

# Impact Assessment: Enhancing the Legislative Framework of the Corrections System

## Section 1: General information

<b>Purpose</b>
<p>The Department of Corrections is solely responsible for the analysis and advice set out in this Regulatory Impact Assessment, except as otherwise explicitly indicated.</p> <p>This analysis and advice was developed in February 2018 for the purpose of informing key policy decisions to be taken by Cabinet.</p> <p>It has been updated in June 2019 following the Justice Committee hearings to incorporate further analysis and information from submitters and officials. This includes the addition of three new proposals, (F), (N) and (S), and some changes to proposals (A), (B), (E), (L), (O), and (P).</p>
<b>Key Limitations or Constraints on Analysis</b>
<p>Several of the amendments are required because legal clarity is needed or there is a legal risk resulting from the current legislation. The degree of legal risk, and the potential outcome from a successful challenge, is difficult to quantify. Because of this uncertainty, the Department has decided to err on the side of caution when assessing the appropriate option to address the relevant issues.</p> <p>Other issues identified below are the result of anecdotal evidence rather than verified data. Again, this makes it difficult to assess the size of the issue, and therefore a proportionate response.</p>
<b>Responsible Manager</b>
<p>Eamon Coulter General Manager - Policy Department of Corrections July 2019</p>

## Section 2: General problem definition and objectives

### 2.1 What is the overall policy problem or opportunity?

The Corrections Act 2004 (the Act) establishes New Zealand's corrections system which the Department of Corrections (the Department) is responsible for administering. The Act specifies the:

- purpose of the corrections system and the principles guiding the corrections system;
- roles and responsibilities of all key personal in the corrections system;
- rules for operating prisons and community work centres;
- coercive powers prison officers can use;
- types of offences that may be committed by prisoners and the associated penalties; and
- mechanisms to ensure that those responsible for managing the corrections system can be held accountable for their actions.

The Act includes a power to make regulations to further ensure the good management of the corrections system and safe custody of prisoners. The Corrections Regulations 2005 (the Regulations) consequently sets out, in more detail than the Act, how the corrections system should operate.

While it provides a sound framework, several amendments are desirable to improve the corrections system because:

- the Act has lagged behind operational best practice or technology advances;
- gaps in the Act have been identified; and
- further legal clarity is needed.

Overall, the proposed provisions relate to the safe and humane management of prisoners, prisoner discipline and prison safety, and the fair treatment of persons.

### 2.2 Who is affected and how?

Overall, the proposed provisions are expected to change behaviour of prisoners and corrections staff responsible for the treatment of prisoners. Other provisions formalise in legislation current operational process or procedures, and therefore in practice, behaviour may not change substantially. The amendments are expected to better assist the Department in the safe and humane management of prisoners, as well as improving prisoner discipline and prison safety.

### 2.3 Are there any constraints on the scope for decision making?

The amendments reflect the outcomes of a broad review of the Corrections Act, rather than a particular issue that has arisen recently. In that sense, the scope has been wide. However, as the Corrections Act relates to the treatment of people in detention, it is particularly important to consider the Bill of Rights, Treaty of Waitangi, and privacy implications of any amendments.

### 2.4 What are the individual decisions that need to be taken?

Nineteen issues with the legislative framework have been identified as presenting barriers to the optimal running of the corrections system. The issues listed below are independent of each other and therefore decisions can be taken separately.

#### **Safe and humane management of prisoners**

- A) Management and care of prisoners vulnerable to self-harm
- B) Use of mechanical restraints on prisoners being treated in hospital

- C) Chains and irons as a form of restraint
- D) Authority and safeguards for the use of cell sharing
- E) Delegation of a health centre manager's powers and functions
- F) Strip searching of prisoners returning from escorted outings

**Prisoner discipline and prison safety**

- G) Tattooing in prison
- H) Prisoner letters that would defy a court order
- I) Prisoners' use of psychoactive substances
- J) Prisoners' management plans
- K) Contact between detector dogs and those being searched
- L) Use of Police jails to respond to accommodation pressures
- M) Use of imaging technology to detect unauthorised items
- N) Search powers to detect unauthorised items

**Fair treatment of persons**

- O) Prisoner knowledge of disciplinary offences
- P) Right to have a decision relating to mother and baby placement reconsidered
- Q) Prisoners' expectations of conditions or opportunities
- R) Charging regime for the cost of telephone calls
- S) Disclosure of phone call recordings

**2.5 Who was consulted?**

The Ministry of Justice, Ministry of Social Development, Ministry of Health, Ministry for Women, Oranga Tamariki - Ministry for Children, The Treasury, New Zealand Police, The Office for Disability Issues, and Te Puni Kōkiri were consulted.

The Human Rights Commission and the Office of the Ombudsman were consulted on all provisions. The Privacy Commissioner was consulted on provisions relating to imaging technology, search powers, disclosure of phone call recordings, and strip searching provisions.

# Section 3: Analysis

## (A) Management and care of prisoners vulnerable to self-harm

### A.1: What is the policy problem or opportunity?

#### Background

Section 60 of the Act allows the prison manager to issue segregation directions for prisoners who require medical oversight. This means that their association with other prisoners is restricted or denied in order to assess or ensure the prisoner’s physical or mental health.

Prisoners who are vulnerable to self-harm often have complex mental health needs, meaning they are not able to be housed in a mainstream unit for lengthy periods. Therefore prisoners who are vulnerable to self-harm are expressly included in section 60(1)(b) as prisoners who may be segregated to assess or ensure their mental health.

Segregation under the Act triggers the application of legislative provisions, which are designed to protect and ensure the safety of vulnerable to prisoners. These requirements include, among other things, placement in a cell designated for prisoners vulnerable to self-harm, a report from the health centre manager within 24 hours, mandatory strip searches, and visits from registered health professionals.

Prison managers are only able to make, and revoke, a segregation direction for medical oversight on the recommendation of the prison’s health centre manager.

In practical terms, the management of prisoners vulnerable to self-harm typically sees them placed in an Intervention and Support Unit (ISU). These units are physically designed to limit opportunities to engage in self-harm and, in line with the legislative framework, limits a prisoner’s ability to associate with other prisoners where necessary.

#### Problems

The current legislative regime is inadequate to properly safeguard the best interests of prisoners vulnerable to self-harm for three primary reasons.

Firstly, the Act emphasises the placement of prisoners vulnerable to self-harm in segregation as the standardised response. The Act is also silent on important elements of the care of prisoners once in segregation, which could be inferred as segregation alone is a sufficient response to ensure the safe custody and welfare of prisoners vulnerable to self-harm.

In reality the Department is improving the operation of ISUs by addressing the reasons why they want to harm themselves, recognising differences in the nature and severity of an individual’s risk, and responding to changes in risk level over time. These improved practices are not reflected in the current requirements in the Act.

Secondly, the Act requires mandatory strip searching every time a segregated prisoner enters the segregation area for the purpose of detecting and removing items that may be used to self harm. However, strip searching can be distressing, particularly if a person has an existing mental health issue or are a victim of sexual violence. As risk is a continuum, this standardised approach may lead to some prisoners being strip searched multiple times per day even though their individual risk does not warrant such requirements.

Thirdly, the formality of the segregation process means that it is not conducive to taking prompt action to assess and mitigate the risk of self-harm.

[Redacted]

A High Court case in 2014 determined that the Department had breached the segregation provisions in the Act by subjecting a prisoner to a regime of non-association with other prisoners in an ISU.<sup>1</sup>

<sup>1</sup> *Toia v Prison Manager, Auckland Prison* [2014] NZHC 867 [30 April 2014].

## **A.2: What options have been considered?**

Three options have been considered with the objective to improve the safe custody and welfare of prisoners vulnerable to self-harm.

### **i) Improve compliance with operational procedures**

The only non-regulatory option considered was to retain the current statutory provisions but with enhanced compliance. The current legislation does not prevent the Department from implementing an improved approach to ISUs so better compliance with operational procedures may be an adequate response to some of the issues identified.

However, this option would not resolve all barriers to achieving better management of prisoners vulnerable to self-harm. Strip searching would still be required even if an individual's risk did not warrant such an approach. The Department would also still be open to legal challenge in instances where segregation occurred before a formal segregation direction was sought because of an immediate risk to a prisoner.

### **ii) Develop a statutory segregation regime specifically for vulnerable prisoners**

The development of a separate segregation regime for prisoners vulnerable to self-harm would reduce the Department's legal risk as it would create new procedural requirements which are better fitted for the treatment of prisoners.

However, this option would continue the current assumption that the management of vulnerable prisoners must involve segregation, rather than a tailored approach to the specific risk of each prisoner.

### **iii) Develop a comprehensive legislative framework for the management of vulnerable prisoners outside the segregation regime**

The development of a new, comprehensive legislative framework will promote best practice in the management of vulnerable prisoners by mandating a planned, multi-disciplinary approach. It will also recognise that it is sometimes necessary to restrict or deny a vulnerable prisoner's opportunities to associate with other prisoners. The new framework would reduce the legal risk by better specifying safeguards, including requirements relating to the prisoner's assessment, observation, personal searches, development of an at risk plan, and time for review of their risk status.

While non-association with other prisoners in an ISU may be one placement option as part of wider approach to managing a prisoner vulnerable to self-harm, this will be included in the new framework, rather than as part of the existing segregation settings.

## **A.3: Which of these options is the proposed approach?**

The preferred option is the development of a comprehensive legislative framework for the management of prisoners vulnerable to self-harm outside the segregation regime. This would involve removing the current provisions for the segregation of vulnerable prisoners.

This framework would prescribe in more detail the procedures for managing vulnerable prisoners. Ultimately this will include requirements for: assessing the risk of self-harm; initial placement and supervision of vulnerable prisoners; confirming an at risk prisoner assessment; the establishment and content of an at risk management plan; and revoking an at risk assessment.

To support a more individualised approach to prisoner searches, the at risk management plan must include the strip search requirements for each individual. The Department is moving towards a more individualised, therapeutic approach that utilises multidisciplinary panels and practices. Therefore an individual's history, circumstances and risks can be considered when developing search requirements as part of their at risk management plans. Ultimately, that would lead to better decision making that balances the potential impact and distress of strip searches, against the risks associated with introducing items that can facilitate self harm, for each person, rather than applying a blanket mandatory requirement.

Removing vulnerable prisoners from the segregation provisions would remove the need for a

segregation declaration to be sought. This option therefore removes the legal risk the Department faced from segregating a vulnerable prisoner before a declaration can be sought.

Although a legislative requirement does not guarantee compliance at an operational level, including the process and procedures in legislation would add greater accountability for the Department to provide the best management possible, rather than relying solely on operational practice.

#### **A.4: What other impacts is this approach likely to have?**

The main risk is striking the right balance between legal clarity and providing sufficient flexibility for staff to react to a wide range of scenarios that involve vulnerable prisoners. Every situation has its own unique circumstances so careful drafting of legislation is needed to ensure the benefits of the proposed changes are maximised.

**(B) Use of mechanical restraints on prisoners being treated in hospital**

**B.1: What is the policy problem or opportunity?**

**Background**

Prisoners can be removed to hospitals to receive medical treatment that is not available in prison. As hospitals are not a secure environment, there may be a risk of escape and a risk to public safety in these circumstances. These risks are mitigated by the presence of an appropriate number of officers and having the prisoner waist restrained while being escorted and then appropriately handcuffed to an officer. However, not all prisoners are restrained during their hospital visit. For example, the Prison Operations Manual explicitly states that no mechanical restraints can be used on prisoners escorted to hospital to give birth.

The Regulation outlines the instances and requirements for use of restraints. It explicitly states that handcuffs and waist restraints may be used by an officer for the purpose of escorting a prisoner outside of a prison.

However, Section 87(5) of the Act provides that a prison manager may authorise the use of a mechanical restraint on a prisoner for more than 24 hours only if, in the opinion of a medical officer, continued restraint is necessary to protect the prisoner from self-harm.

**Problems**

As currently drafted, it is unclear whether the Act authorises the restraint of these prisoners for hospital stays longer than 24 hours. 9(2)(g)(i)

**B.2: What options have been considered?**

Only one option has been considered with the objective to provide legal clarity as to the use of restraint for hospital stays longer than 24 hours, if it is necessary to maintain public safety or prevent the escape of prisoners.

The option is to amend the Corrections Act to exclude the 24 hour time limit from applying to the use of mechanical restraints on prisoners who have been temporarily removed to a hospital for treatment.

**B.3: Which of these options is the proposed approach?**

This option would remove the legal ambiguity by clarifying that restraints can only be used for more than 24 hours during hospital visits if it is necessary to maintain public safety or prevent escape. It would also provide an avenue to ensure longer restraint of prisoners is consistent with humane and safe treatment.

This approach will mean that prisoners who are assessed by prisoner staff as having a high risk of escape and harm can be restrained by handcuffs for their entire hospital stay.

**B.4: What other impacts is this approach likely to have?**

There are risks to continuing mechanical restraints for extended periods, such as the risk of infection and pressure sores. Schedule 5 of the Regulations already provides protections by requiring the escorting officer to take into account the advice of the treating medical practitioner, and implement any measures that are reasonably necessary to ensure the restraint does not adversely affect the health and comfort of the prisoner. The restraint must also be removed if necessary to allow the prisoner to receive medical treatment.

**(C) Chains and irons as a form of restraint**

**C.1: What is the policy problem or opportunity?**

**Background**

The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules) state that “the use of chains, irons or other instruments of restraint which are inherently degrading or painful shall be prohibited”. The Standard Minimum Rules do not define “chains and irons”, but do make it clear that handcuffs are acceptable.

The Department fully meets the requirements of the Standard Minimum Rules with regard to mechanical restraints.

Nevertheless, the Act does not impose a total ban on chains and irons. Rather, section 87(6) stipulates that chains and irons may not be attached to a prisoner’s neck or torso in any circumstances, or to the legs of a prisoner unless “for medical reasons, any other form of restraint would be impractical.” There is no definition of “chains and irons” in the Act.

**Problem**

While the provision in the Act has not been the subject of criticism from any international body, it is not ideal to have a provision which appears to be inconsistent with the Standard Minimum Rules. In addition, it is possible that the section could be misinterpreted as allowing chains and irons other than handcuffs to be used around the arms and wrists of the prisoner, or around their ankles, on medical advice.

**C.2: What options have been considered?**

Two alternative options have been considered with the objective of removing legal ambiguity.

**i) Repeal section 87(6) in its entirety**

Removal of the section in its entirety would address the risk that currently authorised restraints could be held to be in breach of the section, and would ensure that there is flexibility for introducing new restraints.

**ii) Amend section 87(6) to expressly prohibit the use of chains and irons in prisons**

This option would make it explicit that the Department does not intend to use any mechanical restraint on prisoners that could be classified as chains or irons. It would also avoid any interpretation that chains and irons are permissible in some circumstances, while continuing to permit the use of mechanical restraints already authorised for use, such as handcuffs.

This option would ensure consistency with the Standard Minimum Rules.

**C.3: Which of these options is the proposed approach?**

The recommended approach is to amend the Act to make it explicit that no mechanical restraint that could be classified as chains or irons, other than handcuffs, may be authorised for use on a prisoner. This would make it clear that the Act is consistent with the Standard Minimum Rules in this regard, and avoid possible misinterpretation leading to the use of chains and irons.

**C.4: What other impacts is this approach likely to have?**

As the Department does not use chains or irons as restraints, in reality, there will be no change in behaviour. Therefore there are unlikely to be any risks in undertaking the preferred approach.



**(D) Authority and safeguards for the use of cell sharing**

**D.1: What is the policy problem or opportunity?**

**Background**

Shared cell accommodation has a long history in New Zealand. Prisoners are either housed in single cells, double cells or in rooms in self-care units. Rooms in self-care units hold one prisoner per room, while cells can be single or double accommodation. Approximately 40 percent of prisoners are held in shared cells.

Regulation 66 of the Regulations provides the legislative authority for cell sharing. It states that, as far as practicable in the circumstances, prisoners must be accommodated in individual cells. However, it goes on to provide a number of exceptions:

- the use of shared cells is permitted if it will facilitate the management of a prisoner or is necessary because of an emergency of any kind; or
- the use of shared cells is permitted if a single cell is not reasonably available *and* the accommodation of the prisoner in a shared cell is in accordance with chief executive’s instructions; and
- the prohibition on cell sharing does not apply to a cell that is designed and equipped to accommodate the number of prisoners to be accommodated in it.

Shared cell accommodation is an operational necessity and is commonly used internationally. While it is recognised that single cell occupancy accommodation can be preferable<sup>2</sup>, research completed by the Department has shown that cell sharing is acceptable if properly managed<sup>3</sup> and the Department needs to continue its use within appropriate confines.

**Problem**

While the Regulations provide the legislative authority for cell sharing, there are some inconsistencies between the Act, Regulations and operational instructions issued by the Chief Executive of Corrections. That, in turn, may expose the Department to legal challenges to current practice.

9(2)(g)(i)

While the Department considers that cell sharing, as currently implemented in New Zealand, is consistent with domestic law and international obligations, litigation against the Department could be costly for the Crown. In the worst case scenario, a challenge to current practice could result in a court decision requiring the Department to reduce its use of cell sharing, which would increase the pressure on available accommodation and impose substantial costs on the Crown.

**D.2: What options have been considered?**

Three alternative options have been considered with the objective to better align the legislative provisions and remove the legal ambiguity.

<sup>2</sup> For example see Molleman, T and van Ginnekan, E F J C A *multilevel analysis of the relationship between cell sharing, staff-prisoner relationships, and prisoners’ perceptions of prison quality*, International Journal of Offender Therapy and Comparative Criminology, 11 March 2014.

<sup>3</sup> *Prisoner double-bunking: perceptions and impacts*, Department of Corrections, April 2012.

**i) Amend the Act to remove the explicit recognition of the Standard Minimum Rules**

Amending the Act to remove explicit recognition of the Standard Minimum Rules would imply an intention to depart from the standards more broadly. This does not reflect the Department's intention or practice.

**ii) Include a provision authorising cell sharing in the Act**

Including a provision authorising cell sharing in the Act would provide specific authority for the use of shared cells. It would state that, subject to any restrictions set out in the Act or Regulations, prisoners detained in a corrections prison may be held in individual cells, shared cells or self-care units. This would reduce the legal risk because the authority would be in primary legislation, however the appropriateness of prisoners and cells for cell sharing would remain reliant on the chief executive's instructions issues in 2010.

**iii) Amend the Regulations to no longer state a general preference for single cell accommodation**

The Regulations could be amended so that they no longer express a general preference for accommodation in individual cells, but instead state specifications for the use of shared cells, such as a prisoner suitability assessment, and health and safety requirements for those in shared cells. While this option would provide greater certainty as to the appropriateness of prisoners and cells for cell sharing, it would not fully address the legal risk.

**D.3: Which of these options is the proposed approach?**

A combination of options ii) and iii) is recommended. Therefore the Act would be amended to include a provision stating that, subject to any restrictions set out in the Act or Regulations, prisoners detained in a corrections prison may be held in individual cells, shared cells or self-care units. The Regulations would be amended so that they no longer express a general preference for accommodation in individual cells but instead state the specifications for the use of shared cells, such as prisoner suitability assessment, and health and safety requirements for those in shared cells.

The proposal would better align the legislative provisions and make it more difficult to substantiate a claim that cell sharing is inconsistent with the Act, based on alleged incompatibility with broadly-phrased provisions in the Act's purposes and principles sections or in the regulation-making power.

The proposed option would strengthen requirements for prisoners to be held in humane conditions by elevating safeguards regarding a prisoner's suitability and requirements for shared cells in Regulations. Although the proposed option removes the reference in the Regulations that individual cells are preferred, there are already a broad range of exemptions to this preference currently provided in Regulations which allows the use of shared cells to be determined by operational instructions issued by the Chief Executive. Therefore amending the Regulation to make it explicitly clear of the health and safety requirements for those in shared cells, and that prisoner who is assessed as unsuited for a shared cell must be accommodated in an individual cell, provides a more robust guarantee of humane detention.

Specifically the safeguards to be outlined in the Regulation would state that:

- A prison manager must ensure that, before placing prisoners in a shared cell, the prisoners are assessed to determine their suitability for such placement, and that prisoners who are assessed as being unsuitable are accommodated in individual cells. A Shared Accommodation Cell Risk Assessment is already in place which allows prison staff to assess the suitability of prisoners to share cells.
- The ventilation and temperature control for all cells and self-care units must be adequate for the number of occupants, taking into account relevant considerations such as unlock hours
- Shared cells must control privacy for a prisoner using the toilet or shower and provide working alarm(s) or call buttons.

This proposal could be criticised on the basis that cell sharing is inhumane, and therefore contrary to section 23(5) of NZBORA, and that placing the authority in primary legislation is expressly circumventing the protection that NZBORA intends to provide to detainees. However, the Department does not consider that the use of shared cell accommodation is intrinsically inhumane and, further, considers that its use is justified when used with appropriate safeguards.

#### **D.4: What other impacts is this approach likely to have?**

While the proposal should reduce the legal risk, there is no feasible and reasonable way to entirely eliminate legal risk in this area. The outcome of any challenge will depend on the particular circumstances of the case.

## **(E) Delegation of a health centre manager's powers and functions**

### **E.1: What is the policy problem or opportunity?**

#### **Background**

Health centre managers are responsible for maintaining, and advising on, the physical and mental health of prisoners. Each health centre manager must be a registered doctor or nurse.

#### **Problems**

Difficulties have arisen at times when the health centre manager is off-site, typically during weekends and evenings, because there is no provision to delegate their powers and functions. For example:

- Under section 60 of the Act, a prison manager may only direct the segregation of a prisoner for medical oversight on the recommendation of the health centre manager.
- Section 72(3) of the Act empowers health centre managers to prescribe a particular diet for a prisoner. It may be appropriate for another registered nurse to prescribe dietary requirements for a prisoner at the weekend, but they are not authorised to do so.

There is a risk of harm to the prisoner if a necessary direction is deferred because the health centre manager is off-site. There is also legal risk to the Crown if the treatment of a prisoner is carried out in an emergency situation without a valid direction.

The introduction of the new model of care for prisoners who are vulnerable to self harm has also highlighted that there may be instances where the regular Health Centre Manager may not be the most appropriate person to provide mental health advice to the Prison Manager, or be responsible for maintaining the mental health of prisoners. While they may wish to partially delegate their powers and functions related to mental health services to someone with a mental health background on an ongoing basis, delegation is not possible.

### **E.2: What options have been considered?**

Four alternative options have been considered with the objective of improving the health treatment of prisoners at all times.

#### **i) Appoint deputy health centre managers**

While this non-legislative option would ensure there are sufficient staff available to make a direction, the legality of a deputy exercising powers and functions when there is an appointed health centre manager is questionable.

#### **ii) Appoint additional health centre managers**

This non-legislative option would see more than one health centre manager appointed to ensure there is one present at all times. However, the wording of the Act does not contemplate the appointment of more than one health centre manager. While it could be argued that there would only be one acting at any one time and it is therefore consistent with the Act, it is not certain the argument would prevail if challenged.

#### **iii) Add an on-call provision to health centre managers' contracts**

This non-legislative option would see health centre manager be on call for times when they are off-site. However this option would be costly and is operationally impractical. Health centre managers would need to be appropriately compensated for being on-call and, further, it would be unreasonable to expect a health centre manager to be on call every evening and weekend. This option also does not provide the ability to allow other staff to be responsible for a particular health area where they have more experience or expertise.

#### **iv) Add a delegation provision so health centre managers can delegate their powers and functions**

This option would amend the Act to allow health centre managers to delegate their powers and functions.

This would allow their powers or functions to be exercised outside normal working hours to ensure prisoners receive the appropriate treatment promptly. It would also allow partial delegation of powers and functions, such as those relating to mental health treatment and advice, to other health professionals who are more appropriately qualified.

### **E.3: Which of these options is the proposed approach?**

It is recommended that the Act be amended to authorise health centre managers to delegate their powers and functions. This option will help in ensuring prisoners receive the appropriate treatment promptly, while minimising any legal risk from emergency treatment that occurred without a direction.

Through this change health centre managers could delegate their powers and functions in the following ways:

- delegation would be permitted to a 'registered health professional'
- sub-delegation would not be permitted, to ensure only suitably qualified staff members are making the relevant decisions; and
- the health centre manager will be empowered to give directions and impose conditions when delegating a power or function.

A 'registered health professional' is a defined term in the Act and refers to a health practitioner who is registered with an authority governing a health profession under the Health Practitioners Competence Assurance Act.

There may be a perceived risk that a delegation is not clear or is not made to an appropriate person. In practice however, delegation is already common within the Department and there is clear guidance, processes and sign off in place to manage these. The reference to the Health Practitioners Competence Assurance Act also ensures that a delegate is fully competent in their profession.

These changes would provide flexibility in how prisons operate by allowing other professions, such as psychologist or psychotherapist, to be responsible for advising on and delivering mental health services. In doing so, it could improve responsivity and reduce duplicity as advice or services would not have to be diverted through, or overseen, by a Health Centre Manager.

### **E.4: What other impacts is this approach likely to have?**

It is important that any delegations of powers and functions are to people who are qualified to make the relevant decisions. To reduce the risk of inappropriate delegation, restrictions on delegation, as outlined above, will be included. Additional staff training would also be appropriate.

**(F) Strip searching of prisoners returning from escorted outings**

**F.1: What is the policy problem or opportunity?**

**Background**

The Act specifies the situations and circumstances when a prisoner must be strip searched and when they may be strip searched. The purpose of strip searching is to help ensure the security of the prison, and the safety of prisoners, staff and visitors by preventing unauthorised items entering a site.

At present, prisoners can have escorted outings from prison for a range of reasons including: trips to receive medical treatment, attend a funeral or tangi, mothers who drop their babies at day care, and to undertake rehabilitation activities.

Section 98(7)(b) of the Act requires that they must be strip searched upon re-entry to prison.

**Problems**

However, evidence suggests that strip searches can impact people’s dignity and wellbeing, particularly for those with existing mental health issues or who have been a victim of sexual violence.

Because of the potential impacts, strip searching should be restricted to occasions when it is necessary. However the current legal framework relating to escorted outings does not necessarily support this.

Despite having a limited opportunity to obtain contraband during an escorted outing from prison, provisions currently require that a prisoner must be strip searched upon re-entry to prison.

Data indicates that relatively few strip searches following an escorted outing result in the location of contraband, although this is likely to due to a combination of a deterrence effect from mandatory strip searching and a prevention effect from being escorted. In 2018 there were 43,313 reported escorted movements (excluding prison transfers) and prison receptions where strip searches should have been mandatory, as the prisoner returned to the prison from outside the wire. During the same period only 32 strip searches were recorded as locating contraband.

Anecdotally, strip searching has adversely impacted some prisoners’ desire to undertake activities outside of the wire that support their rehabilitation and reintegration.

Overall it is likely that the current requirements create scenarios where strip searches are undertaken when the risk of contraband entering prisons does not warrant such an approach because prisoners had limited or no opportunity to obtain authorised items.

**F.2: What options have been considered?**

Two alternative options have been considered with the objective of better balancing the harm from strip searching against the need to locate unauthorised items.

**i) Remove mandatory strip searching requirement for escorted outings**

This option would remove the mandatory requirement to strip search when a prison returns from an escorted outing as provided in section 98(7)(b) of the Act.

However, staff could still undertake scanner or rub-down search upon re-entry to detect unauthorised items under section 98(1), or conduct a strip search if they have reasonable grounds to suspect a prisoner has an unauthorised item under section 98(3)(a).

This would reduce the impact to prisoners as fewer strip searches would be undertaken.

This option would likely increase the risk, to a small degree, of unauthorised items entering a prison site.

**ii) Amend strip searching power to strip search only if there is a valid reason**

This option would amend the current search powers so that escorted outings would be

included in event based scenarios under section 98(6) where a strip search may be undertaken. In effect this would mean prisoners returning from an escorted outing may only be strip searched if there is a valid reason. Staff would therefore need to justify why a strip search was necessary upon re-entry to prison.

Although the number of strip searches, and therefore their impact, would decrease, there would still remain the potential for some prisoners to be negatively impacted when strip searched.

There also remains a risk that some authorised items enter a prison site because not all prisoners are searched upon re-entry.

### **F.3: Which of these options is the proposed approach?**

It is recommended that the power to strip search be amended so that prisoners returning from an escorted outing may only be strip searched if there is a valid reason.

A valid reason requirement would align with other instances in section 98(6) where a prisoner leaves prison, such as those who are on day release to attend work. Therefore the proposal is unlikely to require substantive training for staff as decision making processes and procedures for reasonable grounds searches are already in place for other situations and circumstances. Relevant factors in determining if there is a need to strip search could include a prisoner's history, unauthorised items in their possession, and the particular circumstances that provide an opportunity for the prisoner to have an unauthorised item.

In practice, shifting away from a mandatory requirement would decrease the number of strip searches undertaken, although it is not possible to estimate the extent of this decrease. Fewer strip searches would reduce the distress and harm to those being searched, and the impact on those undertaking the search. Fewer searches would also likely reduce the amount of staff resourcing needed to process those returning from an escorted outing.

This option may lead to a greater risk of items being introduced as there will not be a strong deterrent effect if not every prisoner is searched every time. However, this is likely to be minimal as a prisoner will be accompanied, there is limited opportunity to obtain, and conceal, contraband during an escorted outing from prison. If a prisoner is not fully accompanied at all times by an officer, and there was an opportunity for the prisoner to conceal an unauthorised item, then this may constitute a valid reason to undertake a strip search. Arguably any risk is significantly lower than what currently exists for other instances where prisoners are not escorted, such as those who are on day release to attend work.

The recommended approach does raise potential human rights implications, and in particular, whether it contravenes the right to be secure against unreasonable search or seizure under the New Zealand Bill of Rights Act 1990. The proposals can be considered justifiable as:

- searches help ensure the security of the prison, and the safety of prisoners, staff and visitors by preventing contraband entering a site
- strip searches will only occur if there is a valid reason, as opposed to every time
- the Act already requires that the power to use a strip search can only be exercised if it is determined that a strip search is the necessary type of search in the circumstances to detect an unauthorised item
- the Act already has a broad principle that all searches are carried out with decency and sensitivity, and in a manner that provides the greatest degree of privacy and dignity.

Overall this option will balance the harm from strip searching against the need to locate unauthorised items by requiring that a strip search must be justified in the circumstances.



#### **F.4: What other impacts is this approach likely to have?**

A movement away from a standardised approach may create some tension between staff and prisoners when a decision to strip search is made, with some prisoners potentially feeling targeted. There may also be possible increases in complaints or legal challenges on whether a decision to strip search was justified. Ultimately this risk already exists as there are other instances where a strip search may occur if there is a valid reason. In practice this risk is managed by staff justifying that a strip search is the necessary type of search in the circumstances to detect an unauthorised item, and staff informing prisoners of the authority and procedure for the search.



**(G) Tattooing in prison**

**G.1: What is the policy problem or opportunity?**

**Background**

In the community, tattooing is a legitimate form of self-expression, involving risks that are managed through professional guidelines. However, tattooing in prisons can pose serious risks to the health of the tattooed prisoner, such as infection or communicable disease, with costs borne by the Department. It can undermine prisoners' opportunities for employment and successful reintegration on release by stigmatising them. Tattoos can also contribute to the widespread problem of gang affiliations in prison and the presence of tattooing materials like needles can endanger staff.

**Problem**

The Act and the Regulations prescribe a disciplinary process for dealing with prisoners who behave in ways that do not result in criminal prosecution, but are nonetheless disruptive, unsafe, inappropriate or inconsistent with the good order and security of the prison.

Although tattooing in prisons is harmful for these reasons, the disciplinary offence provisions of the Act do not sufficiently discourage the practice. As tattooing involves the use of unauthorised items such as needles, some prisoners involved in tattooing others can be charged with having an item in their possession without approval. However the disciplinary provisions do not adequately cover prisoners who are suspected of engaging in tattooing. While they could be charged with unauthorised items, the likelihood of succeeding with such a prosecution is low if they were not caught with tattooing equipment.

**G.2: What options have been considered?**

Three alternative options have been considered with the objective to improve the safe and humane management of prisoners:

**i) Rely on prison rules made by prison managers to prohibit tattooing**

Some prison managers have made rules against tattooing. Where such rules are in place, prisoners who receive tattoos or tattoo others can be charged with failing to comply with a rule of the prison under section 128(1)(a) of the Act. However, prison rules are meant to deal with matters specific to a particular prison, not to implement a national policy. Therefore, the current prison rules do not provide a long-term solution to the problem of tattooing and, if routinely enforced across all sites, may be vulnerable to legal challenge.

**ii) Make tattooing a disciplinary offence where approval is not given**

This option would make it possible for prisoners to obtain approval for tattooing where the prison manager is satisfied that it can be performed safely and that the content of the tattoo would not be offensive or likely to undermine the prisoner's reintegration.

While the Department could introduce provision for approved tattooing, it would impose significant costs and responsibilities on the Department. Arguably, prisons would be required to facilitate tattooing in a safe environment, which would mean providing access to proper equipment and tattoo artists. Where approval is granted, it is likely that the tattooing would have to be carried out under supervision to minimise the risk of abuses. The logistics and costs involved in providing this service far outweigh the advantages.

**iii) Make tattooing and receiving tattoos a disciplinary offence**

Making tattooing and receiving tattoos while in prison a disciplinary offence would reduce the health and security risks associated with tattooing in prisons by sending a clear message to prisoners that it is a prohibited activity. Although the threat of a disciplinary penalty is unlikely to deter prisoners altogether, the Department's message that the behaviour is unacceptable is more likely to have an appreciable effect when supported by the disciplinary process.

### **G.3: Which of these options is the proposed approach?**

The Department recommends amending the Act to make it a disciplinary offence for a prisoner to tattoo another prisoner or consent to receive a tattoo from another prisoner, or to tattoo themselves.

This would send a clear message that tattooing is unacceptable in prisons, and avoid the costs and risks to the Department that would arise from allowing prisoners to seek approval for tattooing. Undoubtedly such a ban would limit prisoners' freedom of expression, including expression of their cultural identity. However, it would help to reduce the health and security risks associated with tattooing in prisons by sending a clear message to prisoners that it is a prohibited activity.

### **G.4: What other impacts is this approach likely to have?**

There are risks involved in establishing this new disciplinary offence. One risk is that it may incite charges on a broader basis than intended because it may be difficult to identify prisoners who do not deserve prosecution because they did not receive the tattoo willingly. However, these situations are anecdotally uncommon and prosecutors will be discouraged from charging a tattooed prisoner where they have reason to suspect coercion was involved.

Additionally, it could be considered that making tattooing a disciplinary offence is an infringement on the right to freedom of expression contained in the New Zealand Bill of Rights Act 1990 (NZBORA). However, the extent of this infringement is arguably minor and justified by the significant health and safety issues tattooing in prison can cause.

**(H) Letters that defy a court order**

**H.1: What is the policy problem or opportunity?**

**Background**

Courts have powers under civil and criminal law to issue orders that forbid contact with certain people who have, for example, protection orders under the Domestic Violence Act 1995. Prisoners who have such orders against them are liable to criminal prosecution if they contact a protected person, including by writing a letter that is delivered to that person. Due to the large volume of letters, not all are read in their entirety by staff.

**Problem**

If an outgoing letter is read by prison staff and withheld on the ground that it is likely to breach a court order under section 108(1)(d)(vi) of the Act, the prisoner is unlikely to be prosecuted under criminal law, and a prosecution under the Act is unlikely to be successful because contact was not made. This creates an inconsistency between letters that are delivered, and those that are not.

In some cases, the prisoner could be charged with a disciplinary offence. Prisoners who behave in an offensive, threatening, abusive, or intimidating manner are committing a disciplinary offence under section 128(1)(c) of the Act. This provision would cover writing letters with intrinsically objectionable content, such as threats.

However, under current provisions, prisoners are not clearly discouraged by the criminal law, or by disciplinary provisions in the Act, from writing letters that would breach a court order if delivered.

Due to this lack of consequence, prisoners are not clearly discouraged from attempting to breach an order and may cause distress to the person protected by that order, or facilitate other criminal activity where association with an affiliate is prohibited. Therefore prisoners may make further attempts to contact the protected person with the hope one letter reaches the recipient.

**H.2: What options have been considered?**

The only alternative option considered was to make it a disciplinary offence to attempt to communicate in any way that would breach an order or any direction of a court. The current hearing adjudication for alleged offensive behaviour would apply for this new offence. Punishment can include forfeiture or postponement of all or any privileges, and forfeiture of earnings.

**H.3: Which of these options is the proposed approach?**

This option would address the anomaly that correspondence that, if delivered, would constitute a criminal offence, but does not amount to a non-criminal disciplinary offence if it is intercepted instead. Although the threat of a disciplinary penalty is unlikely to deter prisoners altogether, the introduction of an offence and subsequent punishment will create a greater disincentive for prisoners to write letters that would breach a court order if delivered.

**H.4: What other impacts is this approach likely to have?**

The ability to enforce such an offence provision depends on the Department accessing records of protection orders. Once the Department has a better understanding of the relevant protection orders held against prisoners, resources can be better targeted towards letters sent by those prisoners. The Department continues to work with justice sector agencies on

opportunities to improve sharing of information about court orders and directions.

**(I) Prisoners’ use of psychoactive substances**

**I.1: What is the policy problem or opportunity?**

**Background**

Prisoners are not only prohibited from using illegal drugs, they are also prohibited from using alcohol and from smoking tobacco or other substances. These substances are banned in prisons because their use is detrimental to prisoners’ physical and/or mental health and behaviour, and to the maintenance of good order in prisons.

**Problem**

While the Act prohibits drugs as defined by the Misuse of Drugs Act 1975, it is silent on the use of psychoactive substances. The Psychoactive Substances Act 2013 currently bans the sale, supply and possession of a range of products, including synthetic cannabis, because of the adverse effects they can have on users.

As it is not a disciplinary offence to use psychoactive substances in prisons, testing procedures cannot be used to obtain evidence of their use. While it is possible to charge a prisoner with a disciplinary offence when the substance is discovered (possession of an unauthorised item), prisoners do not face any internal consequences after the event for having consumed a psychoactive substance.

Overall, the definition of a drug within the Act is too narrow to adequately capture all substances that have a detrimental effect on a prisoner’s physical and/or mental health and behaviour, and to the maintenance of good order in prisons.

**I.2: What options have been considered?**

The only alternative option considered is to redefine “drug” in the Act so that it covers psychoactive substances as defined under the Psychoactive Substances Act.

**I.3: Which of these options is the proposed approach?**

The preferred option is to redefine “drug” in the Act to include psychoactive substances as defined under the Psychoactive Substances Act.

This would mean that prisoners could be tested for the presence of psychoactive substances and, in the event of a positive test, could be charged with a disciplinary offence. The current hearing adjudication for alleged offensive behaviour would apply for this new offence. Punishment can include forfeiture or postponement of all or any privileges, and forfeiture of earnings.

This option would have limited financial implications as laboratories will need to be contracted to test for additional substances. However, this should not significantly affect the overall cost of drug testing, as the Department is able to determine the volume and nature of tests purchased. Any financial implication would be met with the Department’s baseline funding.

**I.4: What other impacts is this approach likely to have?**

Being able to test for psychoactive substances would also improve the Department’s ability to identify and address prisoners’ drug issues.

**(J) Prisoners’ management plan**

**J.1: What is the policy problem or opportunity?**

**Background**

Section 51 of the Act requires a management plan to be devised for every prisoner sentenced to over two months or remanded in custody for over two months, and specifies what such plans must cover.

The Department’s planning for the management of prisoners takes a range of forms and is made up of a number of documents held in hard copy and electronically on the Department’s Integrated Offender Management System.

**Problem**

The Act contains some legal ambiguity as to what form a management plan should take and, notably, it is unclear whether a plan has to be a single document or can comprise information from a range sources.

This lack of clarity creates some legal risk.

If a plan has to be a single document, the Department may not always meet the requirement in section 51(4)(b) of the Act that a plan must “make provision for the safe, secure and humane containment of the prisoner”. This is because the Department’s planning document for prisoners, the “remand/offender plan”, focuses primarily on rehabilitation and reintegration. Custodial management issues are addressed elsewhere, for example, through security classification and at risk assessments.

**J.2: What options have been considered?**

Three alternative options have been considered with the objective of reducing the legal risk.

**i) Change the format of the “remand/offender plan”**

This option would make changes to the format of the “remand/offender plan” to ensure that one document covered all of the requirements of section 51. That document is intended to plan for a prisoner’s rehabilitation and covers all the legislative requirements of a management plan apart from “the safe, secure and humane containment of the prisoner,” which is provided for elsewhere.

This option would change the intent of the document, which is to plan for a prisoner’s rehabilitation, and not cover aspects of their custodial management. The inclusion of this extra information would require custodial staff input and is a change that is likely to result in costs in staff time and delays in the rehabilitation planning process. Any changes to IT systems to hold all information in one location would likely be expensive.

**ii) Amend the requirements of a management plan to remove the provision for safe, secure and humane containment**

This option would amend the requirements of the management plan so the current format of the “remand/offender plan” would satisfy the requirements. Although it is not intended, removing the provision for the safe, secure and humane containment of prisoners from the requirements of a management plan could be construed as weakening the Department’s obligations to prisoners.

**iii) Clarify that a management plan may comprise information recorded on multiple records**

This option would amend the Act to clarify that a prisoner’s management plan may comprise information set out on one or more electronic or paper records. This would be a relatively simple provision to address the legal ambiguity without requiring the Department to change its procedures.

**J.3: Which of these options is the proposed approach?**

The Department proposes to amend the Act to clarify that a prisoner’s management plan may comprise information recorded on one or more electronic or paper records. This would make it clear that a “management plan,” as required by section 51 of the Act, is not referring to one document. This is the simplest option to address the risk from legal ambiguity.

**J.4: What other impacts is this approach likely to have?**

In practice, this option is not expected to alter the Department’s approach to planning for the management of prisoners. This will continue to be made up of a number of documents held in hard copy and electronically on the Department’s Integrated Offender Management System.

**(K) Contact between detector dogs and those being searched**

**K.1: What is the policy problem or opportunity?**

**Background**

The Department currently uses drug, cell phone, and tobacco detecting dogs to help keep contraband out of prisons. They are used in personal searches of prisoners, visitors and contractors, and a variety of other searches including mail, vehicles, cells and prison perimeters.

The dogs are trained to show a passive sit response to odours and there is no authority to use the dogs to restrain prisoners or other persons. This is reflected in section 97(3) of the Act, which provides that the handler "...must not allow the dog to come into physical contact with the person being searched".

**Problem**

The policy of this provision remains sound, but frontline staff have found that strict compliance is not always possible because dogs' tails or noses sometimes brush against the person being searched. While such inadvertent contact is unlikely to have serious legal consequences, it is undesirable to have laws that cannot be fully observed.

**K.2: What options have been considered?**

Two alternative options have been considered with the objective of reducing the legal risk.

**i) Enhance compliance with the Act**

The only non-regulatory option considered was to maintain the legislative status quo but enhance compliance with the Act. However, the operational reality is that it is not possible to ensure compliance at all times and while inadvertent contact is unlikely to have serious consequences, it is undesirable to have laws that cannot be fully observed.

**ii) Amend the Act to slightly reduce the requirements placed on dog handlers**

The only regulatory option considered was to amend the Act to slightly reduce the requirements placed on dog handlers. The new provision would require dog handlers to "take reasonable precautions" to prevent the dog coming into physical contact with the person being searched. This would not reduce the intention that dog handlers should attempt to ensure that contact does not take place but will allow for the operational reality to align with legal requirements.

**K.3: Which of these options is the proposed approach?**

The Department proposes to amend the Act so that dog handlers have to take "reasonable precautions" to prevent dogs coming into physical contact with a person being searched, instead of completely prohibiting contact.

This option would best retain the intention of the provision, while providing some legal protection against inadvertent contact with a dog.

**K.4: What other impacts is this approach likely to have?**

In practice, this option is not expected to alter the Department's approach to using dogs to detect contraband. Staff will need to continue to take precautions so that any contact between dogs and those being searched is inconsequential.



## (L) Use of Police jails to respond to accommodation pressures

### L.1: What is the policy problem or opportunity?

#### Background

To build and maintain infrastructure that will meet future demand, the Department relies heavily on forecasts of the prisoner population. It can be difficult to accurately predict changes in the prison population, so as insurance against unexpected stress on prisons, the Department has limited additional capacity in the form of a “capacity buffer” and “disaster recovery” beds.

The Act also currently provides for the short-term detention of prisoners in Police jails where there is a shortage of accommodation in Department prisons in the relevant area. Police jails are operated by Police, and prisoners are under the custody of the Commissioner of Police.

#### Problem

There have been instances in the past where the prison muster has trended very close to capacity within the corrections system, and alternative accommodation options were investigated to ensure the Department could fulfil its statutory responsibility for the safe, secure and humane detention of prisoners. However, there is a limited range of short term options. For example, prisoners can be relocated to other areas of the country, but this can be costly, disruptive to prisoners, and time-consuming.

The New Zealand Police has indicated that it can safely accommodate approximately 100 prisoners in Police jails that are not in use. This measure affords the Department some limited additional capacity, however, it is limited by Police staffing resources to manage these prisoners.

Police have limited resources and are not in a position to divert resources from other activities to safely manage a greater number of prisoners. Therefore, the potential to utilise spare capacity within a Police jail when there is an acute shortage of accommodation is constrained.

### L.2: What options have been considered?

Two alternative options have been considered with the objective of providing prison capacity to address short term muster pressures.

#### i) Allow Corrections officers to be employed to operate a Police jail

This option would allow Corrections officers to be employed by Police to operate a Police jail during a shortage of accommodation, providing them the powers of an authorised officer under the Policing Act 2008. This would overcome much of the resourcing issue. However, preserving the status of the facility as a Police jail would increase operational risks because it would likely involve a corrections officer wearing a different uniform and being subject to Police direction and oversight.

#### ii) Allow the Department to operate spare Police jail capacity on a temporary basis

This option would empower the Minister of Corrections, when there is an unanticipated acute shortage of prison accommodation, to declare that spare capacity in a Police jail can be temporarily operated by the Department as if it were a part of a Corrections prison. This would allow Corrections staff to run the relevant Police jail and the Department to resource it appropriately.

This would involve the Minister making a declaration by way of a notice in the *Gazette*. Such a declaration would need agreement from the Commissioner of Police. Housing prisoners in a Police jail does raise risks as these jails are not designed for long periods of imprisonment. While these are not new risks, as there are already provisions to house prisoners in Police jails, a number of additional safeguards would be necessary to limit risk. These include:

- stating that such a declaration could only be made to address an acute shortage of accommodation in the area, once all other practicable steps have been taken to address the shortage
- requiring that prison directors must take all reasonable steps to provide prisoners with their minimum entitlements
- placing limits on the regime’s duration and a maximum period of detention for affected prisoners
- ensuring that vulnerable prisoners, such as youths and prisoners with significant mental health issues, are not eligible for detention in the temporary facilities.

### **L.3: Which of these options is the proposed approach?**

While the best alternative option is to allow the Department to operate spare Police jail capacity on a temporary basis, recent declines in the prison muster and additional capacity provided by new build, have decreased the likelihood that additional capacity will be needed.

Despite being close to capacity in the past, the latest muster projections indicate Corrections has sufficient capacity over the next several years to accommodate all prisoners within established Corrections’ prisons. After which, new capacity will come online following the completion of new builds.

The need for additional short term options to address accommodations has therefore subsided.

The preferred option is to maintain the status quo and for Corrections to manage accommodation within existing provisions.

### **L.4: What other impacts is this approach likely to have?**

Retaining the status quo will require the Department to manage the prison population within existing provisions, which include beds set aside as a “capacity buffer” and for “disaster recovery”.

While the risk of insufficient accommodation can not be completely eliminated, given recent declines in the muster and future builds that provide additional capacity, the Department is confident any unexpected growth in the muster can be managed through existing avenues.

**(M) Use of imaging technology to detect unauthorised items**

**M.1: What is the policy problem or opportunity?**

**Background**

Searching prisoners, staff and visitors is necessary to detect and deter the possession of contraband. The Department is permitted, and in some instances mandated, to search prisoners to detect contraband. This is a coercive power, heavily regulated in legislation. The Department is currently able to conduct searches of fully-clothed prisoners, staff and visitors using an electronic device (known as ‘scanner search’) or through a rub-down search. These are limited in their ability to locate internally concealed contraband. There is also a very limited authority to conduct x-ray searches. Such searches may only be carried out on prisoners, not on staff or visitors, and only where an officer has reasonable grounds to believe that an unauthorised item is concealed in or around the prisoner’s body. Imaging technology searches are personal searches that display images on a screen with the aim of locating items concealed under the clothing or within the body. The technology has recently been introduced to prisons in other jurisdictions. While the evidence is not conclusive, it shows promise in detecting contraband.

**Problem**

The Act also does not explicitly mention the use of imaging technology as an option to locate items concealed under the clothing and within the body. The definition of a ‘scanner search’ within the Act is relatively broad, but it is unlikely that Parliament contemplated the use of imaging technology when it gave a broad authority to undertake scanner searches in 2004. As imaging technology searches are significantly more intrusive than the use of other scanning devices, carrying out imaging technology searches without express legislative authority would represent a significant legal risk for the Crown.

**M.2: What options have been considered?**

Two options that have been considered with the objective of removing the legal ambiguity regarding the use of imaging technology searches.

**i) Introduce imaging technology as a separate type of search**

This option would remove the legal ambiguity by amending the Act to create a separate type of search for imaging technology searches. Such searches could reduce the reliance on strip searching to detect contraband on prisoners. However, this option would limit the potential use of imaging technologies on staff and visitors to instances where there are reasonable grounds to suspect they possess contraband. Such a restriction would diminish the deterrent effect on staff and visitors bringing contraband into prison. Moreover, there is a risk that staff or visitors hiding contraband will not be detected and a risk of litigation if the Department searches staff or visitors without sufficient cause.

**ii) Amend the definition of scanner search to cover imaging technology searches**

This option would remove the legal ambiguity by amending the Act to state that scanner searches include imaging technology searches. Imaging technology searches could then be used on prisoners, staff and visitors, and as an alternative to strip searches. Under this option there would not be a reasonable grounds requirement for searching staff and visitors with imaging technology, and therefore would not attract the same legal risk as the alternative option. This option would also create the greatest deterrent effect on staff and visitors bringing contraband into prison.

### **M.3: Which of these options is the proposed approach?**

The Department proposes to amend the Act so that the definition of scanner searches includes imaging technology searches, and allow such technology to be used as an alternative to a strip search. This will allow approved imaging technology searches to be used on prisoners, staff and visitors for the purpose of detecting any unauthorised item.

It could also reduce reliance on strip searches, which are time consuming for staff and not necessarily as effective at locating internally concealed contraband. Additionally, certain prisoners, such as those who have been sexually abused, may find strip searches distressing. This would be reduced by employing imaging technology as it is much less intrusive.

Having the imaging technology onsite should also result in fewer visits to the hospital to conduct x-rays to locate internally concealed items. The potential efficiency of the imaging technology search, to reduce the number of strip searches and visits to hospital, would benefit the Department as less labour resources would be needed to be dedicated to the searching of prisoners.

However, as imaging technology searches are intrusive, the following legislative privacy safeguards are proposed for people subject to imaging technology searches:

- a restriction on the type of image that may be displayed for searches that are not an alternative to a strip search, which requires genitalia to be blurred or blocked;
- a provision that an image may be retained only as long as is necessary to determine the presence of an unauthorised item; and
- a prohibition on photographing or other copying of the image, or providing it to another person, which would be treated as offences with a maximum fine of \$2000 (similar to offences defined in section 146 of the Act).

The proposals relating to imaging technology searches are enabling, and given the technology is still developing, the Department is not expected to proceed with a national roll-out immediately. Instead, the Department would likely conduct a trial of imaging technology searches to work through the practicalities, privacy issues and weigh up the financial costs of introducing such technology.

### **M.4: What other impacts is this approach likely to have?**

Some imaging technology devices emit a small amount of radiation. It is not considered necessary to provide specific safeguards relating to potential exposure to radiation, as the Radiation Safety Act 2016 provides a statutory framework to protect people from the harmful effects of ionising radiation.

## (N) Search powers to detect unauthorised items

### N.1: What is the policy problem or opportunity?

#### Background

Searching prisoners, staff and visitors is necessary to detect and deter the possession of contraband. The Department is currently able to conduct searches of prisoners, staff and visitors using an electronic device (known as 'scanner search') or through a rub-down search if there are reasonable grounds to suspect someone is concealing an authorised item.

For scanner searches, the Department utilises walk through metal detectors, similar to those found at airports to scan people. The Act also provides the power to use scanner searches to detect contraband within a person's property or possessions, for which the Department typically uses x-ray machines.

For rub-down searches, the Act affords the Department the ability to request the person being searched to remove any items of outer clothing or accessories. Although this is restricted where that person has no other clothing, or only underclothing, under that outer clothing. This allows those items to be x-rayed separately, and to assist staff in carrying out a more effective rub-down search without heavy or bulky clothing that may conceal unauthorised items.

#### Problem

The current framework for searches creates two issues where greater clarity is required.

Firstly, in regards to scanner searches, there is no explicit authority to require visitors to remove any items of outer clothing or accessories. Unlike procedures for airport security, if an alert has sounded during a search, it is unclear whether staff can instruct the person being search to remove items so they can be searched separately, and to perform another scanner search of the person to eliminate the items as the cause of the alert. The authority to conduct a scanner search includes the authority to search "any item carried by, or in the possession of, that person". It could be argued that that outer clothing and accessories are items carried by or in the possession of any person. However, as a scanner search is of a "fully clothed" person, the intention of the Act appears to be that no clothing is to be removed as part of a scanner search.

A request to remove outing clothing and accessories can be made under the provision for a rub-down search. However, a rub-down search must be conducted after informed consent is obtained. It can only be carried out by a person of the same sex as the person to be searched, and it needs to be conducted in a way that maintains privacy. The requirements require significant staff resource which makes it an operationally inefficient way of determining the cause of the initial alert. It is also physically more intrusive than a scanner search.

Secondly, in regards to rub-down searches, if someone refuses to submit to a rub-down search they must be refused admission. The only exception to this is where they have no other clothing, or only underclothing, underneath.

9(2)(g)(i)

The Department would therefore have no means to determine what the object is, and it is appropriate to ask them to leave the premises to maintain the security of the prison, and the safety of staff, visitors, and prisoners.

9(2)(g)(i)

## N.2: What options have been considered?

Two options have been considered to address the issues outlined above.

### i) Align search powers across all forms

This option would amend the Act to ensure search powers are consistent across all forms of scanner searches by stating that anyone subject to scanner searches can be required to remove outer clothing and accessories (except where the person being searched has no other clothing, or only underclothing, underneath). The purpose of instructing visitors to remove items is to allow those items to be x-rayed separately, and to perform another scan of the visitor to eliminate the items as the cause of the alert.

### ii) Clarify Corrections' powers to deny entry

This option would amend the Act to clarify that if a person subject to a rub-down or scanner search refuses to remove outer clothing on the grounds that they have no clothing, or only underclothing, underneath, then they may be refused admission (or required to leave if they are already inside). [REDACTED] 9(2)(g)(i) [REDACTED]

## N.3: Which of these options is the proposed approach?

A combination of both options is recommended to address the two issues raised above. Therefore the Act would be amended to clarify that:

- scanner searches are intended to detect items that are concealed within a person, and beneath or within their clothing or possessions
- scanner searches include the power to require persons to remove outer clothing and accessories (except where the person being searched has no clothing, or only underclothing, underneath)
- if a person refuses to remove outer clothing during a rub-down or scanner search on the grounds that they have no clothing or only underwear underneath, then they may be refused admission (or required to leave if they are already inside).

In practice, for a scanner search this would align with search processes at New Zealand airports. That is, a visitor would place their bags, jackets, wallets, shoes and other possessions on a conveyer belt, and these undergo an x-ray scan to ensure they do not contain contraband. The visitor would then walk through the door frame scanner. If metal is detected, the visitor could be scanned again using a hand held metal detector, and then asked to remove items of outer clothing. These items are inspected, and may be searched by the x-ray machine, with the visitor walking through the door frame metal detector.

This approach would be a more efficient, and less intrusive, process that relying on a rub-down search to determine the cause of an alert. A rub-down search is more intrusive and requires significant staff resource as it must be conducted after informed consent is obtained and can only be carried out by a person of the same sex as the person to be searched.

[REDACTED] 9(2)(g)(i) [REDACTED]

[REDACTED] In such cases, if an alert is triggered, to maintain the security of the prison, and the safety of staff, visitors, and prisoners, it is appropriate to refuse entry if Correction cannot determine if an item has been concealed amongst clothing, shoes and accessories.

If the person being searched has no clothing, or only underclothing, underneath, they can still enter the prisons by giving consent to undertake a rub-down search to determine the presence of item that caused the alert.

#### **N.4: What other impacts is this approach likely to have?**

The recommended options highlight the need to balance the impact on privacy against the necessity to locate unauthorised items. The possible intrusion on privacy can be considered justifiable as:

- searches help ensure the security of the prison, and the safety of prisoners, staff and visitors by preventing contraband entering a site
- the Act already has a broad principle that all searches are carried out with decency and sensitivity, and in a manner that provides the greatest degree of privacy and dignity
- the search provision are broadly comparable to airport security who have similar safety and security concerns.



## (O) Prisoners' knowledge of disciplinary offences

### O.1: What is the policy problem or opportunity?

#### Background

Section 42(1) of the Act requires that recently received prisoners are given, in writing, relevant information on the operation and rules of the prison, rules about authorised property, and the entitlements of prisoners.

However, there is no requirement to provide them with information on disciplinary offences and, in practice, the induction process for new prisoners does not typically include this information. It is left to the prisoner to become familiar with the offences.

#### Problem

Although in general, people are responsible for understanding the law, some conduct that is lawful outside prison, such as smoking and drinking alcohol, is banned in prisons. Without sufficient knowledge of the disciplinary offences, it is unlikely that prisoners will be deterred from committing them.

The current requirement that information be provided in writing also creates issues as research indicates that prisoners tend to have a higher level of illiteracy than the general population. Previous New Zealand research has found that 65 percent of people in prison have literacy and numeracy levels lower than National Certificate of Educational Achievement (NCEA) level 1<sup>4</sup>.

Many also speak English as a second language. Operational procedures require staff to provide all necessary information in oral form. However, this does not necessarily bridge language barriers.

Therefore, the Department has a strong interest, not only in making sure prisoners are aware of the offences, but in helping prisoners understand them and apply them to their own circumstances.

### O.2: What options have been considered?

Two options have been considered with the objective of improving prisoners' knowledge of disciplinary offences.

#### i) Change operational procedure to actively provide prisoners with information

This option would see the Department changing operational procedure to actively provide prisoners, on admission, with information about disciplinary offences. However, this would not address the inconsistency in the legislation and there might still be instances where staff would not fully comply.

#### ii) Introduce a statutory requirement to provide prisoners with all relevant information in a form that is accessible and appropriate to the prisoner's abilities and language

This option would include the introduction of a statutory requirement to provide prisoners with information about disciplinary offences on admission. The inclusion of a statutory duty will provide robust assurance and more accountability that prisoners will be informed of the necessary information. Further, it will achieve consistency with the statutory duty in section 42 to provide prisoners with information about prison rules.

In the interest of ensuring prisoners are aware of relevant information, this information should be provided in a form that is accessible and appropriate to the prisoner's abilities and language. This could mean that information provided in a prisoner's preferred language, and in different forms such as written, oral, or visual. As some prisoners may speak or read an uncommon language, Corrections may need to source a translator or translate documents.

<sup>4</sup> *Corrections Works*, Department of Corrections, December 2015.



**O.3: Which of these options is the proposed approach?**

The Department proposes to amend section 42 of the Act to include an obligation to provide newly admitted prisoners with information about disciplinary offences, and for it to be in a form that is accessible and appropriate to the prisoner's abilities and language.

This option is preferred as it reduces inconsistency between prison rules and disciplinary offences, provides more accountability that prisoners will be informed of the necessary information, and increase prisoners' understanding of such information.

**O.4: What other impacts is this approach likely to have?**

If this recommendation is implemented, the information provided to prisoners would need to meet requirements set out in section 164 of the Act. Specifically, the information would have to be presented in such a way that the prisoner could be reasonably expected to understand it, and it would need to be updated as necessary.

## (P) Right to have a decision relating to mother and baby placement reconsidered

### P.1: What is the policy problem or opportunity?

#### Background

Since September 2011, the Act has provided for mothers with children who are less than 24 months old to apply to have those children with them in prison. Mothers with Babies Units were opened at Auckland Region Women's Corrections Facility, Wellington's Arohata Prison and Christchurch Women's Prison. The number of mothers and children in prisons is small and fluctuating. In July 2018, there were nine mothers and nine children.

The chief executive of the Department of Corrections has the statutory authority to approve a mother's request to have her child with her in prison. Having approved such a request, the chief executive may decide to end a child's placement, for example, on the basis that it is no longer in the child's best interests. In practice, the chief executive has delegated to prison managers the authority to make decisions on placements in Mothers with Babies Units. These decisions are made on the recommendation of multi-disciplinary panels, which include some external members from Plunket, the Ministry of Health and Oranga Tamariki.

#### Problems

When an application for placement in a Mothers with Babies Unit is declined, or it is decided to end such a placement, the mother has no statutory right to appeal the decision. However, they could complain to the Ombudsman or institute judicial review proceedings.

The Department has set up its own process, under which the prisoner can ask a senior manager at a Regional Office to review the decision. However, this process has been criticised by the Office of the Children's Commissioner in a May 2014 report, which noted that "the same multi-disciplinary group who are responsible for determining mothers' eligibility to be in the Mothers with Babies Units are also responsible for considering mothers' appeals".

Overall the current process is not sufficiently robust to safeguard the best interests of the child.

### P.2: What options have been considered?

Three options have been considered with the objective of providing a robust and fair appeal system following a mother and baby placement.

#### i) Improve the current process for determining the placement of mothers and babies

This option would remove the current review process but strengthen the original decision making process.

The Act and Regulations give prisoners a right to apply for a reconsideration of important decisions about their management. Significantly, a prisoner dissatisfied with their security classification can apply to the chief executive for reconsideration. The decision about placement of a prisoner in a Mothers with Babies Unit is arguably as important as a security classification decision and, therefore, a mother should be able to seek a reconsideration of that decision.

However, including a reconsideration process in operational policy instead of having statutory authority does not confer any rights on the mother and could be subject to change.

#### ii) Amend the Act so mother with baby placement decisions are made by the prison manager and reconsidered by the chief executive

This option would amend the Act so the original placement decision is made by prison manager, and any reconsideration would be made by the chief executive.

Inclusion in the Act would provide robust assurance that reconsideration decisions are taken fairly and provide more accountability. This would install a procedure where the person who

reconsidered a decision would not have been involved in the original decision-making process.

**iii) Amend the Act so the prisoner could seek a reconsideration of the placement decision from the chief executive**

This option would amend the Act so that any reconsideration would be made by the chief executive. Although this would not be a legal requirement as with the previous option, operationally the chief executive would continue to delegate to prison managers the authority to make and end placements in Mothers with Babies Units. This would mean that the person who reconsidered a decision would not have been involved in the original decision-making process.

**P.3: Which of these options is the proposed approach?**

The Department proposes to amend the Act to provide a statutory process to reconsider decisions about the placement of prisoners and their babies in Mothers with Babies Units. It is further proposed that the statutory decision making power for the reconsideration decision is given to the chief executive, and that this power can not be delegated to a staff member of a prison. To ensure mothers understand the process available to them, it is also appropriate to introduce a legislative requirement for the applicants to be told of the reason for the original decision and process of reconsideration.

Under the proposed amendments, the chief executive would continue to delegate to prison managers the authority to make decisions to approve and end placements in Mothers with Babies Units. It is not considered necessary to provide legislative authority for the multi-disciplinary panels as there is already a legislative requirement to consult with Oranga Tamariki and seek advice from child development specialist. As such it is anticipated that multi-disciplinary panels would continue to advise on placement decisions. The Department would ensure that a panel providing advice for reconsideration of a placement decision is not the same panel that advised on the original placement decision.

To ensure separation of decision making, it is proposed to introduce a requirement that the chief executive may not delegate the power to reconsider applications to a staff member of a prison.

Therefore in practice, prisons managers will be responsible for making the initial placement decisions, and the chief executive will be responsible for reconsidering any decision when requested by a mother.

This option would continue to employ the principle that decisions on prisoners' location and management should ultimately rest with the chief executive because they have the legal custody of all prisoners and are responsible for ensuring the safe custody and welfare of prisoners.

**P.4: What other impacts is this approach likely to have?**

The main risk is ensuring the person who reconsiders a decision is not involved in the original decision-making process. In practice, prison managers make the initial decision on a placement through a delegated power from the chief executive. The chief executive is therefore the ultimate decision maker by having the power to make the judgement on a placement through the appeals process.

**(Q) Prisoners’ expectations of conditions or opportunities**

**Q.1: What is the policy problem or opportunity?**

**Background**

Regulation 196 provides, in summary, that a prisoner does not have any legitimate expectation of having similar conditions or opportunities throughout their period of detention. The purpose of this provision is to clarify that a prisoner’s conditions may be changed for various reasons, as long as entitlements conferred by the Act or Regulations are not affected.

**Problem**

The validity of Regulation 196 has been upheld by the courts. Nevertheless, there is some legal risk in having a provision that denies legitimate expectations located in the Regulations. This is because, unlike primary legislation, regulations can be overturned by the courts, for example, if they are found to be ultra vires.

**Q.2: What options have been considered?**

Because the problem arises from a provision being located in secondary legislation instead of primary legislation, the only regulatory option considered was elevating regulation 196 into the Act.

The Legislation Advisory Committee Guidelines on the Process and Content of Legislation (2014 edition) state: *“As a general rule, matters of policy and principle should be included in primary legislation. Delegated legislation should deal with technical matters of implementation and the operation of the Act”*. Regulation 196 can be regarded as stating a broad principle which has wide ranging effects on prisoners.

This option will reduce the legal risk in having a provision that limits legitimate expectations located in the Regulations instead of in primary legislation.

**Q.3: Which of these options is the proposed approach?**

The Department proposes to revoke Regulation 196 and amend the Act to insert the substance of the Regulation.

Regulation 196 can be regarded as enunciating a broad principle, namely that prisoners only have legitimate expectations regarding their accommodation or treatment where those expectations are based on provisions in the Act or Regulations. It is applicable to a wide range of circumstances within the prison system. For example, it would apply where a prisoner is transferred from one prison to another, and finds that the standard of accommodation is lower than where they were previously located or that an activity they were engaged in is not available at the new prison. It would also apply where changes of treatment occur for disciplinary or security reasons, or where there is a change of policy.

**Q.4: What other impacts is this approach likely to have?**

Overall this proposal is not expected to change behaviour. Instead it will assist in reducing the legal risk in having matters of policy and principle located in the Regulations instead of in primary legislation.

## (R) Charging regime for the cost of telephone calls

### R.1: What is the policy problem or opportunity?

#### Background

One of the principles guiding the corrections system is that contact between prisoners and their families must be encouraged and supported, so far as is reasonable and practicable within the resources available, and to the extent that this contact is consistent with the maintenance of safety and security requirements.

Under the Act and Regulations, prisoners are guaranteed opportunities to receive private visitors, make outbound telephone calls, and send and receive written correspondence.

Every prisoner is entitled to make at least one outgoing telephone call of up to 5 minutes duration per week, but they must meet the cost of that call. The current telephone system uses pay phones where prisoners need to purchase phone cards to place a call.

#### Problem

The Department is investigating options to upgrade the telephone system, and two issues have been anticipated in relation to the current requirement that prisoners “meet the cost of that call”.

Firstly, an upgraded system may require, or provide the ability to, the Department to implement alternative methods for charging prisoners for their calls. For example, a telecommunication provider may charge the Department a flat monthly cost for all calls made by prisoners. A flat monthly rate creates complexity in how to divide the overall cost charged to the Department across the number of prisoners making calls, and frequency and duration of those calls. In this instance it would be difficult to charge a prisoner for the precise cost of their phone call.

Secondly, the Act does not sufficient flexibility in regards to if prisoners are charged for the cost of telephone calls. The cost of phone calls can be prohibitive to some prisoners, which can impact on a prisoner’s ability to maintain the family and social relationships that promotes their rehabilitation and reintegration. While the Department may wish to waive the cost of phone calls to promote family and social relationships, the Act prevents this as it requires prisoner to “meet the cost of that call”.

### R.2: What options have been considered?

Two alternative options have been considered with the objective of providing greater flexibility for the charging regime for telephone calls.

#### i) Provide calls free of charge

This option would amend the Act so that prisoner calls would be offered free of charge. Free calls would provide the greatest chance of promoting contact between prisoners and their families. However, there would be significant cost to the Crown of doing so. Free calls may also lead to instances where influential prisoners abuse the system by monopolising the phone.

#### ii) Provide the Department with flexibility to accommodate different charging regimes

This option would amend the Act so that prisoners who make outgoing telephone calls may be required to contribute toward the cost of telephone calls. This option would provide flexibility to operate different charging regimes that reflect the technology in operation at each prison site. It would also provide the ability for the Department to waive the cost of the phone calls.

**R.3: Which of these options is the proposed approach?**

The preferred approach is to amend the Act to state that prisoners who make outgoing telephone calls may be required to contribute towards the cost of telephone calls.

This will provide the Department with added flexibility to introduce new charging regimes that reflect the telephone system at each prison site.

This amendment will also provide the ability for the Department to promote greater communication with family and friends by waiving the cost of calls.

**R.4: What other impacts is this approach likely to have?**

This option may increase complaints as prisoners at different sites could be treated differently with respect to charging for calls.

**(S) Disclosure of phone call recordings**

**S.1: What is the policy problem or opportunity?**

**Background**

The Corrections Act allows the Department to monitor and record prisoner telephone calls. On occasion, intelligence and security agencies request copies of prisoner call recordings for intelligence gathering purposes.

As these recordings qualify as personal information, the information is governed by the Privacy Act. The Privacy Act allows the disclosure of personal information if it was one of the purposes with which the information was obtained or is directly related to those purposes. As Section 112 of the Corrections Act does not list the collection of intelligence information as a purpose for monitoring calls, prisoner telephone calls can be disclosed to intelligence and security agencies under an exception provided by Section 57 of the Privacy Act.

The Intelligence and Security Act made a consequential amendment in 2017 to the Corrections Act to provide an explicit legal authority for the Department to disclose recordings of prisoner calls to an intelligence and security agency if the disclosure is necessary to enable the agency to perform any of its functions. It also took the opportunity to clarify that recordings could only be disclosed by meeting the higher threshold in the Corrections Act, rather than through an exemption granted in the Privacy Act.

The Intelligence and Security Act requires an intelligence and security agency to destroy received information as soon as it is not required by the agency for the performance of its functions. Whereas the Corrections Act requires that an agency that receives a recording must destroy or erase it as soon as it appeared that no proceedings or disciplinary proceedings will be taken where the information would be presented as evidence.

**Problem**

The legal duties related to two aspects of telephone recordings do not fully align across both the Intelligence and Security Act and the Corrections Act.

Firstly, the Intelligence and Security Act allows recording to be retained as long as it is needed by an intelligence and security agency for the performance of its functions. However, the Corrections Act requires a receiving agency to destroy or erase recordings as soon as it appeared that no proceedings or disciplinary proceedings will be taken where the information would be presented as evidence.

As the New Zealand Security Intelligence Service is receiving the recordings for intelligence-gathering purposes, and not in contemplation of proceedings, it would arguably have to destroy these recordings as soon as they were received.

Secondly, the Intelligence and Security Act made consequential amendments to the Corrections Act to make it clear that the Department had to follow the more stringent test in the Corrections Act before it could disclose telephone call recordings. However, there is a further provision in Section 118 of the Corrections Act which contradicted this, suggesting that disclosure was also permissible under the less stringent tests in the Privacy Act 1993.

Both discrepancies undermine the original intent of the changes enacted through the Intelligence and Security Act, which ultimately create legal ambiguity as to which clauses takes precedent.

**S.2: What options have been considered?**

The only alternative option considered is to implement the original policy intent of the changes enacted through the Intelligence and Security Act by clarifying in the Corrections Act that:

- intelligence and security agencies can retain recordings if they are required to enable an agency to perform any of its statutory functions

- the Department can only disclose recordings by meeting requirements under the Corrections Act.

### **S.3: Which of these options is the proposed approach?**

The recommended option is to amend the Corrections Act to implement the original policy intent of the changes enacted through the Intelligence and Security Act.

To address the destruction discrepancy, the Corrections Act would need to be amended to exclude intelligence and security agencies from the requirement to destroy or erase recordings if it will not be in used in proceedings or disciplinary proceedings. Instead intelligence and security agencies will be able to retain recordings if they are required to enable an agency to perform any of its statutory functions. This amendment would align with the Intelligence and Security Act, which already requires an intelligence and security agency to destroy received information as soon as it is not required by the agency for the performance of its functions.

To address the disclosure discrepancy, the Corrections Act would need to be amended to remove the suggestion that disclosure through the less stringent tests in the Privacy Act 1993 was also permissible. This amendment would clarify and strengthen the safeguards applying to the disclosure of prisoner telephone call recordings.

### **S.4: What other impacts is this approach likely to have?**

As the recommended approach seeks to address inconsistencies, it is not expected to have noticeable practical implications.



## Section 4: Conclusions

### 4.1 What combination of options is likely best to address the problem, meet the policy objectives and deliver the highest net benefits?

Overall the Department recommends the following approaches to address the 18 issues identified with the current legislative framework. The issues listed below are independent of each other and therefore decisions can be taken separately. All proposals require legislative amendments to the Corrections Act.

- Develop a comprehensive legislative framework for the management of prisoners vulnerable to self-harm that is separate from the current segregation regime;
- Provide legal clarity for the use of restraints for hospital stays longer than 24 hours;
- Make it explicit that no mechanical restraint that could be classified as chains or irons, other than handcuffs, may be authorised for use on a prisoner;
- Include a provision stating that prisoners detained in a corrections prison may be held in individual cells, shared cells or self-care units, and amend the Regulations to include safeguards and to remove the general preference for accommodation in individual cells;
- Authorise health centre managers to delegate their powers and functions;
- Amend search powers so that prisoners returning from an escorted outing may only be strip searched if there is a valid reason
- Make it a disciplinary offence for a prisoner to tattoo another prisoner, consent to receive a tattoo from another prisoner, or tattoo themselves;
- Make it a disciplinary offence to attempt to communicate in any way that would breach an order or direction of a court;
- Redefine “drug” in the Act so that it covers psychoactive substances as defined under the Psychoactive Substances Act;
- Clarify that a prisoner’s management plan may comprise information recorded on one or more electronic or paper records;
- State that dog handlers have to take “reasonable precautions” to prevent dogs coming into physical contact with a person being searched;
- Amend the definition of scanner searches to include imaging technology searches;
- Align search procedures by providing the ability to require the removal of outer clothing and accessories, and powers to deny entry if those being search refuses to comply;
- Introduce an obligation to provide newly admitted prisoners with information about disciplinary offences;
- Introduce a statutory reconsideration process, with decisions made by the chief executive, regarding decisions about the placement of prisoners and their babies in Mothers with Babies Units;
- Revoke Regulation 196, which states that prisoner does not have any legitimate expectation of having similar conditions or opportunities throughout their period of detention, and amend the Act to insert the substance of the Regulation;
- Provide the Department with flexibility to accommodate different charging regimes for prisoner phone calls; and
- Clarify that intelligence and security agencies can retain recordings if they are required to enable an agency to perform any of its statutory functions, and that the Department cannot disclose recordings under the Privacy Act 1993.

#### **4.2 Are the proposed preferred approaches compatible with the Government's 'Expectations for the design of regulatory systems'?**

The proposals are not expected to substantially overhaul the regulatory system within the Corrections portfolio, and broadly speaking, they meet the expectations for the design of regulatory systems. For example, the regulatory system will continue to have the same objectives as described in Section 6 (Principles guiding corrections system) of the Corrections Act. The proposals are designed to achieve the principles in a more effective manner. However, given the Act deals with the incarceration of people, there will continue to be some impacts on individual autonomy. Some provisions, namely (O), (P), and (R) are designed to ensure there is fair and equitable treatment of regulated parties (prisoners). Provision (C) relating to the use of chains and irons is aimed at more explicitly meeting the relevant international standard set out by the United Nations Standard Minimum Rules for the Treatment of Prisoners.

The expectations relating to predictable and consistent outcomes may not be met. While the proposed provisions are expected to change behaviour of prisoners and corrections staff responsible for the treatment of prisoners, the control and command nature of the prison environment makes it difficult to predict behaviour, particularly given 62 percent of people in prison have recently experienced a mental disorder and 47 percent of people in prison have an addiction problem. Although a legislative requirement does not guarantee staff compliance, including the process and procedures in legislation would add greater accountability for the Department to provide the best management possible.

#### **4.3 What are stakeholders' views on the preferred approaches?**

##### **Ministry of Health**

The Ministry of Health was supportive of the proposed changes to the treatment of prisoners vulnerable to self-harm.

It stated that delegation of health centre managers' responsibilities seems an appropriate option. It also suggested that there may be merit in progressing with an option to ensure there is a health centre manager on-site at all times to allow for consistency of approach and ownership of the role.

The Ministry of Health also raised concerns as to the impacts of prolonged restraint on a prisoner during a stay in hospital. A provision to establish safeguards to protect against this risk was included.

##### **Ministry of Justice**

The Ministry of Justice did not have any concerns with the recommendations.

##### **New Zealand Police**

The New Zealand Police did not have any concerns with the recommendations.

##### **Ministry of Social Development**

The Ministry of Social Development was supportive of the proposed changes to the treatment of prisoners vulnerable to self-harm, strip searching of prisoner returning from escorted outings, and the delegation of health centre managers' powers and functions.

They also sought assurance that searches of visitors who are children or young people are handled with sensitivity, and that information about the search rules is provided prior to arrival and will be in a form that will be suitable for conveying to children and young people.

##### **Oranga Tamariki – Ministry for Children**

Oranga Tamariki sought confirmation that the current policy of not mixing young and adult prisoners in shared cells would continue. They also sought confirmation that youths would

be excluded from being held in Police jails.

Oranga Tamariki are supportive of the Mother with Babies proposal, and strip searching of prisoner returning from escorted outings.

### **Office for Disability Issues**

The Office for Disability Issues sought confirmation that information provided to newly admitted prisoners will be provided in forms that prisoners with deaf and hearing impairments and prisoners with intellectual/learning disabilities can understand.

### **Ministry for Women**

The Ministry for Women was supportive of the proposals relating imaging searches proposal and strip searching following escorted outings as they will be particularly beneficial to female prisoners by reducing the risk of re-traumatising those who have experienced sexual or physical abuse. However, they have significant concerns about the general use of strip searches in practice given the risk of re-traumatisation.

### **Te Puni Kōkiri**

Te Puni Kōkiri did not raise any concerns with the recommendations.

### **New Zealand Security Intelligence Service**

The New Zealand Security Intelligence Service is supportive of the proposal to address inconsistent provisions for the disclosure of phone call recordings.

### **Human Rights Commission**

During policy development the Human Rights Commission (HRC) noted it will be necessary to ensure that any legislative regime for the management of vulnerable prisoners contains sufficient safeguards to prevent the unreasonable or prolonged detention of individual prisoners. These safeguards are provided in Schedule 5 of the Regulations, which requires that an escorting officer must implement any measures that are reasonably necessary to ensure that the mechanical restraint does not adversely affect the health and comfort of the prisoner.

The HRC also made a submission to the Justice Committee, which can be found on the New Zealand Parliament website.

During consultation following the conclusion of the Select Committee process, the HRC were supportive of the proposal relating to strip searching following an escorted outing, although they preferred the use of imaging technology instead of strip searches, where this is available.

### **Office of the Privacy Commissioner**

During policy development, the Office of the Privacy Commissioner raised concerns over the intrusiveness of imaging technology and sought inclusion of safeguards to limit the privacy and health impacts. These safeguards are now included.

The Privacy Commissioner also made a submission to the Justice Committee, which can be found on the New Zealand Parliament website.

During consultation following the conclusion of the Select Committee process, the Privacy Commission were supportive of the amendments regarding at-risk prisoners and strip searching provisions, but expressed a view that imaging technology should be preferred to strip searches wherever possible.

### **Ombudsman**

During policy development, the Ombudsman noted the need for the mother and baby placement decisions to be completed promptly, without compromising the quality of the decision.

The Ombudsman also made a submission to the Justice Committee, which can be found on the New Zealand Parliament website.

The Ombudsman was supportive of the proposal to amend the strip search powers for those returning from escorted outing. The Ombudsman was also supportive of not using Police jails to respond to accommodation pressures.

They also sought clarification that information about disciplinary offences and complaints processes would be provided immediately after a prisoner's reception at a prison.

### **National Preventative Mechanisms**

The National Preventative Mechanisms (NPM) under the Optional Protocol to the Convention against Torture made a submission to the Justice Committee, which can be found on the New Zealand Parliament website.

During consultation following the conclusion of the Select Committee process, the NPM were generally supportive of revisions to proposals relating to at-risk prisoners, Police jails, and mother and baby placement decisions.

While the NPM were supportive of revisions to the use of mechanical restraints during hospital visits, they raised concerns that the use of restraints may not be proportionate to the prisoner's risk profile and could be used on women prisoners during child birth. The Prison Operations Manual states that restraint requirements are determined by completing the prisoner transportation risk assessment. It also explicitly states that under no circumstances can any mechanical restraints be used on prisoner giving birth.

The NPM also raised concerns that the search proposals could curtail prisoners' contact with whānau and friends. While the recommended option introduces slightly more arduous requirement for some visitors, this broadly aligns with airport security protocol and at the very least, visitors can enter prison by giving consent to undertake a rub-down search to determine the presence of item that may have caused an alert.

# Section 5: Implementation and operation

## 5.1 How will the new arrangements be given effect?

The proposals will require amendments to the Corrections Act, as well as some consequential amendments to the Regulations.

If passed into law, the proposals will be implemented by the Department of Corrections through normal operational channels, such as updating the Prison Operations Manual, which guides staff on process and procedures. Staff training may be required for some proposals.

There are no significant additional costs associated with any of the proposals, and implementation costs and risks will be managed within the Department’s baseline funding. Proposals relating to imaging technologies provide additional tools and flexibility for the Department. While there may be additional costs with these tools should they be used, any funding decisions would be made at that time.

## Section 6: Monitoring, evaluation and review

### 6.1 How will the impact of the new arrangements be monitored?

The intention of these amendments is to make a number of improvements to the current legislative framework of the corrections system. This will contribute to achieving the Department's objectives of ensuring compliance with sentences and orders, and managing offenders safely and humanely. As many of the proposals update the legislation based on already improved operational policy, it is not envisaged that there will be substantial changes to departmental performance indicators and data collection.

### 6.2 When and how will the new arrangements be reviewed?

A formal review process of the proposals is not expected. However, the implications of all proposals will be monitored in routine internal service improvement processes and internal audit.