



To: Hon Kelvin Davis, Minister of Corrections

## Proposed legislative amendment to section 139 of the Corrections Act 2004

Date	6 April 2020	Decision needed by	8 April 2020
B number	B4011	Priority	High

### Recommendations

**Agree** to progress a legislative proposal to amend section 139 of the Corrections Act 2004, to allow Visiting Justices to conduct hearings and appeals of offences against discipline by telephone conference when a video link or in person hearing is impracticable. This procedural change will only apply whenever an Epidemic Notice is in force.

**Note** that, subject to Cabinet approval, this legislative proposal is likely to be included in an Omnibus Bill, which will include a number of otherwise unrelated urgent legislative changes that stem from the impact of COVID-19.

**Note** that a Cabinet paper is likely to be jointly developed by multiple Ministers to progress the legislative proposals to be included in the Omnibus Bill.

**Note** that there is likely to be a shortened period of Ministerial consultation for the joint Cabinet paper, to account for the need to progress these legislative amendments urgently.

### 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
Jeremy Lightfoot	Chief Executive	s9(2)(a)	<input checked="" type="checkbox"/>
Emma MacDonald	General Manager Policy		<input type="checkbox"/>
s9(2)(a)	Senior Policy Adviser		<input type="checkbox"/>

## Key messages

- When a prisoner's conduct constitutes an alleged offence against discipline, charges can be laid and heard by a Visiting Justice in accordance with the Corrections Act 2004 (the Act) through a face-to-face hearing or by video link.
- A legislative amendment is proposed to enable Visiting Justices to hear disciplinary charges by telephone conference during the COVID-19 epidemic (the epidemic), and any future epidemics. The amendment would only apply each time an Epidemic Notice is in force. This legislative amendment would be included in the next COVID-19 Omnibus Bill.
- To ensure that visits or video links are always the first resort, the proposed legislative amendment will include a requirement to use visits or video links whenever practicable.
- This amendment is necessary because it will not always be possible for Visiting Justices to carry out face-to-face or video link hearings during an epidemic.
- In the absence of the proposed legislative amendment, some hearings will need to be delayed until a Visiting Justice is able to hear disciplinary charges by video link or in person.

## Proposal

- 1 This paper seeks your approval for a legislative proposal to allow Visiting Justices to conduct hearings by telephone conference during epidemics. The proposed legislative amendment will only apply each time an Epidemic Notice is in force.
- 2 The proposed legislative change needs to be progressed urgently due to the impact of the Alert Level Four restrictions.

## Background: Visiting Justices conduct hearings for disciplinary charges

- 3 Visiting Justices are Barristers and Solicitors or Justices of the Peace who have a quasi-judicial role within the corrections system.<sup>1</sup> A central function of a Visiting Justice is to conduct hearings when a prisoner is charged with a disciplinary offence. Visiting Justices are appointed by the Minister of Justice for a three-year term and are entirely independent from Corrections.
- 4 Disciplinary charges can be laid in a range of circumstances, such as fights, use of alcohol or other drugs, damage to property, and obstructing custodial staff in the course of their duties. No criminal conviction results from disciplinary offences, but penalties can be imposed such as confinement to their cell, loss of privileges, or forfeiture of earnings. Serious matters are referred to the Police for criminal charges to be laid instead of being dealt with by a Visiting Justice.
- 5 The legislation sets out a hierarchy of responses to disciplinary offences, to the effect that:
  - minor infractions should be dealt with between custodial staff and the prisoner (i.e. through a request to stop the alleged behaviour);
  - minor disciplinary offences are dealt with by a hearing adjudicator (i.e. a staff member delegated that role by the Chief Executive of Corrections);

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<sup>1</sup> A District Court Judge can also carry out this function.

- any penalty imposed by a hearing adjudicator is suspended if the prisoner appeals, until a Visiting Justice confirms or discharges the penalty;
- any offending that could result in a higher penalty, or that involves complex issues, is heard by a Visiting Justice, along with any appeal of an adjudicator's decision; and
- serious matters should be dealt with by Police instead of the disciplinary offence process.

**Issue: an urgent legislative amendment is required because in person or video link hearings are not always feasible**

- 6 Visiting Justices must hear matters in person or by video link, but this requirement is not always feasible during the COVID-19 epidemic because:
- Visiting Justices cannot always travel to prisons due to COVID-19 transmission risks, and even when they can travel to prisons it is wise to minimise unnecessary physical contact;
  - online communication platforms are not always able to be used in prisons, and may not always be sufficiently secure in a hearing context; and
  - some Visiting Justices have pre-existing conditions or are in high-risk categories and cannot travel to a site with a justice sector audio-visual link.

*Proposed solution: enable matters to be heard by telephone conference*

- 7 To address this issue, a legislative amendment is proposed for section 139 of the Act, to allow charges to be heard by telephone conference whenever an Epidemic Notice is in force. This would be accompanied by a requirement for hearings to occur via video link or in person whenever practicable.
- 8 This amendment will provide flexibility for Visiting Justices to allow for the hearing of charges via telephone conference when they consider this to be appropriate, while ensuring continued use of video links.

*An Omnibus Bill allows legislative changes to a number of different statutes*

- 9 We propose that this legislative amendment is achieved through the next Omnibus Bill that the government is preparing, to address urgent COVID-19 matters.
- 10 Legislation can be progressed through an Omnibus Bill that covers a diverse range of topics where separate amendments to multiple statutes are required. This issue is likely to meet the criteria for inclusion in this Bill, subject to Cabinet approval.

*Why is it important that hearings take place in a timely manner?*

- 11 Disciplinary offences involve complex rights-based considerations, and decisions need to be made appropriately and with sufficient independence where higher level penalties are imposed.
- 12 Prisoners, and other interested parties, need certainty around whether an offence has occurred, and the nature and scale of the penalty that will be imposed. Without the proposed change, there is a risk that hearings will not proceed in a timely fashion. Ultimately, the concern is that prisons may lose the ability to maintain order through the deterrent effect of penalties during a particularly complex time.

- 13 An important part of the legislative purpose of the corrections system is to ensure public safety by ensuring that sentences are administered in a safe, secure and effective manner. s9(2)(g)(i)

### **Human rights considerations apply to the proposed legislative change**

- 14 Natural justice may be impacted by the proposal given that the proposal will result in a change of hearing procedure in some circumstances. However, all other procedural requirements in the Act will continue to apply, including the right to cross-examine witnesses.
- 15 We anticipate that a reasonably significant volume of hearings will still proceed by video link and that these hearings can be prioritised for people who require a visual format, such as people with disabilities. Additionally, Visiting Justices:
- will need to consider natural justice issues in deciding whether to proceed with a telephone conference; and
  - can approve a request from a prisoner to have legal representation at the hearing.

### **Consultation with Visiting Justices**

- 16 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 when practicable during the Alert Level Four. 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.

### **Next steps**

- 17 Subject to your approval, once the expected content of the COVID-19 Omnibus Bill is confirmed, a joint Cabinet paper will be developed to cover the entirety of the Bill and promptly circulated for a very short period of agency consultation.
- 18 This is likely to be followed by a shortened period of Ministerial consultation, due to the timeframes for an urgent Omnibus Bill.
- 19 Once legislative proposals have been approved by Ministers and Cabinet, the Omnibus Bill is likely to be drafted quickly, and then proceed through Cabinet and parliamentary stages immediately.
- 20 Officials can provide further advice when we have more certainty around the timeframes for this process.

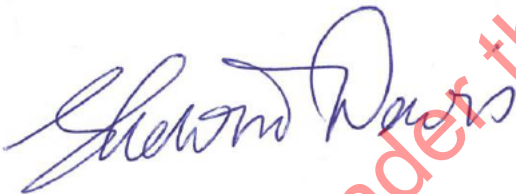
**Recommendations**

21 It is recommended that you:

- a) **Agree** to progress a legislative proposal to amend section 139 of the Corrections Act 2004, to allow Visiting Justices to conduct hearings and appeals of offences against discipline by telephone conference when a video link or in person hearing is impracticable. This procedural change will only apply whenever an Epidemic Notice is in force. **YES/NO**
  
- b) **Note** that, subject to Cabinet approval, this legislative proposal is likely to be included in an Omnibus Bill, which will include a number of otherwise unrelated urgent legislative changes that stem from the impact of COVID-19. **YES/NO**
  
- c) **Note** that a Cabinet paper is likely to be jointly developed by multiple Ministers to progress the legislative proposals to be included in the Omnibus Bill. **YES/NO**
  
- d) **Note** that there is likely to be a shortened period of Ministerial consultation for the joint Cabinet paper, to account for the need to progress these legislative amendments urgently. **YES/NO**



Jeremy Lightfoot  
Chief Executive



Hon Kelvin Davis  
**Minister of Corrections**

Date signed:  
08 / 04 / 2020

Minister's comments



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