and was considered by Cabinet when policy approval was given to amend the Regulations [CAB-21-MIN-0430 refers].
- 18 A joint quality assurance panel, chaired by the Ministry of Justice and with members from the Department of Corrections, and New Zealand Police, reviewed that RIS and considered it to **meet** the Quality Assurance criteria.

Publicity

- 19 I do not intend to publicly announce these amendments once they have been enacted.

Proactive release

- 20 I intend to proactively release a copy of this paper under the Official Information Act 1982 with no redactions, and within the 30 business days timeframe set out by Cabinet.

Consultation

- 21 Agencies were consulted on the Amendment Regulations that Cabinet approved on 21 February 2022. This included New Zealand Police, Ministry of Justice, the Office of the Ombudsan, the Human Rights Commission, the Department of Prime Minister and Cabinet, and the Treasury. Their feedback was provided at the time of Cabinet endorsement [CAB-22-MIN-0042].

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- 22 Agencies were not consulted on the Amendment Amendment Regulations. This is because these amendments seek to resolve a technical error and do not represent a new policy that requires further consultation.

Recommendations

I recommend that Cabinet Legislation Committee:

- 1 **note** that on 26 October 2021, Cabinet agreed to amend Regulations relating to pepper spray;
- 2 **note** that on 21 February, Cabinet agreed to the Corrections Amendment Regulations 2022 and that they will come into effect on 1 April 2022;
- 3 **note** that the Corrections Amendment Regulations 2022 Amendment Regulations 2022 will give effect to the decisions referred to in paragraphs 1;
- 4 **authorise** the submission to the Executive Council of the Corrections Amendment Regulations 2022 Amendment Regulations 2022;
- 5 **agree** to waive the 28-day gazette period so that the Corrections Amendment Regulations 2022 Amendment Regulations 2022 will enter into force before 1 April 2022.

Authorised for lodgement

Hon Kelvin Davis
Minister for Corrections