

In Confidence

Office of the Minister for Corrections  
Cabinet Legislation Committee

## **Pepper Spray and Mail Copying: Corrections Amendment Regulations 2022**

### **Proposal**

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

### **Executive summary**

- 2 The Pepper Spray and Mail Copying: Corrections Amendment Regulations 2022 (Amendment Regulations) were developed to give effect to two sets of policy decisions that Cabinet has previously agreed to. This will ensure the Corrections Regulations 2005 remain fit for purpose to support the efficient and safe operation of prisons.

### ***Policy: pepper spray***

- 3 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 needed. It also enables violent situations to be controlled quickly, which further minimises harm to staff and people in prison.
- 4 On 26 October 2021, Cabinet [CAB-21-MIN-0430 refers] approved the policy intent of amending the Corrections Regulations 2005 (the Regulations) by:
  - 4.1 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;
  - 4.2 introducing the requirement that only the prison manager or acting prison manager may:
    - 4.2.1 authorise the planned use of pepper spray, and
    - 4.2.2 authorise trained corrections officers to use pepper spray in spontaneous use of force incidents at the discretion of the corrections officer;
  - 4.3 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.

*Policy: mail copying*

- 5 For people in prison, sending and receiving mail is a crucial way to maintain relationships with their friends, whānau, and the wider community. However, mail can also be used to distribute harmful material. Each week, the Department of Corrections (Corrections) has to identify and withhold harmful material from amongst 15,000 items of mail. In order to do this effectively, it is important that Corrections is enabled by the Regulations to make timely decisions around withholding mail that may, for example, contain harmful content, prejudice the maintenance of the law, or pose a threat to the security of the prison. The current Regulations prevent Corrections from copying prisoner mail to provide it to trained staff to evaluate the content at centralised location.
- 6 On 9 March 2020, Cabinet [CAB-20-MIN-0074 refers] approved the policy intent of amending the Regulations by:
  - 6.1 amending regulation 84 to support the powers and duties in the Act (including reading, disclosing and withholding mail), to comply with other enactments and rules of law, and to copy mail with the consent of the person in Ara Poutama Aotearoa's management in prison, which will allow copying where:
    - 6.1.1 the correspondence is between the person in Ara Poutama Aotearoa's management and Ara Poutama Aotearoa (which is already permitted in the Regulations);
    - 6.1.2 in order for an authorised person to read an item of correspondence in a copied form (under section 107 of the Act);
    - 6.1.3 in order to disclose information obtained from correspondence (under section 110A);
    - 6.1.4 in order to obtain legal advice to determine whether:
      - 6.1.4.1 there are sufficient grounds to withhold correspondence under section 108(1)
      - 6.1.4.2 whether correspondence that is withheld under section 108(1) should be forwarded to an enforcement officer under section 108(2);
      - 6.1.4.3 whether mail can be disclosed for another purpose set out in the Act (including where there is a serious and imminent threat to public health and safety, where necessary for court proceedings, where authorised by the privacy commissioner, or to avoid prejudice to the maintenance of law by a public sector agency – under section 110A(c));
      - 6.1.4.4 to comply with another enactment or rule of law (section 110A(c));

## IN CONFIDENCE

6.1.4.5 where the person in Ara Poutama Aotearoa's care consents to a copy being made; and

6.2 requiring that any copies are destroyed once their purpose has been served (if there is no other applicable purpose).

### **Timing and 28-day rule**

7 The Amendment Regulations comply with the 28-day rule and will come into force on 25 March 2022.

### **Compliance**

8 The Amended Regulations comply with:

8.1 the principles of the Treaty of Waitangi;

8.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 or the Human Rights Act 1993;

8.3 the principles and guidelines set out in the Privacy Act 2020;

8.4 the Legislation Guidelines (2018 edition), which are maintained by the Legislation Design and Advisory Committee.

9 I have had mixed feedback regarding compliance with international standards and obligations around the use of pepper spray in passive resistance or confined spaces. It is my view that Corrections is able to manage and mitigate the risks involved with pepper spray use in such instances, and that staff do all they can to de-escalate incidents without force or using pepper spray where possible.

10 When I was briefed on these proposed amendments in 2021, officials provided me with information on the benefits, risks and mitigations of pepper spray use. I am satisfied of the matters as set out in s 85(3) of the Act. It is my view that staff require access to a full spectrum of tools to respond when volatile situations arise that will minimise harm to staff and prisoners. I am also satisfied that robust training on the use of de-escalation tools as well as when to use force mitigates risks where pepper spray is used.

### **Regulations Review Committee**

11 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**

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

IN CONFIDENCE

### **Impact Analysis**

- 13 A Regulatory Impact Statement (RIS) was not prepared alongside this Cabinet paper.
- 14 A RIS was developed for pepper spray 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].
- 15 A joint quality assurance panel, chaired by the Ministry of Justice and with members from the Department of Corrections, and New Zealand Police, reviewed this pepper spray RIS and considered it to **meet** the Quality Assurance criteria.
- 16 A RIS was not prepared on mail copying, as the Regulatory Quality Team at Treasury determined that an exemption was suitable on the grounds that these amendments have no or only minor impacts on businesses, individuals, or not-for-profit entities.

### **Publicity**

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

### **Proactive release**

- 18 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**

- 19 Agencies consulted on the pepper spray amendments include: New Zealand Police, Ministry of Justice, The Department of Prime Minister and Cabinet, and the Treasury. They provided no comments on this paper.
- 20 For pepper spray, these, and other agencies, alongside some targeted Māori interest groups, were consulted when I originally sought policy approval for these amendments. Their feedback was provided to Cabinet at the time of endorsement [CAB-21-MIN-0430].
- 21 The Chief Ombudsman wants it to be noted that his previous feedback was only summarised and it did not adequately reflect his concerns. He is of the view that the proposed regulations may be in breach of New Zealand's international human rights obligations.
- 22 The Human Rights Commission continues to oppose the use of pepper spray in cases of passive resistance in line with international human rights guidance. The Commission also recently published Dr Sharon Shalev's recent report on women's prisons in Aotearoa New Zealand, "First do no Harm: Segregation, Restraint and Pepper Spray use in women's prisons in New Zealand," which calls for an end to the use of pepper spray in women's prisons.
- 23 I consider that the feedback received from the Chief Ombudsman and Human Rights Commission relates to changes being made to operational practice, as opposed to the regulatory framework. The regulatory amendments I propose will provide a stronger

**IN CONFIDENCE**

foundation for supporting staff to use pepper spray in a way that is safe and lawful and complies with international human rights guidance.

- 24 Overall the changes will address issues raised by stakeholders about the need for higher levels of assurance around the authorisation of pepper spray delivery mechanisms. Importantly, the amendments promote transparency by clarifying what pepper spray delivery mechanisms are permitted to be used for different scenarios. This includes, for example, the delivery mechanism to be used in a prison cell prior to staff entry, which is the MK-9, Cell Buster. Cabinet approval will be needed for new mechanisms in the future, better ensuring robust consideration that any changes to the delivery mechanisms Corrections officers use will comply with human rights guidance to minimise and manage the physical impacts. Improved clarity in the regulation amendments about the use of non-lethal weapons being used only when reasonably necessary supports better practice in cases of passive resistance.
- 25 Corrections is aware of the dangers of pepper spray use, and staff are trained regularly on the importance of communication and de-escalation tactics as an alternative to a use of force. Force and pepper spray are only used as a last resort when staff are unable to resolve a situation using other means. Where it is used for passive resistance it must be reasonably necessary in the circumstances. Corrections has replied to the Human Rights Commission about Dr Shalev's recent report noting that much change has taken place since the events and data used in that report. In a custodial environment, where violence occurs on a daily basis, it is critical that staff have the confidence to use tools to de-escalate situations without the need for physical contact. Where pepper spray is used, Corrections data shows that pepper spray reduces the injury rate among staff and people in prison when a use of force is required.
- 26 Agencies consulted on the copying amendments included: NZ Police, Ministry of Justice, Department of Prime Minister and Cabinet, and Treasury. They provided no comments on this paper.

**IN CONFIDENCE**

**Recommendations**

I recommend that Cabinet Legislation Committee:

- 1 **note** that on 26 October 2021, Cabinet agreed to the development of Regulations relating to pepper spray;
- 2 **note** that on 9 March 2020, Cabinet agreed to the development of Regulations relating to mail copying;
- 3 **note** that the Corrections Amendment Regulations 2022 will give effect to the decisions referred to in paragraphs 1 and 2 above;
- 4 **authorise** the submission to the Executive Council of the Corrections Amendment Regulations 2022;
- 5 **note** that the Corrections Amendment Regulations 2022 come into force on 25 March 2022.

Authorised for lodgement

Hon Kelvin Davis  
Minister for Corrections