

In Confidence

Office of the Minister of Corrections

Cabinet Social Wellbeing Committee

Proposed amendments to the Corrections Regulations 2005 regarding the use of pepper spray in custodial settings

Proposal

- 1 I seek Cabinet's agreement to make three amendments to the Corrections Regulations 2005 relating to the use of pepper spray as a tactical force option in prison environments.

Relation to government priorities

- 2 In the 2020 election manifesto, the Government committed to continue the reform of our criminal justice system and implement *Hōkai Rangi*, the Department of Corrections (Corrections) strategic direction to address the over representation of Māori in the corrections system through te ao Māori approaches developed in partnership with Māori.

Executive Summary

- 3 Corrections is in the process of significant change, facilitated by its strategy, *Hōkai Rangi*. A key focus of this change is about reducing harm to prisoners and ensuring that Corrections supports staff and fosters a culture of continuous improvement. Part of this work involves ensuring that regulations and guidance on the use of force are clear and robust so that force is only used where necessary, reasonable, and proportionate.

We are strengthening the regulatory provisions for pepper spray as a use of force

- 4 Pepper spray is a critical tool that allows corrections officers working in prisons to respond to complex and volatile situations that can arise. This is because pepper spray significantly minimises the risk of physical injuries more than other tactical options when a "use of force" is needed. It also enables corrections officers to control violent situations quickly, which helps further minimise harm to staff and people in prison.
- 5 Because pepper spray is a use of force that causes short-term physical harm it is vital that the regulatory framework as set out in the Corrections Regulations 2005 (the Regulations) is robust. My officials have identified some comparatively minor changes to the regulations that are necessary at this time to support Corrections in pursuing further operational changes that support the safe use of pepper spray.
- 6 The first and more substantive change will remove the potential of new pepper spray delivery mechanisms being introduced in the future that the Minister and Cabinet have not approved to be safe and lawful. There is also an opportunity to ensure that operational decision-making around pepper spray is made at a higher management level to provide greater transparency. Additionally, I seek to amend the Regulations to

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be more in line with the Corrections Act 2004 (the Act) so that Corrections staff have more explicit guidance on the use of non-lethal weapons.

- 7 To achieve these goals, I seek Cabinet's agreement to amend the Regulations to:
 - 7.1 explicitly define the delivery mechanisms that corrections officers can use to deploy pepper spray, and specify which delivery mechanism can be used for spontaneous use of force and planned use of force **(Rec 1)**
 - 7.2 require the prison manager to approve the use of pepper spray when its use is planned **(Rec 2)**
 - 7.3 state that non-lethal weapons can only be used when necessary, reasonable, and proportionate, thereby reiterating the requirement of s 83(2) of the Act **(Rec 3)**.
- 8 Subject to Cabinet's agreement, my officials will work with the Parliamentary Counsel Office to draft amendments to the Regulations before submitting these to the Cabinet Legislative Committee **(Rec 5)**.

These regulatory changes are needed now and will be supported by longer term operational change

- 9 Agencies such as Police understand the need for these immediate regulatory changes. Other stakeholders including the Ombudsman, the Human Rights Commission and some government agencies have communicated a strong desire to see pepper spray carefully used and its use monitored rather than these regulatory changes being made now. They noted the disproportionate use of pepper spray on Māori as an issue and consider a wider regulatory review is required.
- 10 Those views carry weight with me, and my officials are working to address them on a longer timeframe. These regulatory amendments are comparatively minor, and it is operational changes that will significantly address those interests. Right now it is important that these regulatory amendments be made to support corrections officers to keep themselves and people in prison safe.
- 11 The critical operational changes underway include strengthening reporting mechanisms for the use of force and the introduction of training in areas such as human rights, unconscious bias, and trauma-informed approaches **(Rec 4)**. The ongoing implementation of the Corrections strategic approach, *Hōkai Rangī*, with its focus on increasing oranga/wellbeing through partnership and te ao Māori approaches, seeks to address disproportionate impacts on Māori.

Background: pepper spray is a tactical option available to corrections officers

- 12 Corrections officers have a range of tactical options available to respond to complex and volatile situations in prisons, to prevent injury to themselves or people in prison. This ranges from communication and de-escalation techniques, to deploying pepper spray and using physical restraint. The key benefit of pepper spray is that it allows staff to respond to situations with less physical contact and in a timely manner, reducing the number of injuries to staff and prisoners. Data from 2020 on staff injuries resulting from staff responding to assaults or restraining a prisoner showed

that injuries occurred at 15 times the rate of injuries resulting from pepper spray use. Pepper spray is therefore vital to keep staff and people in prison safe.

- 13 Pepper spray does, however, have health impacts for men and women who are exposed. These are carefully managed by Corrections Health Services who provide information on medical risks for prisoners prior to pepper spray being deployed where practicable, and treat prisoners following exposure. This includes assessing their physical and mental health needs. I am confident that Corrections staff are proactive in ensuring that the risks associated with pepper spray are mitigated to the highest extent possible.
- 14 This careful management is necessary because pepper spray causes temporary distress to people it is used on, with most effects generally lasting around 45 minutes, with skin irritation lasting up to two hours. Effects can include coughing, shortness of breath, intense burning and swelling of the skin and eyes, nausea, and vomiting. There are rarer health risks in some circumstances, for example for people with heart conditions. Additionally, the evidence around pepper spray and mental health is unclear. However, it may have the potential to exacerbate pre-existing mental health conditions.
- 15 Available data shows that between 2017 and 2020 pepper spray was deployed during 649 out of just over 4,000 use of force incidents. Of these incidents 39 involved what is called the MK-9 with wand extension or ‘Cell Buster’.¹

The Corrections legislative framework authorises the use of force

- 16 The Act enables a corrections officer to use physical force when dealing with a prisoner only when there are grounds for believing such use of force is reasonably necessary. This includes in self-defence, in defence of another person, in the case of an escape, to prevent property damage or in the case of active or passive resistance to a lawful order (s 83(1)). The Act also stipulates that no more force than is reasonable, necessary, and proportionate in the circumstances can be used (s 85(2)).
- 17 Staff also have access to non-lethal weapons, which can be used to control and restrain prisoners. These non-lethal weapons are designed to temporarily disable or incapacitate the prisoners (s 85(4)). The Minister of Corrections can authorise a non-lethal weapon if they are satisfied that its use is compatible with the humane treatment of prisoners, and that the potential benefits from the use of the weapon outweigh the potential risks (s 85(3)).

The Corrections Regulations support the use of pepper spray

- 18 Pepper spray, in the form of an aerosol spray, has been authorised for use as a non-lethal weapon in the Regulations since 2010 (reg 123A-123D). More information on previous regulatory changes relating to pepper spray can be found in Appendix Two.
- 19 The Regulations provide guidance to support the safe and lawful use of pepper spray. Pepper spray must be issued at the direction of the prison manager, or by a trained corrections officer should it be impracticable to gain the prison manager’s approval (reg 123B). It must also be used in a way that minimises pain to the prisoner, so far as

¹ This is a device that uses a hose to disperse pepper spray under doors or through windows.

that is consistent with protecting prison security or the safety of any person (reg 123C(3)). Staff are also required to undergo annual training on pepper spray use (reg 123C(4)).

Decisions around pepper spray use are made at the operational level

- 20 Corrections' Prison Operation Manual and the Custodial Practice Manual lay out the operational policies around the use of pepper spray. This guidance supports corrections officers to use pepper spray in a way that is safe and lawful. This includes training that specifies that force, including pepper spray, can only be used when reasonable, necessary, and proportionate. Corrections officers must undergo refresher training on an annual basis.
- 21 Corrections currently uses three types of aerosol spray delivery mechanisms from the brand SABRE: the MK-3 a small hand-held device that corrections officers carry on their person, the MK-9 a larger hand held device that is used when corrections officers are able to plan its use, and the MK-9 with extension wand that is used under a door, or through windows and vents.
- 22 Prison managers authorise corrections officers who have received adequate training to carry pepper spray. They are then allowed to carry pepper spray on their person throughout the course of their duties to respond to spontaneous situations as they arise. This could include outbursts of violence, such as assaults or prisoners fighting.
- 23 When pepper spray is used in planned incidents, it must be authorised by the prison manager or a trained officer for each planned incident that occurs. A planned incident could include prisoners setting fires or destroying property in their cell.

Ensuring pepper spray regulations provide a robust and transparent operational environment

Current settings allow for the introduction of new aerosol delivery mechanisms without Ministerial or Cabinet approval

- 24 Because aerosol delivery mechanisms are already broadly authorised through the Regulations, new aerosol delivery mechanisms could be introduced under current regulatory settings without requiring approval from myself or Cabinet.
- 25 This is not desirable as it could result in the future authorisation of an aerosol delivery mechanism that was not anticipated by previous Ministers and Cabinet when the Regulations were approved. The Regulations are therefore too broad and lack clarity.
- 26 Given that pepper spray causes significant short-term distress to prisoners, it is important that there is a high threshold for the introduction of any new delivery mechanisms and that the Minister of Corrections is satisfied with their use.

Decision making for authorising pepper spray needs to be purposeful

- 27 The current Regulations require pepper spray to be authorised by the prison manager, or another trained staff member if it is impracticable for the prison manager to authorise it. Operationally, there is no threshold for when it becomes 'impracticable'

to seek the prison managers approval. Allowing a trained staff member to make this decision may not give appropriate assurance around the use of pepper spray.

- 28 It is important that decisions about authorising pepper spray, particularly in planned use, are made by someone with a sufficient level of seniority to ensure pepper spray is used appropriately. The decision maker should also be separate from the team that proposes to use it, to ensure considered decision-making occurs.

I propose greater clarity on how pepper spray can be used in cases of passive resistance

- 29 Because Corrections officers are making decisions in dynamic situations, it is critical for all parties to have clear and consistent guidance about their rights and responsibilities. The Act states that any use of force must be reasonably necessary, but the Regulations do not clearly include these parameters for non-lethal weapons. It is important that both the Regulations and the Act support the current operational guidance for staff and provide clarity and consistency around when pepper spray can be used.
- 30 This need for clarity is especially pertinent for situations that relate to passive resistance. The Act currently allows all non-lethal weapons, including pepper spray, to be used in cases of active or passive resistance to a lawful order (s 83(1)). I need to make sure that Corrections' use of pepper spray is guided more closely by our international human rights guidance, which states that chemical irritants should not be used without imminent threat of injury.

There are relevant judicial review proceedings in the High Court

- 31 Relevant judicial review proceedings, *Cripps v Attorney-General*, are currently making their way through the High Court. This claim focuses on the MK-9 with extension wand (also known as Cell Buster), with three overlapping causes of action. The causes of action assert that the Regulations do not specify the delivery mechanisms, the Minister was not provided with sufficient information to approve MK-9, and the use of the MK-9 is in breach of the New Zealand Bill of Rights 1990 and international human rights law.
- 32 The case is currently adjourned, partly to provide Corrections with time to review the Regulations. Following these proposed regulatory changes being made, the Court will return to hearing in early 2022.

Proposed amendments to the Corrections Regulations 2005

- 33 To address the issues outlined above, regulatory change is needed. After consideration, I am proposing three comparatively minor amendments to the Regulations that will support the continued safe and lawful use of pepper spray.
- 34 These changes to Regulations will be supported by additional operational changes, as already noted in this paper.

Amendment one: explicitly define the delivery mechanisms for pepper spray

- 35 I propose to amend the Regulations to explicitly specify what delivery mechanisms can be used to deploy pepper spray, including what devices can be used for spontaneous and planned use. This amendment will be achieved by drafting a definition that captures the key characteristics of the devices currently in use by Corrections, namely the MK-3, the MK-9, and the MK-9 with extension wands. The drafting of the amendment will not refer to specific brand names. This should mean that minor changes in the supply chain will not result in the need for further regulatory change (**Rec 1**).
- 36 I believe this approach will provide greater clarity at both the regulatory and operational level. This amendment will mean that current delivery mechanisms in use by Corrections will continue to be authorised for use. However, the introduction of different delivery mechanisms in the future will require approval from the Minister of Corrections and Cabinet, and therefore need to align with the guidance laid out in s 85(3) of the Act.
- 37 I am confident that the delivery mechanisms that were approved by a previous Minister of Corrections and currently used by Corrections staff are capable of being used in a way that is safe and humane, and that the benefits of use outweigh the risks.

Amendment two: require the prison manager to approve the use of pepper spray

- 38 I propose to amend the Regulations to allow only the prison manager to authorise the use of pepper spray when its use in prisons is planned. This would include a person acting in the role of prison manager, should the permanent prison manager be away. This change would mean that trained officers would no longer be allowed to authorise pepper spray for planned or spontaneous use (**Rec 2**).
- 39 I consider that this change will provide an additional level of assurance around the use of pepper spray in planned use of force incidents.

Amendment three: non-lethal weapons can only be used when necessary, reasonable, and proportionate

- 40 I seek agreement to amend the Regulations to state that non-lethal weapons must not be used where that use would represent a use of force that is more than reasonably necessary in the circumstances. This amendment will make it clearer that the Regulations are in line with s 83(2) of the Act (**Rec 3**).
- 41 This amendment would reflect the operational practices that corrections officers already follow and provide additional assurance that pepper spray will be used in line with international human rights obligations.

Operational changes are also taking place

- 42 A strong regulatory framework is fundamental to ensure robust operational practices. The regulatory amendments outlined in this paper are comparatively minor changes that will support Corrections to continue to create operational improvements in line with the focus in *Hōkai Rangi* on promoting oranga/wellbeing. These operational improvements are outlined below (**Rec 4**), and current operational guidance is summarised in Appendices Three and Four.

Reviewing the reporting and monitoring mechanisms for use of force

- 43 Corrections is identifying ways to improve the process that staff undertake following a use of force review to better support staff continuously improve their practice. One focus of this review has been on the reporting and monitoring process for the use of force. That part of the review concluded that more consistency is required in the review process to support staff confidence in it and in the learning process.
- 44 Improvements to the review process will result in continuous improvements to operational practice and ensure that lessons, both positive and negative, are learned and acted on. This process will also result in improved data collection, which will allow Corrections greater oversight of the use of force and the use of pepper spray nationally.

Implementing new training

- 45 An analysis of population impacts identified the disproportionate use of pepper spray on Māori. I acknowledge the overrepresentation of Māori, but also note that it is not regulatory change that will address this issue. These regulatory amendments will instead support Corrections to continue to investigate and determine how operational guidance can be strengthened in line with the focus of *Hōkai Rangī* on addressing the overrepresentation of Māori.
- 46 Currently, Corrections are considering whether further training for frontline staff is necessary informed by consultation with various groups and agencies who have identified the potential for strengthened training. This could include introducing human rights training, disability responsiveness and mental health training, unconscious bias training, and understanding of trauma-informed language and approaches.
- 47 Corrections is still in the process of assessing how such training could be operationalised.

Improvements in the management of women

- 48 Between February 2019 and February 2020, the treatment of women, particularly wāhine, at Auckland Region Women's Corrections Facility led to complaints that related to, among other things, the use of pepper spray. I have publicly recognised the seriousness of this situation and acknowledged the need for these failings to be addressed across the corrections system.
- 49 Women and wāhine in prison face their own unique challenges, with many having a history of serious trauma which contributed to their offending. Because women represent such a small portion of the prison population (approximately seven percent), their needs remain unacknowledged and unmet. Corrections understands the importance of customised strategies for women in order to support them through their rehabilitation. The approach in this space is ongoing and involves:
- 49.1 reviewing the Prison Operations Manual and the Corrections Regulations 2005
- 49.2 examining maximum security practices, segregation, and management plans based on the needs of women.

50 While this wider work is not specific to the use of force and use of pepper spray, it contributes to creating a culture where women can feel safe, seen and heard. I am confident that these efforts, along with the proposed amendments outlined in this paper, will strengthen the framework for the use of pepper spray and contribute to better outcomes for women.

Financial Implications

51 This proposal has only minor financial implications. The costs of regulatory change and any additional training for frontline Corrections staff will be met within Corrections’ baseline expenditure.

Legislative Implications

52 Subject to Cabinet Social Wellbeing Committee approval, the amendments to the Corrections Regulations 2005 will be drafted with the Parliamentary Counsel Office and submitted to the Cabinet Legislation Committee (**Rec 5**).

Impact Analysis

Regulatory Impact Statement

53 A Regulatory Impact Statement (RIS) has been prepared alongside this Cabinet paper and is attached for consideration.

54 A joint quality assurance panel, chaired by the Ministry of Justice and with members from the Department of Corrections, and New Zealand Police, has reviewed the Regulatory Impact Statement prepared by the Department of Corrections. The panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the Quality Assurance criteria.

55 The panel does note that consultation on the proposals has been targeted, involving only a few organisations outside of government and, in particular, there has been no consultation with those most impacted - prisoners. Given the narrow scope of the proposed changes, the panel accepts that the requirements have been met. However, it is essential that the impacts of these changes are evaluated, alongside the wider operational improvements, as planned by Corrections.

Climate Implications of Policy Assessment

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

Population Implications

57 The potential population impacts are set out in the table below.

Population group	How the proposal may affect this group
Māori	Māori are overrepresented in the prison population, at approximately 52 percent compared to approximately 16% of the general population. Additionally, data available on the use of

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	pepper spray shows that Māori are disproportionately represented above this general overrepresentation. Under Te Tiriti o Waitangi and the United Nations Declaration on the Rights of Indigenous Peoples, Corrections has an obligation to protect the rights of Māori. While the regulatory changes outlined in this proposal are unlikely to impact the over representation, changes at the operational level, such as through the introduction of unconscious bias training, and ongoing work to implement <i>Hōkai Rangī</i> , could mitigate this.
Women	Pepper spray use on women appears to be proportionate to their representation in the prison population (around seven percent). However, when examining pepper spray incidents over the past four years, Māori women are overrepresented in the sample size. This cannot be said for certain as the sample size of incidents (150 over four years) is too small to draw statistically significant results. While the regulatory changes outlined in this proposal are unlikely to impact this apparent overrepresentation, changes at the operational level, such as through the introduction of training on unconscious bias and trauma-informed approaches, as well as ongoing work to improve our operational and regulatory framework for women, could mitigate this.
Disabled people	<p>People under Corrections management often have complex needs and high rates of mental illness and learning disabilities, with over 90 percent of people in the Corrections system being diagnosed with a mental illness or drug addiction at some point in their life. The research on pepper spray use and mental illness is limited but indicates that it has the potential to aggravate pre-existing trauma.</p> <p>Additionally, under the United Nations Convention on the Rights of Persons with Disabilities, Corrections has an obligation to ensure that all disabled people are treated with dignity. Corrections is investigating whether introducing training in disability responsiveness and mental illness could improve outcomes for this cohort.</p>
Young people	At times, people under 18 may come under Corrections custodial management. Corrections does not currently hold anyone under 18. By default, people under 18 who have offended generally go into the care of Oranga Tamariki, unless their behaviour and risk surpasses a specific threshold that requires Corrections management. This tends to mean that the young people who end up in Corrections management are often less likely to be compliant and more likely to exhibit violent behaviour, which can exacerbate the chances of pepper spray being used. Since 2017, there have been 17 incidents of pepper spray use on 17 year olds. Risks to young people are mitigated through Corrections Health Services, who assess the physical and mental health needs of people following exposure to pepper spray.
Older people	There is limited information on the effects of pepper spray on older people. However, we do know that older people face worse and more chronic health outcomes, which does mean that their

	response to pepper spray exposure may be more severe. This is mitigated through Corrections Health Services, and strict guidance that states pepper spray cannot be used on people with certain conditions, such as serious heart or respiratory conditions.
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Human Rights

- 58 Pepper spray is able to be used in a manner that is consistent with the New Zealand Bill of Rights Act 1990. The Minister in authorising its use must be assured that the benefits outweigh the risks. However, the consistency of this use is dependent on a case by case basis. The Corrections Act and Regulations contain a number of safeguards to support safe use. This regulatory framework is complimented by robust operational guidance, which Corrections is also investigating how to further strengthen.

- 59 The use of pepper spray is also impacted by international human rights guidance. According to United Nations guidance on the use of less-lethal weapons, pepper spray is able to be used by law enforcement for reasons as outlined in s 83(1) of the Corrections Act. However, the use of pepper spray in cases of passive resistance is questioned by the United Nations, and requires additional mitigations to support safe use.

- 60 In response to this, the third amendment that I am seeking agreement to will help mitigate against the use of pepper spray where its use is not proportionate. This will be a minor change and work in conjunction with further operational changes that officials are currently developing, such as additional training for staff. I believe this will reinforce the safe and legal use of pepper spray without limiting corrections officer’s ability to safely carry out their duties. As pepper spray has been shown to result in less injury to staff and people in prison than other use of force, its ongoing use is imperative.

- 61 New Zealand is also party to the United Nations Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, and the United Nations International Covenant on Civil and Political Rights. As such, New Zealand is required to periodically report on compliance to these conventions. I am confident that corrections officers are supported through both regulatory and operational guidance to work in accordance to the principles outlined in these conventions and is able to report as required. Health impacts are carefully and purposefully managed by Corrections Health Services.

- 62 Also, of note is the United Nations Standard Minimum Rules for the Treatment of Prisoners. Although not legally binding, the Standards provide a best-practice guideline on, among other things, minimum entitlements, seclusion, and restraint.

Te Tiriti o Waitangi

- 63 The regulatory amendments outlined in this proposal do not have treaty implications as they are minor changes aimed at strengthening the regulatory framework to support pepper spray use. While Corrections is investigating why Māori are overrepresented in pepper spray use, I am certain that the ongoing work in the operational space will seek to address this.

Consultation

- 64 The following organisations were consulted on this proposal: Police, Ministry of Justice, Oranga Tamariki, Ministry of Health; Ministry for Women, the Office for Disability Issues, the Office for Seniors, Te Puni Kōkiri, the Office of the Ombudsman, and the Human Rights Commission.
- 65 The Department of Prime Minister and Cabinet and the Treasury have also been informed.
- 66 The feedback received from agency consultation was mixed, with some agencies being supportive of regulatory amendments, while others saying that more needs to be done to create wider change. Some agencies raised concerns about use on Māori, and use in cases of passive resistance, and highlighted the potential for a broader review on the use of pepper spray. All agencies were supportive of changes at the operational level. A summary of this feedback can be found at Appendix one.
- 67 Corrections also undertook targeted public consultation with its Wellness and Wellbeing Insights and Advisory Group, Māori Women's Welfare League, and the Tangata Whenua Committee.
- 68 These groups were broadly supportive of regulatory and operational change, and noted that it was important that pepper spray use was well regulated and carefully monitored. The main point of disagreement was about the use of pepper spray in cases of passive resistance. Many felt that the regulatory proposal would not address this issue, and pointed to the need for operational improvements to create meaningful changes on the ground. Some of these groups said that it was important that regulatory change supported the implementation of *Hōkai Rangī*, and supported both staff, and men and women in prison, and Māori.
- 69 The Corrections Association of New Zealand and Public Service Association were also consulted. They provided no substantive feedback on these proposals.
- 70 While feedback on these regulatory proposals was mixed these changes are necessary now. Agency concern was focussed on the need for wider change, rather than raising technical issues with the proposed regulatory amendments.
- 71 As noted earlier, these changes are a relatively minor part of a wider review of the use of force. Over the following 12 to 24 months as Corrections makes further operational changes, more regulatory change may be identified and I will again report to Cabinet if needed. In the meantime, these changes include important protections for people in prison and staff, and support the use of an essential tactical option.

Communications

- 72 I intend to announce the amendments outlined in this proposal following cabinet decisions, at the same time as I proactively release the Regulatory Impact Statement.

Proactive Release

- 73 I intend to proactively release a copy of this Cabinet paper and the associated Regulatory Impact Statement under the Official Information Act 1982 in part, and within the 30 business days timeframe set out by Cabinet.

Recommendations

I recommend that the Committee:

- 1 **agree** to amend the Corrections Regulations 2005 to explicitly define pepper spray delivery mechanisms by adding broad definitions that describe the key characteristics of the devices currently in use: the MK-3, MK-9, and MK-9 with extension wand; and specify which mechanisms can be used in both spontaneous and planned use of force;
- 2 **agree** to amend the Corrections Regulations 2005 to introduce the requirement that only the prison manager may authorise the use of pepper spray;
- 3 **agree** to amend the Corrections Regulation 2005 to state that non-lethal weapons may not be used when that use would represent a use of force that is more than reasonably necessary in the circumstances, in keeping with the Corrections Act 2004;
- 4 **note** that officials are undertaking work to identify other changes at the operational level, including changes to operational guidance and providing additional training to frontline staff on the use of pepper spray;
- 5 **invite** the Minister of Corrections to issue drafting instructions for the changes to the Corrections Regulations 2005 to give effect to these proposals;
- 6 **agree** that the Minister of Corrections can make additional minor decisions in order to give effect to the policy agreed to in this proposal;
- 7 **note** that the recommendations with drafting implications are subject to Parliamentary Counsel's discretion as to how best express these in the Corrections Regulations 2005.

Authorised for lodgement

Hon Kelvin Davis

Minister of Corrections

Appendix one: Summary of agency feedback

1. This section provides a summary of feedback from agencies. The agencies consulted on this paper were: Police; Ministry of Justice; Oranga Tamariki; Ministry of Health; Ministry for Women; the Office for Disability Issues, the Office for Seniors, Te Puni Kōkiri, the Office of the Ombudsman, and the Human Rights Commission. The Department of Prime Minister and Cabinet and the Treasury have also been informed.

General agency comments

2. Some agencies were broadly supportive of regulatory change. Treasury had no comments on this paper. Police, while having no substantive feedback, said they understood that these regulatory change needed to be progressed. The Office for Disability Issues suggested introducing disability responsiveness and mental health training, while the Office for seniors suggested that training around age and age-related illness, such as dementia, could be considered to support staff in managing these groups. The Ministry of Health requested further reference to mental health, while Oranga Tamariki wanted reference to young people, which has been included.

Work is already underway to address issues raised by other agencies

3. Pepper spray is an important tool to keep staff and prisoners safe from violence and longer term harm. Its use is mitigated through health services and staff training, which teaches staff the all use of force must be reasonable, necessary, and proportionate.
4. The agencies below raised concerns about the over representation of Māori in pepper spray incidents, international human rights, and the need for ongoing work on pepper spray and the use of force more generally.
5. Corrections has informed them that work is underway on a wider review of the use of force review process that will largely address those issues. The ongoing implementation of Hōkai Rangi is also critical to solving these problems going forward. As noted in this paper, addressing overrepresentation on Māori is a long term goal under Hōkai Rangi. Corrections expects that training and other initiatives underway as part of the implementation of Hōkai Rangi will address some of the issues raised by agencies.

Ministry for Women

6. Manatū Wāhine, Ministry for Women does not support the proposed regulatory changes in this paper because it requests a fuller investigation, evaluation, and review of pepper spray practices, which they consider should be commenced immediately.
7. Corrections has informed them that this work is largely underway through the use of force review and the Women's Network Improvement Programme.

Te Puni Kōkiri

8. Te Puni Kōkiri is broadly supportive of regulatory changes that support the implementation of Hōkai Rangi. However, they do not believe these regulatory

changes go far enough to address issues for Māori. They have recommended that further work be done, and are supportive of new training to address the needs of Māori. They have also recommended that any new training be developed with iwi groups.

Ministry of Justice

9. The Ministry of Justice are supportive of the first and second regulatory amendments, and expressed concern that removing the right of trained officers to authorise pepper spray in planned incidents could create operational problems for staff as decision-making could take more time. Additionally, they have said that the third amendment will not go far enough to address the problems highlighted in this paper. They have suggested that further work needs to be done at the operational level to address this issue, such as a potential future review of the Corrections Act.

Office of the Ombudsman

10. The Chief Ombudsman noted that he had raised concerns in his OPCAT reports about the increasing use of pepper spray and some of the circumstances in which it has been used in Aotearoa New Zealand prisons. The Ombudsman also said that, in his view, the proposed options do not adequately reflect international human rights guidance and jurisprudence relating to pepper spray. The Ombudsman is not convinced that reiterating what is in the Corrections Act will provide any additional assurance that pepper spray would be used in line with international guidance relating to passive resistance.

Human Rights Commission

11. The Human Rights Commission recommended a broad review of the system and policy under which pepper spray operates, and a wider review on the use of force, with specific reference to Te Tiriti o Waitangi and international human rights guidance. Like the Ombudsman, the Human Rights Commission are concerned that the proposal will not go far enough to address issues with pepper spray use.
12. The Human Rights Commission did not agree that the Corrections Act was consistent with international human rights guidance if it allowed the use of pepper spray in circumstances where it could not be considered reasonable, necessary, and proportionate - for example, in cases of passive resistance.

Appendix two: key legislative and operational requirements for pepper spray use

<p>The overarching framework for pepper spray is set out in the Corrections Act 2004 and the Corrections Regulations 2005</p>	<p>The legislation only allows pepper spray to be used in specified situations</p> <p>The legislative and regulatory framework says that pepper spray can only be used where a custodial officer has grounds to believe that it is reasonably necessary:</p> <ul style="list-style-type: none"> • to protect people from injury, including self-defence, • to prevent someone from escaping, or an attempted escape, • where someone actively or passively resists a lawful order, • to prevent damage to property. <p>There are several other protections in the regulatory framework</p> <p>There are other key requirements in the Act and Regulations that support pepper spray use, which include:</p> <ul style="list-style-type: none"> • pepper spray can only be issued to trained custodial staff who undergo refresher courses annually • pepper spray must be used in a way that minimises injury • the person must be examined by a medical professional as soon as practicable after pepper spray use, but within three hours* <p><i>*In contrast, the Police Manual calls for medical attention only where the person experiences effects for longer than 45 minutes or where there are wellbeing concerns.</i></p>
<p>This is supported by operational guidance that outlines processes for the use of pepper spray</p>	<ul style="list-style-type: none"> • Operational guidance supports staff to make decisions that align with the regulatory requirements. The guidance seeks to minimise the use of force so that it is only used on reasonable grounds. The outline set out below is a condensed summary of operational guidance. See Appendix two <p>Training and authorisation requirements</p> <ul style="list-style-type: none"> • Pepper spray can be carried during rostered duties, including transporting people to other sites. Staff receive training before they are authorised to use pepper spray, and then receive updated training on an annual basis. Staff are taught about the risks involved with pepper spray use, including potential health risks. • The guidance notes that pepper spray must not be used in some situations, including where the person has a firearm, where the person is pregnant, where they could fall and injure themselves, where they are already restrained, or where they cannot be continuously observed. • Further information on training guidance for use of force is laid out below. corrections officers are trained using the TEN-R process. <p>Procedures for use</p> <ul style="list-style-type: none"> • Prior to both planned and spontaneous use, staff must consider whether other options would resolve the situation safely. They also need to consider whether force is reasonable, necessary, and proportionate in the circumstances. If the

	<p>situation can be solved using a lower level tactical option, pepper spray must not be used.</p> <ul style="list-style-type: none"> • Prior to planned use of pepper spray, staff must seek prior authorisation from the prison director, or a trained staff member if the prison director is unavailable. Additionally, a decontamination area should be set up with health staff close by. Staff must check whether the person has any health conditions that may cause an adverse reaction to pepper spray. This includes cardiac and respiratory conditions, allergies, pregnancy, or long-term steroid use. <p>Requirements after pepper spray use</p> <ul style="list-style-type: none"> • As soon as reasonably practicable, staff must check the person’s breathing and then follow decontamination procedures. A person who has been exposed to pepper spray must not be left lying face down with their hands restrained behind them. The person must be seen by a member of the health team as soon as reasonably practicable, but within three hours. The person must be interviewed within three hours of the incident to identify any other support needs. • Additional information on post-incident response is detailed below.
<p>Health services provide medical support when needed</p>	<p>Corrections’ Health services teams have three roles in the use of pepper spray, which are:</p> <ul style="list-style-type: none"> • to provide relevant health information on prisoners to custodial staff before planned use • to assess whether medical intervention is required after pepper spray use and to provide treatment, including after hours • to provide emergency health care to custodial staff if required. <p>All health assessments prior to the planned use of pepper spray are recorded in the Patient Management System by Corrections Health services. This would include any reasons not to proceed with use.</p> <p>Corrections’ Health services policies outline how these services will be provided, and say that the potential impacts of pepper spray include:</p> <ul style="list-style-type: none"> • intense irritation to the nose and eyes, and the potential for injury to the cornea • coughing and shortness of breath • burning and swelling of the skin • nausea and vomiting • in rare cases, people may have a cardiac or respiratory effect. <p>Health staff assess the person who has been exposed to pepper spray following the decontamination process. They will check for extended periods of respiratory distress, as well as pulse and blood pressure. Where the person’s breathing is severely affected medical attention must be given precedence over relocating them from the area. All treatment provided to a person who has been exposed to pepper spray must be documented in their clinical records.</p>

Appendix three: TEN-R Operational Risk Assessment Tool

- TEN-R supports the Assess – Plan – Act process by identifying key factors that must be considered when determining an appropriate response to the situation. This framework is also used by Police.

Threat	<ul style="list-style-type: none"> • This step is about assessing how serious the situation is and the current danger the subject presents to themselves and others. Staff must assess the threat posed based on what they see and hear, and what is known about the subject and situation. This involves conducting a risk assessment based on intent, capability, opportunity, and physical environment.
Exposure	<ul style="list-style-type: none"> • This step is about assessing the potential harm (whether physical or otherwise) to staff and other people, or the security of a facility or equipment. In all instances, assessment and planning can mitigate the degree of exposure. Staff need to understand exposure to harm and damage by considering safety, including self-awareness of capability, and security.
Necessity	<ul style="list-style-type: none"> • This step is about determining if there is a need to intervene immediately, later, or not at all. Staff must consider all tactical options, which may not require the use of force. Taking action must be informed, and supported by a clear assessment of the known threat and exposure involved. Staff must assess the need to proceed with their intended response at that particular time, date, and place, with resources and tactical options available to them. The assessment will determine one of three outcomes: <ul style="list-style-type: none"> ○ to proceed with an immediate and unplanned response ○ to not proceed ○ to proceed with a delayed and planned response. • Any option must endeavour to maximise safety and minimise risk.
Response	<ul style="list-style-type: none"> • This step means understanding the threat, exposure, and necessity to determine what response is appropriate on the balance of the information available. The action plan must be based on the threat posed by the subject, their intent, opportunity, and ability to cause harm to staff and others, and assessment of when best to proceed with a response. • In some instances, there may be a need to delay action until resources or equipment is available. Caution is not cowardice and there may be good reason to cordon and contain the subject while awaiting the arrival of support, such as Advanced Control and Restraint, Prison Negotiators, or other specialist services. • In remaining instances, prompt action may be required to prevent further loss or injury. Even in active situations, there must be calculated thinking and decision making supported by robust training and experience.

Appendix four: key components of incident response

- The diagram below provides an outline of the incident response guidance for Use of Force as set out in the Prison Operations Manual (POM).

IR.02.06 Spontaneous use of force

- A staff member who uses force or officer who uses individual carry pepper spray (ICP) on a prisoner in any circumstances must promptly report the use of force / pepper spray to the prison director (IOMS incident reporting).
- Staff must advise the unit PCO or on-call manager as soon as possible following the incident (the prison director and Regional Commissioner must also be advised within two hours of the incident occurring).

IR.05.04 Incident debrief meetings

- A team debrief must occur as soon as practicable but within 24 hours

IR.05.07 Post Incident Review

- All C&R and spontaneous Use of Force incidents, including individual carry pepper spray are to be reviewed as soon as possible after the incident.
- This review is to be carried out by an officer nominated by the prison director to consider whether the situation was handled in the most appropriate way, what led to the situation, and what strategies need to be put in place to avoid future situations that lead to the use of force.
- The depth of any such review should reflect the seriousness of the incident, but should in any case cover not only the use of force itself and the outcome, but also what led to the incident, and what steps were taken to avoid the use of force (negotiation etc).
- Each incident is investigated by prison management as soon as is practical after it has occurred, and the results of the investigation documented and reported
- For internal (prison) incidents, the incident follow-up report is forwarded to the regional commissioner for approval of planned actions, and to ensure follow up.
- The reviewing officer places a record of findings in the Use of Force Register and informs the prison director of the findings.
- IR.05.Form.01 Debrief report (to CSM within 3 days/72 Hours)
- IR.05.Form.02 Notice of the use of mechanical restraints (report to VJ as soon as practicable)
- IR.05.Form.03 Report on the use of force – use of non-lethal weapon (to be sent to Uoff@corrections.govt.nz as soon as practicable)

IR.05.01 – Initial Post Control and Restraint

- Officer in charge of the incident must immediately advise the prison director, on-call officer or supervision officer immediately following incidents where use of force has been used
 - IR.05.Form.03 Report completed
- The prison director is informed of internal (prison) incident details and must approve the initial follow-up actions (e.g. immediate needs and placement).
- Contact Health Centre (Assessment as soon as practicable and within 3 hours)
- IR.05.Form.01 Debrief report (to CSM within 3 days/72 Hours)
- IR.05.Form.02 Notice of the use of mechanical restraints (report to VJ as soon as practicable)
- IR.05.Form.03 Report on the use of force – use of non-lethal weapon (to be sent to Uoff@corrections.govt.nz as soon as practicable)
- OBC & CCTV footage to National Office within 3 working days of the incident

IR.05.05 Post incident debrief

- Staff involved in the use of force hold a debrief immediately after each incident.
 - The debriefing manager must place copies of all incident reports and forms on:
 - the relevant staff files
 - the prisoner(s) files, and
 - the Use of Force Register.
- Forward the original Incident reports and forms to the prison director.

IR.05.08 Use of Force Register

- A Use of force register shall be maintained which contains the details of any incident where any use of force is used, including mechanical restraints and / or control and restraint and requires:
 - Unit PCO / on-call manager's signature
 - Prison director's signature
 - Reviewing officer's comments
 - Signature of reviewing officer and the date.
- Information recorded in the register includes the name of the person who authorised the use of force, details of the incident, intervention strategies used prior to the use of force, details of the type of force used and the subsequent result.
- The prison director confirms that all the required steps were implemented and signs the Use of force register to certify that all actions were undertaken within time and in the correct way.