Impact Assessment: Enhancing the Legislative Framework of the Corrections System

Section 1: General information

Purpose
The Department of Corrections is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet.

Key Limitations or Constraints on Analysis
Several of the amendments are required because legal clarity is needed or there is a legal risk resulting from the current legislation. The degree of legal risk, and the potential outcome from a successful challenge, is difficult to quantify. Because of this uncertainty, the Department has decided to err on the side of caution when assessing the appropriate option to address the relevant issues. Other issues identified below are the result of anecdotal evidence rather than verified data. Again, this makes it difficult to assess the size of the issue, and therefore a proportionate response.
Responsible Manager
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Section 2: General problem definition and objectives

2.1 What is the overall policy problem or opportunity?

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

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

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

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

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

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

2.2 Who is affected and how?

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

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

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

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

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

Safe and humane management of prisoners

a) Inadequate regime for the segregation of prisoners at risk of self-harm
b) Legal ambiguity for use of mechanical restraints on prisoners being treated in hospital

c) Allowed use of chains and irons in prisons
d) Legal ambiguity for use of cell sharing
e) Inability to delegate health centre manager's powers and functions

Prisoner discipline and prison safety

f) Health and safety risk from tattooing in prison
g) Inconsistent treatment of delivered and intercepted letters that defy a court order
h) Narrow definition of a drug
i) Lack of clarity in the requirement for prisoners to have a management plan
j) Overly strict requirement on contact between detector dogs and those being searched
k) Limited Police personnel to fully utilise spare capacity within Police jails
l) Limited ability to use imaging technology to detect contraband

Fair treatment of persons

m) Limited prisoner knowledge of disciplinary offences
n) Lack of statutory right to appeal decision relating to mother and baby placement
o) Legal risk from limiting prisoners' expectations of conditions or opportunities
p) Inflexible charging regime for the cost of telephone calls

2.5 Who was consulted?

The Ministry of Justice, Ministry of Social Development, Ministry of Health, Ministry for Women, Oranga Tamariki - Ministry for Children, The Treasury, New Zealand Police, and Te Puni Kōkiri were consulted on all provisions except for the provision relating to the cost of telephone.

The Human Rights Commission and the Office of the Ombudsman were consulted on all provisions. The Privacy Commissioner was consulted on provisions relating to imaging technology.

Section 3: Analysis

(A) Inadequate regime for the segregation of prisoners at risk of self-harm

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

Background

Section 60 of the Act allows the prison manager to issue segregation directions for prisoners who require medical oversight. This means that their association with other prisoners is restricted or denied in order to assess or ensure the prisoner's physical or mental health. Prisoners who are at risk of self-harm are expressly included in section 60(1)(b) as prisoners who may be segregated to assess or ensure their mental health.

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

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

Prisoners who are at risk of self-harm often have complex mental health needs, meaning they are not able to be housed in a mainstream unit for lengthy periods.

In practical terms, the management of prisoners at risk of self-harm sees them placed in an At Risk Unit. These units are physically designed to limit opportunities to engage in self-harm and, in line with the legislative framework, usually operate a regime which significantly limits a prisoner's ability to associate with other prisoners.

Problems

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

Firstly, the Act emphasises the placement of at risk prisoners in segregation as the primary response, but is silent on important elements of the care of at risk prisoners once in segregation. As currently drafted, one inference is that segregation is a sufficient response to ensure the safe custody and welfare of prisoners at risk of self-harm. In reality the Department is improving the operation of At Risk Units by addressing the reasons why they want to harm themselves, recognising differences in the nature and severity of risk, and responding to changes in risk level over time. Improved practices are not reflected in the current requirements in the Act.

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

[redacted]

Withheld under s9(2)(g)(i) of the OIA

[redacted] A High Court case in 2014 determined that the Department had breached the segregation provisions in the Act by subjecting a prisoner to a regime of non-association with other prisoners in an At Risk Unit.[1]

A.2: What options have been considered?

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

i) Improve compliance with operational procedures

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

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

However, this option would not resolve all barriers to achieving better management of at risk prisoners. The Department would still be open to legal challenge in instances where segregation occurred before a formal segregation direction was sought because of an immediate risk to a prisoner.

ii) Develop a statutory segregation regime specifically for at risk prisoners

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

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

iii) Develop a comprehensive legislative framework for the management of at risk prisoners outside the segregation regime

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

In addition, as segregation provisions relate to highly vulnerable prisoners, it is desirable that treatment of those prisoners is outlined in legislation, rather than operational procedures. Although in practice the management of an at risk prisoner might not alter if the legislation reflected the improved approach, it would add greater accountability for the Department to provide the best management possible.

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

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

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

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

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

Removing at risk prisoners from the segregation provisions would remove the need for a segregation declaration to be sought. This option therefore removes the legal risk the Department faced from segregating an at risk prisoner before a declaration can be sought.

A.4: What other impacts is this approach likely to have?
The main risk is striking the right balance between legal clarity and providing sufficient flexibility for staff to react to a wide range of scenarios that involve vulnerable prisoners. Every situation has its own unique circumstances so careful drafting of legislation is needed to ensure the benefits of the proposed changes are maximised.

(B) Legal ambiguity for use of mechanical restraints on prisoners being treated in hospital

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

Background

Prisoners are removed to hospitals in order to receive medical treatment not available in prison. As hospitals are not a secure environment, there may be a risk of escape and a risk to public safety in these circumstances. These risks are mitigated by the presence of an appropriate number of officers and having the prisoner waist restrained while being escorted and then appropriately handcuffed to an officer. Not all prisoners are restrained during their hospital visit.

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

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

Problems

As currently drafted, it is unclear whether the Act authorises the restraint of these prisoners for hospital stays longer than 24 hours. Withheld under s9(2)(g)(i) of the OIA

B.2: What options have been considered?

Only one alternative option has been considered with the objective to provide legal clarity as to the use of restraint for hospital stays longer than 24 hours.

The option is to amend the Corrections Act to exclude the 24 hour time limit from applying to the use of mechanical restraints on prisoners who have been temporarily removed to a hospital for treatment, but any extension of restraint beyond 24 hours is subject to any limitations and restrictions set out in regulations made under the Act.

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

This option would remove the legal ambiguity as to the use of restraints for longer than 24 hours, while providing an avenue to ensure longer restraint of prisoners is consistent with humane and safe treatment.

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

The health risks associated with prolonged restraint will be mitigated by any restrictions set out in regulations. It is considered that any safeguards are more appropriately addressed in regulations, which already provide greater prescription around the use of restraints.

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

There are risks to continuing mechanical restraints for extended periods, such as the risk of infection, pressure sores and psychological impact. To mitigate these risks, regulations will be developed to outline safeguards to ensure the safe and humane treatment of prisoners in hospital.

(C) Allowed use of chains and irons in prisons

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

Background

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

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

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

Problem

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

C.2: What options have been considered?

Two alternative options have been considered with the objective to remove the legal ambiguity.

i) Repeal section 87(6) in its entirety

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

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

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

This option would ensure consistency with the Standard Minimum Rules.

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

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

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

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

(D) Legal ambiguity for use of cell sharing

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

Background

Shared cell accommodation has a long history in New Zealand. Prisoners are either housed in single cells, double cells or in rooms in self-care units. Rooms in self-care units hold one prisoner per room, while cells can be single or double accommodation. Approximately 40 percent of prisoners are now held in shared cells and there is no indication that this proportion is likely to decrease.

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

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

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

Problem

The current legislative framework relating to use of shared cell accommodation in prisons does not fully reflect the current and appropriate use of cell sharing in New Zealand. That, in turn, may expose the Department to legal challenges to current practice. While the Regulations provide the legislative authority for cell sharing, other parts of the Act do not necessarily align fully with this authority.

[redacted]

Withheld under s9(2)(g)(i) of the OIA

[redacted]

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

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[2] For example see Molleman, T and van Ginnekan, E F J C A *multilevel analysis of the relationship between cell sharing, staff-prisoner relationships, and prisoners" perceptions of prison quality,* International Journal of Offender Therapy and Comparative Criminology, 11 March 2014.

[3] *Prisoner double-bunking: perceptions and impacts,* Department of Corrections, April 2012.

D.2: What options have been considered?

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

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

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

ii) Include a provision authorising cell sharing in the Act

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

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

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

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

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

In combination, these amendments would enable current policy on the use of shared cells to continue with reduced legal risk, while strengthening requirements for prisoners to be held in humane conditions.

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

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

Safeguards would be outlined in the Regulation to state that:

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

such as unlock hours
- Shared cells must control privacy for a prisoner using the toilet or shower and provide working alarm(s) or call buttons.

D.4: What other impacts is this approach likely to have?
While the proposal should reduce the legal risk, there is no feasible and reasonable way to entirely eliminate legal risk in this area. The outcome of any challenge will depend on the particular circumstances of the case.

(E) Inability to delegate health centre manager's powers and functions

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

Background

Health centre managers are responsible for ensuring the provision of health care and treatment to prisoners, and have some of the statutory powers and functions previously allocated to medical officers. These changes reflect the fact that registered nurses employed or contracted by the Department play a pivotal role in the organisation and delivery of health services to prisoners.

Problems

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

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

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

E.2: What options have been considered?

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

i) Appoint deputy health centre managers

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

ii) Appoint additional health centre managers

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

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

This non-legislative option would see health centre manager be on call for times when they are off-site. However this option will be costly and is operationally impractical. Health centre managers would need to be appropriately compensated for being on-call and, further, it would be unreasonable to expect a health centre manager to be on call every evening and weekend.

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

This option would amend the Act to allow health centre managers to delegate their powers and functions. This would allow their powers or functions to be exercised outside normal working hours and ensure prisoners receive the appropriate treatment promptly. Delegations powers already exist in other roles, such as for the chief executive and prison managers.

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

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

Their powers and functions can be delegated in the following ways:

- delegation would be permitted to a medical officer, or an employee of the Department who is a nurse or medical practitioner (or in the case of a contract managed prison, an employee of the contractor or sub-contractor who is a nurse or medical practitioner);
- sub-delegation would not be permitted to ensure only suitably qualified staff members are making the relevant decisions; and
- the health centre manager will be empowered to give directions and impose conditions when delegating a power or function.

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

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

(F) Health and safety risk from tattooing in prison

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

Background

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

Problem

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

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

F.2: What options have been considered?

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

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

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

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

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

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

iii) Make tattooing and receiving tattoos a disciplinary offence

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

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

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

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

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

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

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

(G) Inconsistent treatment of delivered and intercepted letters that defy a court order

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

Background

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

Problem

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

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

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

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

G.2: What options have been considered?

The only alternative option considered was to make it a disciplinary offence to attempt to communicate in any way that would breach an order or any direction of a court.

The current hearing adjudication for alleged offensive behaviour would apply for this new offence. If the adjudicator finds the offence is proven, then the prisoner can be punished with one of more of:

- forfeiture or postponement of all or any privileges for any period not exceeding 28 days
- forfeiture of earnings for any period not exceeding 7 days
- confinement in a cell for any period not exceeding 7 days.

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

This option would address the anomaly that correspondence that would, if delivered, constitute a criminal offence, does not amount to a non-criminal disciplinary offence if intercepted.

Although the threat of a disciplinary penalty is unlikely to deter prisoners altogether, the introduction of an offence and subsequent punishment will create a greater disincentive for prisoners to write letters that would breach a court order if delivered.

G.4: What other impacts is this approach likely to have?
The ability to enforce such an offence provision depends on the Department accessing records of protection orders. Once the Department has a better understanding of the relevant protection orders held against prisoners, resources can be better targeted towards letters sent by those prisoners. The Department continues to work with justice sector agencies on opportunities to improve sharing of information about court orders and directions.

(H) Narrow definition of a drug

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

Background

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

Problem

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

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

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

H.2: What options have been considered?

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

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

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

This would mean that prisoners could be tested for the presence of psychoactive substances and, in the event of a positive test, could be charged with a disciplinary offence. The current hearing adjudication process for alleged offences would apply for this new offence. This would mean that if the adjudicator finds the offence is proven, then the prisoner can be punished with one or more of:

- forfeiture or postponement of all or any privileges for any period not exceeding 28 days
- forfeiture of earnings for any period not exceeding 7 days
- confinement in a cell for any period not exceeding 7 days.

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

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

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

(I) Lack of clarity in the requirement for prisoners to have a management plan

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

Background

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

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

Problem

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

This lack of clarity creates some legal risk.

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

I.2: What options have been considered?

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

i) Change the format of the "remand/offender plan"

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

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

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

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

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

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

I.3: Which of these options is the proposed approach?
The Department proposes to amend the Act to clarify that a prisoner's management plan may comprise information recorded on one or more electronic or paper records. This would make it clear that a "management plan," as required by section 51 of the Act, is not referring to one document. This is the simplest option to address the risk from legal ambiguity.

I.4: What other impacts is this approach likely to have?
In practice, this option is not expected to alter the Department's approach to planning for the management of prisoners. This will continue to be made up of a number of documents held in hard copy and electronically on the Department's Integrated Offender Management System.

(J) Overly strict requirement on contact between detector dogs and those being searched

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

Background

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

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

Problem

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

J.2: What options have been considered?

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

i) Enhance compliance with the Act

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

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

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

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

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

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

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

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

(K) Limited Police personnel to fully utilise spare capacity within Police jails

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

Background

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

The Act currently provides for the short-term detention of prisoners in Police jails where there is a shortage of accommodation in Department prisons in the relevant area. They are operated by Police, and prisoners are under the custody of the Commissioner of Police. Prisoners can be detained in a Police jail for up to seven days. The chief executive, after consulting the Commissioner of Police, can extend the period of detention in a Police jail to a total period of 21 days. A Visiting Justice can authorise a further extension of up to 14 days.

Problem

The Police has determined that it can safely accommodate approximately 100 prisoners in Police jails. This measure affords the Department some limited additional capacity, however, it is limited by Police staffing resources to manage these prisoners.

The Police has limited resources and is not in a position to divert resources from other activities to safely manage a greater number of prisoners. Therefore the potential to utilise spare capacity within a Police jail is constrained, which overall impacts the Department to fulfil its statutory responsibility for the safe, secure and humane detention of prisoners. Prisoners are instead housed in less suitable Department accommodation or moved to other areas of the country, which is costly, disruptive, and time-consuming.

K.2: What options have been considered?

Two alternative options have been considered with the objective of better utilising spare capacity with Police jails.

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

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

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

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

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

The preferred option is to empower the Minister of Corrections to declare that spare capacity in a Police jail can be temporarily operated by the Department as if it were a part of a Corrections prison.

This would involve the Minister declaring, by notice in the *Gazette,* that all or part of a Police jail is temporarily converted to an established Corrections prison (in practice, likely to be the

prison nearest to the Police jail concerned). Such a declaration could only be made to address an acute shortage of accommodation in the area, once all other practicable steps have been taken to address the shortage.

A declaration changes the legal status of the relevant land, so that if it is used as a prison, then the necessary detention powers and obligations apply. A declaration does not infringe on any property rights and therefore the Department would need agreement from the Commissioner of Police to use any cells.

The jails (or parts of jails) that could be made available to the Department would be negotiated in advance with Police under a memorandum of understanding. The memorandum would include any conditions or agreed restrictions on the use of each facility, including (where relevant) stipulating that the Police could continue to operate specified cells for Police purposes.

Safeguards would include the limited circumstances in which this regime can be established, limits on its duration and a maximum period of detention for affected prisoners (of seven days). As part of the legislative safeguards for operating the temporary facilities:

- prison directors would have to take all reasonable steps to provide prisoners with their minimum entitlements to exercise, access to private and specified visitors, to send and receive mail, to make telephone calls, and access to information and education;
- no person under 18 years of age would not be eligible for detention in the temporary facilities; and
- no prisoners could be detained in the facilities more than seven days running, or 21 days over a 12 month period.

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

Housing prisoners in a Police jail raises risks as they are not specifically designed for long term imprisonments. While these are not new risks as there are already provisions to house prisoners in Police jails, a number of additional safeguards are necessary to limit risk. These include:

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

This authority to temporarily bring jails within the prison estate, should the need arise, is a cost-effective way to increase the Department's short-term options for alleviating muster pressures. There would be small costs in making at least one of these facilities operational (in the region of $100,000 for the disused facility in Papakura). Otherwise, the main costs associated with the use of jails by the Department are likely to relate to the diverting of staff and other resources to the jail.

(L) Limited ability to use imaging technology to detect contraband

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

Background

Searching prisoners, staff and visitors is necessary to detect and deter the possession of contraband. The Department is permitted, and in some instances mandated, to search prisoners to detect contraband. This is a coercive power, heavily regulated in legislation.

The Department is currently able to conduct searches of fully-clothed prisoners, staff and visitors using an electronic device (known as 'scanner search') or through a rub-down search. These are limited in their ability to locate internally concealed contraband.

There is also a very limited authority to conduct x-ray searches. Such searches may only be carried out on prisoners, not on staff or visitors, and only where an officer has reasonable grounds to believe that an unauthorised item is concealed in or around the prisoner's body.

Imaging technology searches are personal searches that display images on a screen with the aim of locating items concealed under the clothing or within the body. The technology has recently been introduced to prisons in other jurisdictions. While the evidence is not conclusive, it shows promise in detecting contraband.

Problem

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

L.2: What options have been considered?

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

i) Introduce imaging technology as a separate type of search

This option would remove the legal ambiguity by amending the Act to create a separate type of search for imaging technology searches. Such searches could therefore be used on prisoners in place of strip searching, and on staff and visitors where there are reasonable grounds to suspect possession of contraband.

However, this option would limit the potential use of imaging technologies on staff and visitors to instances where there are reasonable grounds to suspect they possess contraband. Such a restriction would diminish the deterrent effect on staff and visitors bringing contraband into prison. Moreover, there is a risk that staff or visitors hiding contraband will not be detected and a risk of litigation if the Department searches staff or visitors without sufficient cause

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

This option would remove the legal ambiguity by amending the Act to state that scanner searches include imaging technology searches. Imaging technology searches could then be used on prisoners, staff and visitors at any time, and as an alternative where strip searches are mandatory.

Under this option there would not be a reasonable grounds requirement for searching staff and visitors with imaging technology, and therefore would not attract the same legal risk as the alternative option. This option would also create the greatest deterrent effect on staff and visitors bringing contraband into prison.

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

The Department proposes to amend the Act so that the definition of scanner searches includes imaging technology searches, and so that approved imaging technology searches can be considered where strip searches are currently mandatory.

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

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

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

- a restriction on the type of image that may be displayed, except where imaging technology searches are used as an alternative to strip searching a prisoner, to require the use of devices that blur or block the display of the body beneath clothing, particularly the genitalia;
- a provision that an image may be retained only as long as is necessary to determine the presence of an unauthorised item; and
- a prohibition on photographing or other copying of the image, or providing it to another person, which would be treated as offences with a maximum fine of $2000 (similar to offences defined in section 146 of the Act).

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

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

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

(M) Limited prisoner knowledge of disciplinary offences

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

Background

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

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

Problem

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

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

M.2: What options have been considered?

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

i) Change operational procedure to actively provide prisoners with information

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

ii) Introduce a statutory requirement to provide prisoners with information

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

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

The Department proposes to amend section 42 of the Act in order to include an obligation to provide newly admitted prisoners with information about disciplinary offences. This option is preferred as it reduces inconsistency between prison rules and disciplinary offences, while also providing more accountability that prisoners will be informed of the necessary information.

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

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

(N) Lack of statutory right to appeal decision relating to mother and baby placement

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

Background

Since September 2011, the Act has provided for mothers with children who are less than 24 months old to apply to have those children with them in prison. Mothers with Babies Units were opened at Auckland Region Women's Corrections Facility, Wellington's Arohata Prison and Christchurch Women's Prison. The number of mothers and children in prisons is small and fluctuating. As at 1 February 2018, there are nine mothers and nine children.

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

Problems

Where an application for placement in a Mothers with Babies Unit is declined, or it is decided to end such a placement, the mother has no statutory right to appeal the decision, though she could complain to the Ombudsman or institute judicial review proceedings. The Department has set up its own process, under which the prisoner can ask a senior manager at a Regional Office to review the decision. However, this process has been criticised by the Office of the Children's Commissioner in a May 2014 report, which noted that "the same multi-disciplinary group who are responsible for determining mothers' eligibility to be in the Mothers with Babies Units are also responsible for considering mothers' appeals".

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

N.2: What options have been considered?

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

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

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

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

However, including a review process in operational policy instead of having statutory authority does not confer any rights on the mother and the chief executive would have an unfettered discretion to remove the process entirely.

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

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

Inclusion in the Act would provide robust assurance that review decisions are taken fairly and

provide more accountability This would install a procedure where the person who reviewed a decision would not have been involved in the original decision-making process.

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

This option would amend the Act so that any review would be made by the chief executive. The chief executive would continue to delegate to prison managers the authority to make and end placements in Mothers with Babies Units. This would mean that the person who reviewed a decision would not have been involved in the original decision-making process.

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

The Department proposes to amend the Act to provide a statutory review process for decisions about the placement of prisoners and their babies in Mothers with Babies Units. It is further proposed that the statutory decision making power for the review decision is given to the chief executive, and that this power can not be delegated to a staff member of a prison..

Under the proposed amendments, it is envisaged that the chief executive would continue to delegate to prison managers the authority to make and end placements in Mothers with Babies Units. To ensure separation of decision making, the chief executive would therefore be responsible for reconsideration of the decision.

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

It is not considered necessary to provide legislative authority for the multi-disciplinary panels, though it is anticipated that these would continue to advise on placement decisions. The Department would ensure that a panel providing advice for reconsideration of a placement decision is not the same panel that advised on the original placement decision.

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

The main risk is ensuring the person who reviews a decision is not involved in the original decision-making process. In practice, prison managers make the initial decision on a placement through a delegated power from the chief executive. The chief executive is therefore the ultimate decision making by having the power to makes the judgement on a placement through the appeals process. To mitigate this risk and ensure separation of decision making, it is proposed to introduce a requirement that the chief executive may not delegate the power to reconsider applications to a staff member of a prison.

(O) Legal risk from limiting prisoners' expectations on conditions or opportunities

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

Background

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

Problem

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

O.2: What options have been considered?

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

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

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

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

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

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

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

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

(P) Inflexible charging regime for the cost of telephone calls

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

Background

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

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

Every prisoner is entitled to make at least one outgoing telephone call of up to 5 minutes' duration per week, but they must meet the cost of that call.

Problem

Currently the Corrections Act states the Department must charge for phone calls.

The Department is currently upgrading the telephone system following the phase out of call cards. The upgraded system will have the ability to either charge the Department a flat monthly rate for all calls or for each individual call. A flat monthly rate creates complexity in how to divide the overall cost charged to the Department across the number of prisoners making calls, and frequency and duration of those calls.

Charging for phone calls can impact on a prisoner's ability to maintain the family and social relationships that promotes their rehabilitation and reintegration. While the Department moves towards a more sophisticated telephony system, the Department does not have any flexibility to waive the cost of telephone calls to promote rehabilitation.

P.2: What options have been considered?

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

i) Provide calls free of charge

This option would amend the Act so that prisoner calls would be offered free of charge. Free calls would provide the greatest chance of promoting contact between prisoners and their families. However, there would still be some inconsistency with mail, as prisoners can be charged for additional mail above the three free letters per week.

ii) Provide the Department with the ability to waive call charges

This option would amend the Act so the Department can waive the cost of the phone calls. Depending how often the cost is waived, this option would promote contact between prisoners and their families.

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

The preferred approach is to provide the Department the flexibility to waive the cost of a phone call by amending Section 77(6) of the Corrections Act to state that prisoners who make outgoing telephone call may be required to contribute towards the cost of telephone calls.

This amendment will create consistency with mail where prisoners may be charged for sending more than three correspondences per week, while also promoting greater communication with family and friends than the status quo. However, retaining the right to charge for phone calls is an important safeguard in instances where influential prisoners abuse the system by monopolising the phone.

P.4: What other impacts is this approach likely to have?
This option creates a possibility that prisoners at different sites are treated differently with respect to charging for calls. As the Department updates the software at each prison site, and therefore moves towards a flat monthly rate for all calls at each site, it is likely that calls will be provided free of charge. This is similar to the approach for mail.

Section 4: Conclusions

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

Overall the Department recommends the following approaches to address the 17 issues identified with the current legislative framework. The issues listed below are independent of each other and therefore decisions can be taken separately. All proposals require legislative amendments to the Corrections Act.

- Develop a comprehensive legislative framework for the management of at risk prisoners separate from the current segregation regime;
- Provide legal clarity for the use of restraints for hospital stays longer than 24 hours;
- Make it explicit that no mechanical restraint that could be classified as chains or irons, other than handcuffs, may be authorised for use on a prisoner;
- Include a provision stating that prisoners detained in a corrections prison may be held in individual cells, shared cells or self-care units, and amend the Regulations to no longer express a general preference for accommodation in individual cells;
- Authorise health centre managers to delegate their powers and functions;
- Make it a disciplinary offence for a prisoner to tattoo another prisoner, consent to receive a tattoo from another prisoner, or tattoo themselves;
- Make it a disciplinary offence to attempt to communicate in any way that would breach an order or direction of a court;
- Redefine "drug" in the Act so that it covers psychoactive substances as defined under the Psychoactive Substances Act;
- Clarify that a prisoner's management plan may comprise information recorded on one or more electronic or paper records;
- State that dog handlers have to take "reasonable precautions" to prevent dogs coming into physical contact with a person being searched;
- Empower the Minister of Corrections to declare that spare capacity in a Police jail can be temporarily operated by the Department as if it were a part of a corrections prison;
- Amend the definition of scanner searches to include imaging technology searches;
- Introduce an obligation to provide newly admitted prisoners with information about disciplinary offences;
- Introduce a statutory review process, with decisions made by the chief executive, regarding decisions about the placement of prisoners and their babies in Mothers with Babies Units;
- Revoke Regulation 196, which states that prisoner does not have any legitimate expectation of having similar conditions or opportunities throughout their period of detention, and amend the Act to insert the substance of the Regulation; and
- Provide the Department the flexibility to waive the cost of a phone call.

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

The proposals are not expected to substantially overhaul the regulatory system within the Corrections portfolio, and broadly speaking, they meet the expectations for the design of regulatory systems. For example, the regulatory system will continue to have the same objectives as described in Section 6 (Principles guiding corrections system) of the Corrections Act. The proposals are designed to achieve the principles in a more effective manner. However, given the Act deals with the incarceration of people, there will continue to be some impacts on individual autonomy. Some provisions, namely M), N), and P) are

designed to ensure there is fair and equitable treatment of regulated parties (prisoners). Provision C) relating to the use of chains and irons is aimed at more explicitly meeting the relation international standard set out by the United Nations Standard Minimum Rules for the Treatment of Prisoners.

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

4.3 What are stakeholders' views on the preferred approaches?

Ministry of Health

The Ministry of Health was supportive of the proposed changes to the treatment of prisoner at risk of self-harm.

It stated that delegation of health centre manager's responsibilities seems an appropriate option, they also suggested that there may be merit in progressing with an option to ensure there is a health centre manager on-site at all times to allow for consistency of approach and ownership of the role. This option was considered but discounted because of the increased cost of hiring more managers, as well as potential issues of who is in charge when more than one manager is present.

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

Ministry of Social Development

The Ministry of Social Development was supportive of the proposed changes to the treatment of prisoner at risk of self-harm, and the delegation of health centre managers' powers and functions.

Oranga Tamariki – Ministry for Children

Oranga Tamariki sought confirmation that the current policy of not mixing young and adult prisoners in shared cells would continue. They also sought confirmation that youths would be excluded from being held in Police jails. This safeguard is included.

Ministry for Women

The Ministry for Women was supportive of the imaging searches proposal as it will be particularly beneficial to female prisoners by reducing the risk of re-traumatising those who have experienced sexual or physical abuse.

Human Rights Commission

The Human Rights Commission noted it will be necessary to ensure that any legislative regime for the management of at risk prisoners contains sufficient safeguards to prevent the unreasonable or prolonged detention of individual prisoners. These safeguards are provided.

The Human Rights Commission also raised concerns as to the impacts of prolonged restraint on the prisoner. A provision to establish safeguards is provided.

Privacy Commission

The Privacy Commission raised concerns over the intrusiveness of imaging technology

and sought inclusion of safeguards to limit the privacy and health impacts. These safeguards are included.

Ombudsman

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

Section 5: Implementation and operation

5.1 How will the new arrangements be given effect?

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

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

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

Section 6: Monitoring, evaluation and review

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

6.2 When and how will the new arrangements be reviewed?
A formal review process of the proposals is not expected. However, the implications of all proposals will be monitored in routine internal service improvement processes and internal audit.