

Office of the Minister of Corrections

Cabinet Social Wellbeing Committee

## **Proposed amendments to the Corrections legislative framework regarding improved safety, rehabilitation and reintegration outcomes**

### **Proposal**

- 1 I seek Cabinet's agreement to make amendments to the Corrections Act 2004 (the Act) and Corrections Regulations 2005 (the Regulations) to improve safety, rehabilitation and reintegration outcomes, and support the Department of Corrections' (Corrections) strategic direction.

### **Relation to government priorities**

- 2 In its 2020 election manifesto, the Government committed to continuing improvements to the criminal justice system and implementing *Hōkai Rangi*, Corrections' strategic direction to help address the overrepresentation of Māori in the corrections system through uplifting the wellbeing/oranga of Māori in Corrections' management and their whānau.

### **Executive Summary**

- 3 *Hōkai Rangi* challenges Corrections to improve outcomes for all people under its management, and ultimately seeks to reduce the harm criminal activity causes communities. This means doing things differently, including by having purposeful relationships with Māori. Guided by this focus, Corrections has significant operational change underway.
- 4 To further strengthen this operational change, I am proposing the introduction of a Corrections Amendment Bill 2023 to achieve changes that are operational and largely focused on prisons. These changes will support Corrections in further realising its core purpose of public safety, as well as managing sentences safely and effectively, and providing for the rehabilitation and reintegration of people in the corrections system.
- 5 The Act and Regulations outline clear and specific rules about how people in prison are managed. This is necessary to protect the human rights of people under Corrections' management and ensure Corrections meets international obligations, such as those set by the United Nations. Within this context, the changes I propose will establish more transparency in how Corrections improves safety and rehabilitation.

*The proposed changes are in keeping with good legislative practice*

- 6 The proposed Bill supports good regulatory stewardship in that periodically the operational nature of the Corrections system requires the legislative framework to be updated to adapt to changes in best practice, emerging issues, and to

resolve technical difficulties that have developed. This approach ensures that Cabinet, the House, and wider government resources are used efficiently.<sup>1</sup>

*Public consultation on these proposals ran for six weeks over August and September 2022*

- 7 On 8 August 2022, Cabinet approved the release of a discussion document on options to improve outcomes in the corrections system [CAB-22-MIN-0299 refers]. The discussion document included proposals that could result in changes to the Act and Regulations.
- 8 Corrections proactively emailed over 500 partners and key stakeholders to inform them about consultation. One hundred and ninety five survey responses and 57 written submissions were received.
- 9 My officials met with a variety of individuals and groups including some iwi, the Office of the Ombudsman and the Human Rights Commission. They also met a number of feminist groups who shared views on the placement of transgender women in female prisons.
- 10 Engagement also occurred with people who have lived experience at two prisons. The Salvation Army's public submission also included views from people who have been in prison.
- 11 The legislative and regulatory proposals were generally well supported, but some amendments have been made in response to feedback from consultation. Where amendments have been made, this is outlined in the relevant section of this paper.

*This paper seeks agreement primarily for amendments to the Act*

- 12 This paper seeks your agreement to final policy decisions for amendments to the Act and several related amendments to the Regulations. Other proposals that were publicly consulted on in 2022 relating to the Regulations will be progressed separately in a regulatory package in 2023.
- 13 The proposals outlined in this Cabinet paper are separated into three parts.
- 14 My first set of proposals will enable operational improvements and are also designed to support Corrections' role as a responsible regulatory steward:
  - 14.1 modernising and future-proofing the Act to clarify Corrections' powers to monitor prisoner communications and activities for intelligence purposes **[recs 1 – 8]**;
  - 14.2 ensuring the internal disciplinary process in prison is effective **[recs 9 – 17]**;

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<sup>1</sup> These changes would only apply to Corrections prisons, including those run under contract such as by Serco, and not to other New Zealand custodial settings such as Police jails.

- 14.3 strengthening processes for the authorisation and use of non-lethal weapons on prisoners **[recs 18 – 20]**.
- 15 My second set of proposals supports the strategic shifts that are taking place under Corrections' departmental strategy, *Hōkai Rangī*, aimed at improving the ora/anga/wellbeing of all people under Corrections management:
  - 15.1 supporting improved rehabilitation and reintegration outcomes for Māori and all people under Corrections management **[recs 21 – 24]**;
  - 15.2 enabling the limited mixing of remand accused and convicted prisoners for kaupapa Māori, religion, education and therapeutic programmes, with the consent of the remand accused prisoner **[recs 25 – 26]**.
- 16 My third set of proposals are miscellaneous amendments and are operational and technical in nature:
  - 16.1 enabling greater use of body imaging technology **[recs 27 – 29]**;
  - 16.2 enabling the use of body temperature scanners **[rec 30]**;
  - 16.3 changes to requirements for case management plans **[rec 31 – 32]**;
  - 16.4 enabling information sharing with the Inland Revenue Department **[rec 33]**.
- 17 Lastly, I have five proposals that are minor and technical in nature that Treasury has granted exemptions from the Regulatory Impact Statement process **[rec 34]**.

## Summary of proposed changes

### *Part One: enabling operational improvements*

#### **Modernising and future-proofing the Act to clarify Corrections' powers to monitor prisoner communications and activities for intelligence purposes**

- 18 With the emergence of new, more sophisticated gangs and domestic and transnational organised crime groups, risk from illicit or covert activity in prison has increased. Within its current powers, Corrections is limited in its ability to effectively monitor and use information obtained from the variety of communication methods used by these groups in prisons, and cannot accurately assess risks posed to the safety, security, and good order of prisons.
- 19 For example, Corrections is able to open mail to determine whether it should be withheld, but harmful information found in mail cannot be used for intelligence purposes to develop a broader picture of risk. The Act has not responded to changes in technology, and is silent on Corrections' ability to monitor sources such as email or internet services. It is likely that in time prisoners will gain access to regular use of digital technologies, yet Corrections currently has no power to monitor them, despite the safety risks remaining the same as for other sources that Corrections can monitor. The Act is also silent on Corrections'

powers to monitor in-person visits. We know from phone monitoring that some prisoners use in-person visits as an opportunity to discuss activity that may impact the good order of the prison, as they know that visits cannot be monitored.

- 20 Because the Act is outdated and limits Corrections' powers to monitor, collect, use and disclose information for intelligence purposes, this also limits Corrections' ability to support and contribute to the National Security Intelligence Priorities and associated government strategies (e.g. the Transnational Organised Crime in New Zealand Strategy and New Zealand's Countering Terrorism and Violent Extremism Strategy).
- 21 Feedback from public consultation was that the safety and security of prisons is important to ensuring public safety, but Corrections must ensure that any restrictions on people's rights to privacy are proportionate and justifiable. Mass surveillance was raised as a particular infringement and must be justified.
- 22 In response to public feedback, proposals have been amended to ensure any additional powers provided in the Act are necessary for fulfilling Corrections' purpose of maintain public safety and the safety and good order of prisons. This included, for example, putting restrictions on proposals relating to the monitoring of, and the collection and use of information obtained from in-person visits in prisons, which I now propose will only be enabled to occur on a case-by-case basis and with the approval of the Chief Executive of Corrections.
- 23 I recommend that the Act is amended to introduce specific provisions into the legislative framework that will empower and restrict Corrections' ability to monitor, collect, use, and disclose different forms of prisoner communications and information sources for intelligence purposes **[recs 1 – 2e]**. I also seek agreement to amendments that will improve how Corrections processes raw information, by using expertise from other agencies and emerging technology, such as artificial intelligence **[recs 3 – 4]**.
- 24 I intend for Corrections to analyse different technologies such as artificial intelligence before seeking Ministerial approval to authorise their use **[rec 4 – 5]**. Operationally, Corrections would trial technologies before they are rolled out more widely across prisons.
- 25 Finally, I am proposing that changes be made to how information gathered from prisoner communications is retained and disclosed, to ensure compliance with external legislation and to be consistent across different communications and information sources **[recs 6 – 8]**.
- 26 This package of options would create more specific legislative provisions that both enable and appropriately restrict Corrections' ability to monitor prisoner communications and activities and to gather and share the information that is obtained. This would support Corrections to be transparent in its monitoring activity and be more accountable in how it uses its powers. This transparency will assist Corrections to comply with government guidance on the creation of

new intelligence powers, which are expected to be expressly enabled in legislation due to the limitations they place on human rights.<sup>2</sup>

- 27 I do not intend for any of the provisions above to capture health information or information from someone's participation in rehabilitation programmes and services. Monitoring, collection, use and disclosure will only occur when Corrections believes it is reasonably necessary to support the good order and safety of prisons and improve public safety, and will be targeted at high-risk individuals.
- 28 While these powers impact prisoner privacy, they are aligned with the right to be free from unreasonable search and seizure under section 21 of the New Zealand Bill of Rights Act 1990 (NZBORA). This alignment is because the powers will be targeted at the highest risk individuals and safeguards will exist around the retention and disclosure of prisoner information used for intelligence purposes. These powers will enable Corrections to more effectively ensure the safety and good order of prisons. I also propose that a review of these amendments is commenced approximately 18 months following implementation to assess how they are working in practice including how they are impacting prisoner wellbeing and rights. This review would be conducted internally and shared with key stakeholders such as the Ombudsman, the Human Rights Commissioner, and the Privacy Commissioner, for external accountability.

### **Ensuring the internal disciplinary processes in prison are effective**

- 29 One way Corrections maintains the safety and wellbeing of staff and prisoners is through disciplinary processes set out in the Act and Regulations. This ensures that prisoner misconduct is dealt with in a timely and effective way through misconduct hearings and the imposition of penalties. In 2021, 16,684 misconduct charges were brought. The vast majority (75 to 85 percent) of these charges resulted in some form of penalty.
- 30 I would like to resolve some problems that are impacting the effectiveness of the disciplinary process. These problem areas have been identified through a review by Corrections that was undertaken as part of a Joint Action Plan to reduce violence and aggression in prisons.<sup>3</sup>
- 31 I propose that Adjudicators and Visiting Justices who oversee disciplinary hearings are able to offer suspended sentences to incentivise better prisoner behaviour [recs 9 – 11], allow hearings to proceed without the accused being present in some circumstances [recs 12 – 14], allow remote access for misconduct hearings where the Adjudicator or Visiting Justice does not think it is contrary to the interests of justice and with a preference for video over audio links [recs 15 – 16], and specify that inciting other prisoners to commit an offence against discipline is also an offence [rec 17].

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<sup>2</sup> See Chapter 21 of the Legislation Guidelines 2021.

<sup>3</sup> The Joint Action Plan was developed with the Corrections Association of New Zealand and the Public Service Association.

- 32 Feedback from public consultation generally agreed with the sentiment that disciplinary processes need to be effective, which includes being timely. However, there was a strong emphasis on ensuring any amendments to the existing process safeguard the principles of natural justice. For this reason, I do not recommend progressing some proposals that were publicly consulted on. This includes proposals that would have shortened the time a prisoner has to appeal a disciplinary hearing outcome, and giving prison-based Adjudicators powers to consider a wider range of matters.
- 33 In response to public feedback, my proposals now also clarify the limited situations when a hearing could proceed in the accused person's absence. A proposal for suspended sentences will be implemented with appropriate safeguards to prevent Adjudicators and Visiting Justices being subjective in their application.
- 34 These amendments will better support an effective disciplinary process while maintaining a credible, transparent, and fair process that will contribute to a safer prison environment and improved wellbeing for the prison population. These amendments will also be supported by continued operational change that is already underway, such as improved and standardised training for Prosecutors, Adjudicators and Visiting Justices.

**Strengthening processes for the authorisation and use of non-lethal weapons on prisoners**

- 35 Section 85(3) of the Act requires that before Cabinet authorises the use of a non-lethal weapon, the Minister of Corrections must be satisfied that its use is compatible with the humane treatment of prisoners, and that the potential benefits of use outweigh any potential risks.
- 36 Most of the guidance relating to the use of non-lethal weapons is set out in Corrections internal policy documents, but there is no requirement in the Act, Regulations, or operational policy as to what information the Minister needs to receive when making decisions to satisfy the section 85(3) test.
- 37 This creates the risk that when the Minister seeks Cabinet approval to introduce non-lethal weapons, the Minister might not have seen an appropriate level or type of information to be reasonably satisfied of section 85(3) requirements.

9(2)(h)



- 39 9(2)(h) I consider that it is advisable to change both the Act and the Regulations to ensure future Ministers are well supported to make decisions [recs 18 – 19].
- 40 I also propose that clarifications are made to the legislative framework regarding the use of non-lethal weapons when prisoners are passively resisting a lawful order. The Act enables use of force “in the case of active or passive resistance to a lawful order.” The Ombudsman and Human Rights Commissioner have recommended, in keeping with international guidance, that non-lethal weapons such as pepper spray not be used in cases of purely passive resistance. My proposed change is in keeping with legislative requirements for Corrections Officers to use no more force than is reasonably necessary and will be supported by updates to guidance and training for staff.
- 41 I therefore recommend that the legislative framework is updated to clarify that non-lethal weapons may not be used in cases of passive resistance unless staff have reasonable grounds for believing that there is an imminent threat of injury or harm to any person [rec 20].

## ***Part Two: changes to support Corrections’ strategic direction***

### **Supporting improved rehabilitation and reintegration outcomes for Māori**

- 42 Māori are significantly overrepresented in the prison population, comprising approximately 53 percent of people in prison and approximately 43 percent of people serving home detention. Overrepresentation is even higher for wāhine Māori. For example, approximately 68 percent of women on remand in custody have Māori whakapapa.
- 43 Given progress made to date under *Hōkai Rangī*, I consider it is now appropriate to develop pragmatic legislative provisions that clearly state that Corrections must improve outcomes for Māori in the corrections system and support the Crown in meeting its obligations under te Tiriti o Waitangi/the Treaty of Waitangi (te Tiriti). I consider that these changes will also support improved outcomes for all people in the corrections system.
- 44 Corrections consulted publicly on these provisions focusing on four key areas: working with Māori, access to culture and whānau involvement, and improving health, and education outcomes for Māori in prison. These were chosen because they are areas where Corrections has existing statutory responsibilities and where significant inequities exist between Māori and non-Māori in the corrections system.<sup>4</sup>

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<sup>4</sup> Māori in prison have poorer health and education outcomes compared to non-Māori. For example, of prisoners who had their literacy level recorded as of 6 December 2021, 8.1% of Māori had a literacy rate of step six compared to 17.6% of New Zealand Europeans. Literacy and numeracy rates for people in prison are measured on a scale of one to six, where step six is high literacy or numeracy and step one is low literacy or numeracy. People at step six would be able to participate in tertiary education while people at step one would struggle to understand and complete basic application forms.

- 45 Feedback from public consultation was strongly supportive of the focus on these key areas. Working with Māori entities and increasing the number of kaupapa Māori programmes and services in prisons were areas that were particularly strongly endorsed by submitters. Evidence shows that cultural responsiveness has a significant impact on how people engage with interventions.
- 46 In relation to legislative change to commit Corrections to long-term improvements in these focus areas, iwi partners, Māori organisations and other stakeholders such as the Human Rights Commission were supportive, while many other submitters did not specify whether they would prefer legislative or operational change.

*I recommend making pragmatic legislative amendments that will support Corrections to improve outcomes for Māori and all people in the corrections system*

- 47 My recommended option is to amend the Act to clearly state how Corrections must operate in order to improve outcomes for Māori and support the principles of te Tiriti. This approach incorporates feedback received from public consultation and has been tested with a group of technical experts, and other agencies including the Treaty Provisions Oversight Group. These amendments will support improved outcomes for Māori and all people in the corrections system.
- 48 I recommend that the Act is amended to:
- 48.1 incorporate a te Tiriti reference **[rec 21]**;
  - 48.2 incorporate three new principles for the corrections system that are derived from te Tiriti principles to, so far as reasonably practicable, provide for equitable outcomes for Māori, engage and work with Māori, and promote the wellbeing of Māori in the corrections system **[rec 22]**;
  - 48.3 require Corrections to maintain a strategy focused on Māori, and focus resources to improve outcomes in relation to cultural activities, health and education services for all people in prison and enable families, whānau, iwi and hapū to be involved in prison placement decisions **[recs 23a – 23e]**.
- 49 The proposed principles could be inserted into the Act as amendments to the existing Corrections principles or as a separate clause. These options would be worked through in drafting and will take into consideration other legislative models such as the Pae Ora (Healthy Futures) Act 2022. This will include consideration of how the new principles proposed above will interact with the existing section 6 principles in the Act.
- 50 All of the principles and requirements noted above would have appropriate caveats placed on them, to be achieved so far as reasonable and practicable. These types of caveats are placed on existing principles and requirements throughout the Act **[rec 24]**.



- 51 I do not propose to amend the Act to add specific accountability for these new provisions, as the Act already places appropriate accountability on roles within the corrections system.
- 52 I consider that these proposals are pragmatic and will support Corrections to improve outcomes for Māori and all people it manages, by clearly outlining a set of principles and specific requirements that will impact decision-making and operational practice within the corrections system.

**Enabling the limited mixing of remand accused and convicted prisoners for kaupapa Māori, religion, education and therapeutic programmes, with the consent of the remand accused prisoner [contains material that is subject to legal advice privilege]**

- 53 The Regulations currently prevent Corrections from mixing remand accused and convicted people in prison, unless there are exceptional circumstances, such as a natural disaster. This is based on the International Covenant on Civil and Political Rights (ICCPR) that requires the separation of accused and convicted people in prison to protect the presumption of innocence for accused people.
- 54 Given New Zealand's small and geographically dispersed prison population, there are occasions when Corrections cannot provide parallel, non-offence focused programmes to remand accused and convicted prisoners, for example, because there are not enough participants, or it is not financially feasible to do so. The Regulatory prohibition on mixing accused and convicted prisoners prevents Corrections from designing or implementing innovative non-offence focused programmes and services that prioritise the interests of the prisoner, regardless of their conviction status.
- 55 This problem came to light as Corrections worked with mana whenua to design innovative kaupapa Māori approaches in recent years. Overall, there is a lack of clarity about where the boundaries sit between what is permitted and not permitted in relation to mixing accused and convicted prisoners in exceptional circumstances and in line with New Zealand's international obligations. I seek to ensure that the Act and the Regulations include greater clarification about what is permitted.
- 56 I therefore recommend that the Act and the Regulations are amended to allow the limited mixing of accused and convicted people in prison, for kaupapa Māori, education, religion, and therapeutic programmes, with the consent of the remand accused person and where it is in their best interests. In order to achieve this, I recommend that the legislation clarifies that the mixing is enabled despite any international obligations **[rec 25]**.

9(2)(h)



9(2)(h)

- 58 Overall, this change will impact only a small number of innovative programmes that use kaupapa Māori approaches that are inclusive of whakapapa, and key services such as alcohol and other drug treatment programmes. Prisoners on remand for longer than average times will be the main beneficiaries.<sup>5</sup>
- 59 In addition, as part of this amendment, we will work with Parliamentary Counsel Office to ensure that existing provisions continue to clearly permit the mixing of accused and convicted prisoners in Mothers with Babies Units and mixing of young people under 18 and adults [rec 26].

### ***Part Three: miscellaneous changes to improve Corrections' ability to operate safely, efficiently and to reflect best practice***

- 60 I also recommend four miscellaneous changes are made to the Act that are more operational and technical in nature. These will improve Corrections' ability to operate prisons safely, efficiently, and to reflect best practice in rehabilitation as well as better meet our international obligations.

#### **Enabling greater use of body imaging technology**

- 61 Body imaging technology is currently able to be used as a replacement for strip searches in prisons. I seek to enable the wider use of body imaging technology as a replacement for rub-down searches upon re-entry to prison, where the prisoner gives their consent [rec 27]. If the prisoner prefers to receive a rub-down search, this option will remain in place.
- 62 This change would improve wellbeing for prisoners as imaging technology searches do not require the prisoner to be touched, as in a rub-down search. The use of imaging technology will be used within safe radiation limits, and Corrections will prioritise its use in place of strip searches over rub-down searches, as strip searches are more invasive.
- 63 During public consultation, submitters such as the Privacy Commissioner generally supported greater use of body imaging technology and anecdotal feedback from staff and people in prison is that imaging technology is much preferred. These changes received positive feedback from groups such as Intersex Aotearoa for providing more dignity to people. They are also in keeping with United Nations guidance for searches of prisoners, and aligns with the right not to be subject to unreasonable search and seizure in section 21 of NZBORA.
- 64 While body imaging technology is less physically invasive, it is still important that privacy safeguards are in place. As a result, and following consultation, I have amended my recommended options to ensure there are clear provisions in the

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<sup>5</sup> In the financial year 2021/2022, 13,939 remand periods ended. Over half of these lasted less than six weeks and just over 10 percent (1,426) had a duration of six months or longer and it is these people who may benefit most from this change.

Act for when imaging technology can be used and how long imaging technology data can be retained for **[rec 28]**.

- 65 I also recommend amending current requirements in the Act for searches to be carried out by a person “of the same sex” to better support gender diverse people in prison including, for example, transgender and intersex prisoners. This change aligns with the policy intent in previous changes to the Births, Deaths, Marriages and Relationships Registration Act 1995 to introduce a self-identification process for people to amend the sex recorded on their birth certificate **[rec 29]**.

### **Other miscellaneous amendments**

- 66 I recommend additional changes are made to the Act and the Regulations to:
- 66.1 enable body temperature scanners to be used in prisons where there is a necessary and justifiable health risk for their use (such as COVID-19) **[rec 30]**;
  - 66.2 specify in the Act that case management plans must be developed for every prisoner and outline specific requirements for case management plans in the Regulations, including when they must be reviewed **[rec 31 – 32]**; and
  - 66.3 allow Corrections to share information with the Inland Revenue Department **[rec 33]**.
- 67 I also recommend making five minor and technical amendments. These proposals have been granted exemptions from the Regulatory Impact Analysis requirements. They are to:
- 67.1 clarify that prison managers can refuse to issue authorised property to someone who has been assessed as at risk of self-harm **[rec 34a]**;
  - 67.2 clarify that all prisoners may be subject to ongoing assessments of their risk of self-harm **[rec 34b]**;
  - 67.3 clarify that prison managers have the power to deny or restrict associations for prisoners assessed as at-risk **[rec 34c]**;
  - 67.4 change the term ‘management plan’ used in section 51 of the Act to ‘case management plan’ **[rec 34d]**;
  - 67.5 remove sections 98(3)(b) and 98(6) from the Act, which set out situations in which a Corrections Officer may strip search a prisoner, as these sections are unnecessary and cause confusion operationally **[rec 34e]**.

## Next Steps

*I intend to introduce a Bill to the House in 2023*

- 68 Subject to Cabinet agreement, I will authorise Corrections to issue drafting instructions to the Parliamentary Counsel Office before the end of this year [rec 35].
- 69 I intend for changes to the Act to be progressed through a Corrections Amendment Bill, to be introduced to the House in 2023, and passed in 2024, with supporting regulations made afterward.

## Financial Implications

- 70 If Cabinet agrees to these changes, there will be costs associated with operational changes to support implementation such as updates to practice guidance and staff training. Corrections will meet these costs from within baselines.

## Impact Analysis

- 71 The Treasury's Regulatory Impact Analysis team has determined that the proposals in recommendations 33a-e are exempt from the requirement to provide a Regulatory Impact Statement. This is on the grounds that they are suitable for inclusion in a Statutes Amendment Bill (as provided for in Standing Orders).
- 72 The other regulatory proposals in this paper are analysed in the Regulatory Impact Statement attached in Appendix 1.
- 73 The panel has assessed the majority of the RIA as meeting the criteria with the exception of two of the miscellaneous sections which are discussed below, along with the following comments.
- 74 The panel assessed Section D on improving outcomes for Māori as meeting the RIA criteria. However, the panel noted that Corrections may face challenges when it comes to the implementation of the options in relation to health and education as Corrections is not the only agency funding and delivering those service in prisons. These provisions will require careful drafting to ensure they are practical to implement and have appropriate regard to this consideration.
- 75 The panel assessed Section E on the mixing of remand accused and convicted people as meeting the RIA criteria. However, the panel noted that if the option to allow mixing in limited circumstances was to go ahead this could be seen as a breach of Article 10(2) of the International Covenant on Civil and Political Rights which does come with a degree of risk to New Zealand's international reputation. This is somewhat mitigated by the limitations that are proposed, for example having separate accommodation and mealtimes. This risk is balanced against the remainder of New Zealand's international obligations in regard to the treatment of prisoners providing a counterbalance, including the need to provide cultural activities and healthcare to people in prison. Overall, despite these risks,

the panel was convinced by the RIA and the recommended option being the best approach to deliver against the objectives.

- 76 The Panel assessed Section G on body temperature scanners as partially meeting the RIA criteria. The circumstances in which body temperature scanning can be used will determine whether this search is a justifiable encroachment on human rights. Those circumstances are not well explored. Otherwise, the case for being able to scan everyone’s body temperature before entry to prison is convincing.
- 77 The panel assessed Section I on information sharing with Inland Revenue as partially meeting the RIA criteria. The case for preferring a bespoke amendment to the Act over an Approved Information Sharing Agreement is not sufficiently convincing. Nevertheless, the assessment establishes that a bespoke amendment equally fulfils the objectives.
- 78 While the panel assessed each of the sections individually, it was noted that there was limited consultation with prisoners which is not a representative sample and not statistically significant. However, it was noted that the wider public consultation meant people had a chance to submit if previously in prison, or they had whānau in prison. On balance it was the panel’s view that while this limited consultation with people with lived experience placed constraints on the analysis, it did not negatively impact the analysis overall.

## Population Implications

79 The potential population impacts of my proposals are set out in the table below.

Population group	How the proposal may affect this group
Māori	<p>Disproportionate reoffending rates of Māori in the Corrections system was the key driver for the <i>Tu Mai Te Rangī!</i> report of the Waitangi Tribunal, in response to which <i>Hōkai Rangī</i> was developed.</p> <p>Māori are overrepresented in the prison population, comprising 53.1% of people in prison (65.2% of women in prison). Hence, the proposals outlined in this paper are more likely to impact Māori compared to the rest of the prison population.</p> <p>Māori are more likely to be disabled than non-Māori<sup>6</sup> and tāngata whaikaha (Māori with a disability) will benefit from the proposals, particularly options for improving outcomes for Māori, which would support Corrections to focus on delivering healthcare and education in prison that better meets the needs of Māori.</p> <p>The proposals for improving outcomes for Māori would be expected to lead to improved rehabilitation and reintegration outcomes for Māori, which will have benefits for people in the corrections system, their whānau, hapū, iwi and communities. The changes will also support Corrections to meet its overall purpose of improving public safety.</p> <p>For the information collecting and monitoring provisions, I believe that the change will positively impact the safety and wellbeing of people in prison as a whole. However, high profile activities like Operation 8, and issues of Māori data sovereignty, have heightened existing concerns of Māori about</p>

<sup>6</sup> Statistics NZ, Disability Survey: 2013.

	<p>how information collection powers are used. During consultation, Corrections spoke with iwi partners, where it was highlighted that any monitoring should only be targeted at high-risk individuals and only done when it can be reasonably justified. As such, the proposals were amended to make it clear that the policy intent is to ensure monitoring for intelligence purposes only occurs when reasonably justified for supporting Corrections' purpose.</p> <p>Options to enable increased access to non-offence focused programmes and services for remand accused people in prison aim to ensure that kaupapa Māori programmes have the conditions they need to succeed, and to improve wellbeing for Māori in prison (with 1,314 remand accused Māori in prison as of 31 October 2022).</p> <p>Fewer Māori would be subjected to invasive rub-down searches if changes are made that would allow wider use of imaging technology.</p>
<p>Women</p>	<p>There are 486 women in prison and 4,500 women on community sentences and orders, as at 31 October 2022. Wāhine Māori are overrepresented among these groups, and currently make up approximately 65.2% of women in prison and 50.4% of women on community sentences and orders.</p> <p>Changes to the information collecting and monitoring provisions may disproportionately impact wāhine Māori. When women go to prison, they often do not give up their role in the home, which makes it important that Corrections enables connection with friends and whānau. It is possible that changes to how Corrections monitors communications could present a barrier to feeling connected, as Corrections will have more oversight of activity. Corrections spoke to a group of women in prison as part of public consultation, and they reported that they would not support in-person visits being monitored but were aware that Corrections monitored other forms of communication. They provided some examples of when monitoring has supported their wellbeing, for example by preventing threatening emails and mail from being provided to them.</p> <p>Changes to increase access for remand accused people to kaupapa Māori and non-offence-focused programmes may allow more women to access programmes that previously would have struggled with low numbers of participants due to the size of women's prisons. However, the women spoken to at Christchurch Women's did not support mixing as they felt that people on remand would be disruptive for people who were sentenced. This change would only apply in limited circumstances and Corrections considers it will have limited use and this risk can be managed by careful programme delivery.</p> <p>Fewer women (a high percentage of whom have experienced past trauma) would be subjected to invasive rub-down searches as a result of changes to enable wider use of imaging technology.</p>
<p>Disabled people, including people with mental illness or distress in prison</p>	<p>People in prison and serving community sentences often have complex needs, including high rates of mental illness and learning disabilities, with over 90% of people in the Corrections system being diagnosed with a mental illness or drug addiction at some point in their life. There are also high rates of people with neurodisabilities in prison, including Foetal Alcohol Spectrum Disorder.</p> <p>People with disabilities in prison will benefit from improving Corrections' ability to monitor activity or harmful activity, as Corrections will be better able to assess risk and keep people safe, which supports wellbeing and rehabilitation.</p> <p>Disabled people in prison would be subject to fewer rub-down searches due to changes enabling the wider use of imaging technology. This could</p>

	positively impact people who are suffering from mental illness, especially those who have suffered trauma and sexual abuse, or who are experiencing body dysphoria.
Transgender, non-binary, takatāpui and intersex people in prison	<p>Transgender, intersex, and other gender diverse people in prison will benefit from improving Corrections' ability to monitor activity or harmful activity, as Corrections will be better able to assess risk and keep people safe.</p> <p>The wider use of imaging technology will also benefit transgender, intersex, and gender diverse people in prison because they will be subject to less invasive searches. During public consultation, Corrections heard from Intersex Aotearoa that one of their concerns was when intersex people have to be in spaces where their body structure is visible to others, such as during a strip search.</p> <p>Changes to allow gender diverse prisoners to specify whether they prefer a male or female Corrections Officer to carry out searches on them will better support their self-identification.</p>
Young people	<p>There are 756 young adults (under 25-years-old) in prison as at 31 October 2022. Māori youth are overrepresented among these groups, and currently make up 64.2% of young adults in prison and 41.1% of young adults on community sentences and orders.</p> <p>Fewer young people would be subjected to invasive rub-down searches if changes allow the wider use of imaging technology that would be beneficial for this vulnerable population.</p>
Older people	As at 31 October 2022, there were approximately 1,495 people over the age of 50 in prison. Older people on sentences will benefit from changes being made to support wellbeing under <i>Hōkai Rangi</i> .
Pacific people	<p>There were approximately 910 Pacific people in prison as at 31 October 2022.</p> <p>I believe that the information collection and monitoring provisions will positively impact the safety and wellbeing of people in prison as a whole.</p> <p>Fewer Pacific people would be subjected to invasive rub-down searches if changes allow the wider use of imaging technology.</p>
Ethnic communities	<p>Fewer than 4.5% of people in prison are from ethnic communities<sup>7</sup>, not counting individuals from Continental Europe, as at 31 October 2022.</p> <p>Proposals such as for information collecting and monitoring provisions will have an overall positive impact on the safety and wellbeing of people from ethnic communities in prison.</p> <p>Fewer people from ethnic communities would be subjected to invasive rub-down searches if changes allow the wider use of imaging technology.</p>

## Human Rights

80 Corrections understands the ICCPR and its obligation to keep remand accused and convicted prisoners separate. This is relevant to the proposal to enable the limited mixing of remand accused and convicted prisoners for kaupapa Māori, religion, education, and therapeutic programmes. Due to the limited nature of the mixing proposed, with remand accused and convicted prisoners subjected to

<sup>7</sup> The term ethnic communities includes people who identify their ethnicity as African, Asian, Continental European, Latin American or Middle Eastern.

different treatment and the fact that remand accused prisoners would need to consent to the programme, this proposal would comply with the ICCPR.

- 81 Options relating to intelligence gathering and disciplinary processes include safeguards to ensure that they comply with human rights, including the right to privacy and the right to be free from unreasonable search and seizure (section 21 of NZBORA). These safeguards include taking a targeted approach to monitoring, ensuring powers are only used when reasonably justified, creating robust operational policies, and ensuring there are regular reviews of the intelligence function. Any final policy decisions to amend legislation will also undergo NZBORA vetting processes.
- 82 The recommended options to refine the disciplinary processes in prison will bring greater alignment with the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules). Rule 37 requires that conduct constituting a disciplinary offence, the types and sanctions that may be imposed, and the authority competent to impose such sanctions be authorised by law or regulation of the competent administrative authority. The proposals are in line with section 27 of NZBORA, which guarantees the right to the observance of the principles of natural justice.<sup>8</sup> Although disciplinary processes in prison are not criminal, the options were also guided by the ICCPR requirements for criminal procedures.
- 83 The proposals to strengthen processes for the authorisation and use of non-lethal weapons in prisons will better align with sections 99 and 23(5)<sup>10</sup> of NZBORA than the status quo. This will be achieved by better ensuring that the Minister is satisfied that non-lethal weapons are humane and the benefits outweigh the risks. This will happen during the process of Ministerial and Cabinet authorisation for any regulatory changes, by clarifying the processes for before, during, and after the use of non-lethal weapons.
- 84 Clear legislative requirements related to Corrections te Tiriti responsibilities and improving outcomes for Māori will assist with progress towards consistency with UNDRIP (Article 18).
- 85 The wider ability to use imaging technology in place of rub-down searches when a prisoner enters or re-enters prison complies with human rights obligations under NZBORA section 21 and section 9, by ensuring that the least invasive and most proportionate search method is used. This option also aligns with the Bangkok Rules for the Treatment of Women Prisoners, particularly Rule 20, which states that alternative screening methods such as scans should replace invasive body searches. This option also aligns with Article 16 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading

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<sup>8</sup> Natural justice principles are the rule against bias and the right to a fair hearing.

<sup>9</sup> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

<sup>10</sup> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person.



Treatment or Punishment, to prevent acts of cruel, inhuman or degrading treatment.

- 86 The use of body temperature scanners complies with the right to privacy and the section 21 NZBORA right against unreasonable search and seizure, as they are only for use when there is a justified health risk. This ensures privacy is not unnecessarily breached. The right to privacy is also complied with in sharing information with Inland Revenue, as there will be safeguards in the Act that set out what information may be shared, and the circumstances under which it can be shared. The amendment to legislation to allow more flexibility for case management plans also complies with Mandela Rules, which emphasise that rehabilitation plans (part of case management plans) are particularly important.

### **Te Tiriti o Waitangi/Treaty of Waitangi assessment**

- 87 The proposals to monitor prisoner activities and communications for intelligence purposes engages Article Two of te Tiriti by impacting on Māori data sovereignty. Safeguards are in place to ensure Corrections gathers information where it is justifiable and does not retain information for longer than necessary. Further consideration will be given to Māori data sovereignty issues when implementing these proposals and will take into consideration wider government policy that is still under development.
- 88 The changes I am recommending to the disciplinary processes in prisons will support Article Three rights by enhancing access to justice and equity through the disciplinary process.
- 89 The proposals to improve rehabilitation and reintegration outcomes for Māori will embed te Tiriti principles into the Act, which will flow through to decision-making and operational practice. This includes both high-level principles to work with Māori, to achieve equitable outcomes for Māori and promote the wellbeing of Māori, as well as specific requirements to improve outcomes in areas such as health and education.

### **Climate Implications of Policy Assessment**

- 90 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to these proposals as the threshold for significance is not met.

### **Consultation**

- 91 The following government agencies have been consulted in the development of this paper and the discussion document: the Ministries of Education, Justice, Social Development, Health, Women, Pacific Peoples, Ethnic Communities, and Foreign Affairs and Trade, the Department of Internal Affairs, Inland Revenue Department, the New Zealand Police, Oranga Tamariki–Ministry for Children, Te Puni Kōkiri, Te Arawhiti, New Zealand Customs Service, the Public Service Commission, Office of the Privacy Commissioner, the Department of the Prime Minister and Cabinet, the Crown Law Office and the Treasury.

## Proactive Release

92 I will proactively release this Cabinet paper after 30 working days. Any information that may need to be withheld will be done so in line with the provisions of the Official Information Act 1982.

## Recommendations

The Minister of Corrections recommends that the Committee agrees to amend the Corrections Act 2004 and the Corrections Regulations 2005:

### ***Modernises and future-proofs the Act to clarify Corrections' powers to monitor prisoner communications and activities for intelligence purposes***

1. **agree** to introduce a definition of 'intelligence purposes' into the Act that would enable the collection and assessment of prisoner information to prevent harm, identify risk, and detect, deter, and disrupt unlawful or harmful activities to support the purposes and functions of the corrections system;
2. **agree** to introduce specific provisions into the legislative framework that empower and restrict Corrections' ability to monitor, collect, use, and disclose different forms of prisoner communications and information sources for intelligence purposes when reasonably necessary, justified and proportionate, and to notify prisoners and people communicating with prisoners generally that such communications may be monitored, to support the good order and safety of prisons and public safety, including:
  - a. **agree** to allow the monitoring of, and the collection, use, and disclosure of information obtained from verbal communications, such as phone calls and video calling;
  - b. **agree** to allow the monitoring of, and the collection, use, and disclosure of information obtained from, written communications, such as mail and email;
  - c. **agree** to allow the monitoring of, and the collection, use and disclosure of information obtained from visual sources, such as images (including drawings and symbols) or video footage;
  - d. **agree** to allow the monitoring of, and the collection, use, and disclosure of information obtained from digital communications and information sources, such as internet services, open source information, incident reports, biometric information, and trust accounts;
  - e. **agree** to allow the monitoring of, and the collection, use, and disclosure of information obtained from in person visits, on a case-by-case basis, and only when the Chief Executive of Corrections (or a senior delegate) has been satisfied that it is reasonably necessary to support the good order and safety of prisons and improve public safety;
3. **agree** to allow Corrections to disclose information collected from prisoner communications to other government employees for the purpose of translating

information to decipher different or coded language that may have harmful messaging;

4. **agree** to allow the Minister to authorise Corrections to use technology such as Artificial Intelligence for the purpose of monitoring and collecting information from prisoner communications and activities, if the Minister is satisfied that the benefits of using the technology outweigh any risks, and that the use of the technology will not have a disproportionate impact on any one group as far as is reasonably practicable;
5. **agree** to create a regulation making power for detail to be set out in the Regulations about what the Minister must consider to be satisfied that the benefits of using technology such as Artificial Intelligence outweigh any risks;
6. **agree** to repeal the provision relating to recordings of phone calls to be destroyed after two years, and add new provisions that information collected to monitor prisoner activities and communications, and for an intelligence purpose as set out in recs 2(a)-(e), may only be retained for as long as is reasonably necessary for the purpose it was collected. This will be supported by further detail in Corrections' operational disposal schedule (that is developed with the Chief Archivist);
7. **agree** to introduce provisions that provide grounds for disclosure of information collected from prisoner communications and information sources set out in recommendations 2a-2e in circumstances modelled on existing disclosure provisions in the Act for mail and phone calls, to create consistency for how and when information is shared with particular agencies, such as the Police;
8. **agree** to allow Corrections to use and disclose information collected from prisoner communications and information sources as set out in recommendations 2a-2e for the purpose of complying with any enactment or rule of law, such as the Privacy Act 2020;

***Ensuring the internal disciplinary process in prisons is effective***

9. **agree** to specify that when an Adjudicator or Visiting Justice imposes a penalty for an offence against discipline, they may choose to suspend the penalty for up to three months if this is appropriate and in the interests of the person's rehabilitation and reintegration. If the person offends against discipline again during the suspended penalty period the initial penalty will be imposed;
10. **agree** to exempt suspended penalties from the requirement that all penalties begin immediately after they have been imposed;
11. **agree** to clarify that an appeal of a decision for which a suspended penalty has been imposed does not affect the suspension period;
12. **agree** to allow Adjudicators and Visiting Justice's to decide to proceed with misconduct hearings and impose penalties without the accused being present if the person refuses to attend, or if an Adjudicator or Visiting Justice requires them

to leave the hearing on the grounds of disruptive behaviour, and make associated changes to the Regulations;

13. **agree** to require the Adjudicator or Visiting Justice to record in writing the rationale for the decision to proceed with the hearing without the accused person present;
14. **agree** to allow a re-hearing to be requested by the prisoner concerned when the decision of a Visiting Justice at a hearing that proceeded without the accused person present is disputed, or if the Visiting Justice is satisfied that the accused person had a reasonable excuse for non-attendance that was not known at the time of the hearing, or it is in the interests of justice;
15. **agree** to allow those attending a misconduct hearing to attend via remote access, if the Adjudicator or Visiting Justice considers this is not contrary to the interests of justice, but limit the use of audio-only links to only be used if it is not possible to facilitate a hearing in-person or via video link;
16. **agree** to require the rationale for the decision to proceed with a misconduct hearing via remote access to be recorded in writing;
17. **agree** to specify that inciting others in prison to commit an offence against discipline is an offence against discipline itself;

***Strengthening processes for the authorisation and use of non-lethal weapons on prisoners***

18. **agree** to amend the Act to clarify that when approving amendments to non-lethal weapons, in order for the Minister to be satisfied under section 85(3), they must sight and consider material relevant to the use of a non-lethal weapon that demonstrates compatibility with the humane treatment of prisoners and that the potential benefits outweigh the potential risks. This may include extracts from operational policies and manufacturers' instructions, among other information;
19. **agree** to amend the Regulations to include information about the procedures that must be followed before, during and after the use of each type of non-lethal weapon, that helps to ensure that they are used in a way that is compatible with the humane treatment of prisoners;
20. **agree** that the legislative framework is updated to clarify that non-lethal weapons may not be used in cases of passive resistance unless staff have reasonable grounds for believing that there is an imminent threat of injury or harm to any person;

***Supporting improved rehabilitation and reintegration outcomes for Māori***

21. **agree** to amend the Act to incorporate a reference to te Tiriti o Waitangi/the Treaty of Waitangi;
22. **agree** to incorporate three new principles that are derived from principles of te Tiriti o Waitangi/the Treaty of Waitangi, that would so far as reasonably practicable support the Corrections system to provide for equitable outcomes for

Māori, engage and work with Māori, and promote the wellbeing of Māori and other people;

23. **agree** to add five additional requirements to the legislative framework:

- a. to develop and maintain a strategy that is focused on improving outcomes for Māori in the corrections system, that would include an approach to monitor the strategy's outcomes;
- b. for prisoners at all sites, including Māori, to be able to access cultural activities, including through temporary release;
- c. to provide health services that include kaupapa Māori approaches and health sector principles, in order to improve outcomes for all people in prison;
- d. to provide mātauranga Māori as part of the provision of education programmes in prison;
- e. to enable families, whānau, iwi and hapū to be involved in decisions made with respect to which prison people are accommodated in, where appropriate to do so;

24. **agree** that the amendments in recommendations 22 and 23 will be subject to appropriate caveats about being reasonable and practicable within the circumstances;

***Enabling the mixing of remand accused and convicted prisoners, with the consent of the remand accused prisoner***

25. **agree** to amend the legislative framework to allow the limited mixing of remand accused and convicted prisoners for kaupapa Māori, education, religion and therapeutic programmes, with the consent of the remand accused person, and that mixing is enabled despite any international obligations;

26. **agree** to make any necessary amendments to ensure the Act and the Regulations continue to clearly permit mixing of accused and convicted prisoners in Mothers with Babies Units and mixing of young people under 18 and adults;

***Enabling greater use of body imaging technology***

27. **agree** to remove the restriction that requires images produced as a result of an imaging technology search to avoid showing a clear image of the body beneath clothing and to obscure genitals, when this technology is used in place of a rub-down search of a prisoner, when that rub-down search is done upon re-entry to a prison (such as following temporary removal or release). The body imaging scan may only be used in place of a rub-down search where the prisoner consents;

28. **agree** to require that any data collected during an imaging technology scan must be deleted so far as reasonably practicable within 24 hours;

29. **agree** to enable a gender diverse prisoner to nominate whether a strip search, rub-down search, or an imaging technology search is conducted or viewed by a male or female officer;

### ***Other miscellaneous amendments***

30. **agree** to specify that a scanner search may be used on any person entering a prison for the purpose of measuring their body temperature, where there is a necessary and justifiable health risk for their use and where approved by a prison manager (this would be voluntary for statutory and specified visitors who have rights to enter prisons) and that images taken by body temperature scanners would be deleted no more than one hour after they were taken;
31. **agree** to specify in the Act that case management plans must be developed for every prisoner with a Regulation making power for the detail of those plans;
32. **agree** to specify in the Regulations that the detail of case management plans will include when they must be reviewed, and that a wellbeing plan is developed within one week of someone being received to prison, and that a rehabilitation plan for convicted people is to be developed within one month of them being received to prison;
33. **agree** to allow Corrections to disclose prisoner information (with appropriate protections for people's privacy) to Inland Revenue on an ongoing basis for the purpose of complying with the tax system;

### **Minor and technical amendments**

34. **agree** to make five minor and technical amendments to the legislative framework. These proposals have been granted exemptions from the Regulatory Impact Analysis requirements. They are to:
- a. clarify that prison managers can refuse to issue authorised property to someone who has been assessed as at risk of self-harm, which may be appropriate in some situations to keep people safe;
  - b. clarify that a prisoner may be subject to ongoing assessments of their risk of self-harm regardless of whether they were assessed as being at risk of self-harm on reception into a prison;
  - c. clarify that prison managers have the power to deny or restrict associations for prisoners assessed as at-risk;
  - d. change the term 'management plan' used in section 51 of the Act to 'case management plan', to differentiate this term from other types of management plans referred to in legislation;

- e. remove section 98(3)(b) and 98(6) from the Act, which set out situations in which a Corrections officer may strip search a prisoner, as this section is unnecessary and causes confusion about whether strip searches must be carried out in these situations;
35. **invite** the Minister of Corrections to issue drafting instructions to the Parliamentary Counsel Office to amend the Corrections Act 2004 and Corrections Regulations 2005 to give effect to these recommendations;
36. **authorise** the Minister of Corrections to make further decisions on minor and technical matters in line with the policy decisions agreed by Cabinet.

Authorised for lodgement

Hon Kelvin Davis

Minister of Corrections