

# Regulatory Impact Statement: Improving rehabilitation and safety outcomes in prisons

## Table of Contents

Regulatory Impact Statement: Improving rehabilitation and safety outcomes in prisons .....	1
Coversheet.....	4
Context: We are considering regulatory changes that would enable best practice .....	8
What is the context behind the policy problem and how is the status quo expected to develop? .....	8
Part A: Increasing access to privacy and control over lighting in prison cells .....	14
Part A, Section 1: Outlining the problem .....	14
What is the context behind the policy problem and how is the status quo expected to develop? .....	14
What is the policy problem or opportunity? .....	16
What objectives are sought in relation to the policy problem?.....	17
Part A, Section 2: Deciding upon an option to address the policy problem .....	19
What scope will options be considered within? .....	19
What options are being considered? .....	19
How do the options compare to the status quo/counterfactual? .....	21
What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits? .....	23
What are the marginal costs and benefits of the option? .....	24
Part A, Section 3: Delivering an option.....	26
How will the new arrangements be implemented? .....	26
How will the new arrangements be monitored, evaluated, and reviewed? .....	27
Part B: Ensuring the rehabilitation needs and wellbeing of gender diverse prisoners can be considered when determining prison accommodation.....	28
Part B, Section 1: Outlining the problem .....	28
What is the context behind the policy problem and how is the status quo expected to develop? .....	28
What is the policy problem or opportunity? .....	31
What objectives are sought in relation to the policy problem?.....	33
Part B, Section 2: Deciding upon an option to address the policy problem .....	34

What scope will options be considered within? .....	34
What options are being considered? .....	35
How do the options compare to the status quo/counterfactual? .....	38
What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits? .....	40
What are the marginal costs and benefits of the option? .....	41
Part B, Section 3: Delivering an option.....	43
How will the new arrangements be implemented? .....	43
How will the new arrangements be monitored, evaluated, and reviewed? .....	43
Part C: Supporting specialist officers working at height by enabling the use of speed cuffs .....	44
Part C, Section 1: Outlining the problem .....	44
What is the context behind the policy problem and how is the status quo expected to develop? .....	44
What is the policy problem or opportunity? .....	48
What objectives are sought in relation to the policy problem?.....	49
Part C, Section 2: Deciding upon an option to address the policy problem .....	51
What scope will options be considered within? .....	51
What options are being considered? .....	51
How do the options compare to the status quo/counterfactual? .....	53
What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits .....	54
What are the marginal costs and benefits of the option? .....	54
Part C, Section 3: Delivering an option .....	56
How will the new arrangements be implemented? .....	56
How will the new arrangements be monitored, evaluated, and reviewed? .....	56
Part D: Clarifying that young and adult prisoners may mix if it is in the best interests of the young prisoners.....	58
Part D, Section 1: Outlining the problem .....	58
What is the context behind the policy problem and how is the status quo expected to develop? .....	58
What is the policy problem or opportunity? .....	60
What objectives are sought in relation to the policy problem?.....	61
Part D, Section 2: Deciding upon an option to address the policy problem .....	62
What options are being considered? .....	62
How do the options compare to the status quo/counterfactual? .....	64
What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits? .....	65

What are the marginal costs and benefits of the preferred option? .....	65
Part D, Section 3: Delivering an option .....	67
How will the new arrangements be implemented? .....	67
How will the new arrangements be monitored, evaluated, and reviewed? .....	67
Summary of implementation for all proposals.....	68
How will the new arrangements be implemented? .....	68
How will the new arrangements be monitored, evaluated, and reviewed? .....	69
Appendix One: Level of general risk, restrictiveness and where changes are proposed by placement type (privacy screens and in-cell access to light switches) .....	70

## Coversheet

Purpose of Document	
Decision sought:	Cabinet agreement to final policy decisions for Corrections Amendment Regulations 2023
Advising agencies:	Department of Corrections
Proposing Ministers:	Minister of Corrections
Date finalised:	23 May 2023
Problem Definition	
<p>This regulatory impact statement (RIS) considers a package of options that would amend the Corrections Regulations 2005 (the Regulations). The options relate to four discrete areas where change is necessary to improve safety and operational outcomes in prisons in alignment with Corrections' strategic direction <i>Hōkai Rangī</i>, by:</p> <ul style="list-style-type: none"><li>• increasing access to privacy features and control over lighting in prison cells</li><li>• ensuring the rehabilitation needs and wellbeing of gender diverse people can be considered when determining prison accommodation</li><li>• supporting specialist teams at height by enabling the use of speed cuffs</li><li>• ensuring young and adult prisoners may mix when it is in the best interests of the young prisoner.</li></ul>	
Executive Summary	
<p>This RIS analyses four areas of change for the operation of the 18 prisons governed by the Regulations that support the Corrections Act 2004 (the Act).</p> <p>While in some cases operational solutions were considered, the prescriptive nature of the Regulations means that regulatory solutions are recommended, as operational solutions alone will not achieve our objectives.</p> <p><i>Impacts on different population groups</i></p> <p>Māori are overrepresented in prison, making up 53% of the prison population as of 18 January 2023. This means that Māori will be impacted more than other groups by the proposals, including benefits from improved wellbeing and prison safety.</p> <p>Our consideration of how people are assigned to men's and women's prisons has particular impacts on gender diverse prisoners, including those who identify as transgender or intersex.</p> <p>Ultimately, when a prisoner's wellbeing is provided for, they are more likely to have better rehabilitation outcomes, which should contribute to lower reoffending rates and improved prison safety. As such, the proposed changes support the purpose of the corrections system by ensuring sentences are administered in a safe, secure, humane, and effective manner.</p>	



### *The proposals were refined following public consultation*

Public consultation on three of the four proposals took place in August and September 2022, alongside a package of proposed legislative amendments. Consultation resulted in almost 200 survey responses and 57 written submissions. We also held hui with iwi partners and key stakeholders.

As feedback from public consultation was largely supportive, only minimal changes have been made to our proposals, including clarification of the impacts on some key population groups.

There was no public consultation on the use of speed cuffs for Corrections' Specialist Height Teams because it was a later addition to the package of proposed amendments. However, our analysis draws on relevant themes from consultation and we tested the proposals with representatives from the Human Rights Commission and the Ombudsman.

### **Summary of proposals in Parts A to D**

#### ***Part A: Increasing access to privacy and control over lighting in prison cells***

Most cell types enable access to privacy screens (so that prisoners can use the toilet and shower out of sight of anyone who looks through the door window) and internal light switches (so that prisoners can control their own lighting from within the cell).

However, the Regulations prevent people on cell confinement or mental health segregation from having access to these privacy features.

We propose removing these regulatory prohibitions and requiring privacy features to be provided as the default for these cell types, except where staff consider it unsafe to provide these privacy features to prisoners.

#### *Costs and benefits*

Providing greater access to these privacy features is expected to improve the wellbeing of more prisoners and address longstanding issues that the Ombudsman has sought to have changed. We estimate retrofitting these privacy features into 380 cells would cost between \$800,000 to \$3 million and could take until 2027 to implement across all prison sites.

#### ***Part B: Ensuring the rehabilitation needs and wellbeing of gender diverse prisoners can be considered when determining prison accommodation***

We propose amending "the birth certificate rule" to ensure accommodation decisions for gender diverse prisoners are not solely determined by the sex stated on their birth certificate if a prisoner provides one. If the birth certificate rule was invoked, it could compel Corrections to accommodate and manage a prisoner in a prison that does not support their wellbeing and safety and could result in them being segregated from other prisoners.

As part of this change, birth certificates would become one factor that would be considered (if presented) when a prisoner applies for a review of their accommodation under regulation 65C. It could also be considered by Corrections for the purposes of the initial prison placement, if the prisoner provided a certificate for this purpose.

#### *Costs and benefits*

Our preferred approach is designed to support gender diverse prisoners and should result in minimal change from the status quo as it largely aligns with current operational practice. The preferred approach will also ensure that Corrections has the flexibility to consider a range of factors for initial placement if a determination is needed. This could include considering the prisoner's birth certificate, the safety and wellbeing of all prisoners, prison security, the likelihood of the prisoner being managed in protective or directed segregation, and the impact on the prisoner's rehabilitation.

***Part C: Supporting specialist officers working at height by enabling access to speed cuffs***

General use handcuffs are available to Corrections Officers but have some important limitations that inhibit their effective use during at-height incidents (incidents on the roofs of prison buildings). This is because general use handcuffs typically require two hands to administer, the support of another staff member, or a compliant prisoner. Further, the chain from general use handcuffs poses a much greater risk of becoming entangled in other equipment used at height, including the cables and harnesses.

To best support Specialist Height Teams during at-height incidents, we propose amending the Regulations to enable the use of speed cuffs for these situations.

The major advantages of speed cuffs are that they:

- rapidly grip to the prisoner when applied
- can be applied quickly and without getting tangled, essential in an at-height situation
- can be applied one-handed
- reduce risks to staff as an individual staff member can restrain a prisoner quickly in a one-on-one situation with low risk of losing control.

While technically speed cuffs would continue to be available for emergency use under the current authorisation process, in practice they would also be available for Specialist Height Teams who have specialist training.

***Costs and benefits***

There will be some minor one-off costs associated with purchasing the speed cuffs (\$22,500) for up to 68 staff members from Specialist Height Teams, as well as ongoing costs for training. These costs are expected to be managed within baseline.

***Part D: Clarifying that young and adult prisoners may mix if it is in the best interests of the young person***

The Regulations state that young people (under 18-years-old) and adults (over 18-years-old) must be kept separate in prison, unless the Chief Executive (CE) believes that it is in the best interests of the people concerned to mix.

We understand that the original policy intent was to allow young people to mix with adults in prison only when it is in the best interests of the young person. However, a literal interpretation of the Regulations could mean that Corrections is required to demonstrate that mixing is also equally in the best interests of the adults concerned. This is not the intention of the Regulations and does not strictly align with our international obligations, as

the young person's best interests should be the most important consideration when these decisions are made.

We propose amending the Regulations to clarify that young people and adults may mix in prison if it is in the young person's best interests to do so. However, the CE may still consider and manage the best interests of adults on an operational level.

The objective is to ensure the original policy intent is captured effectively in the Regulations and to ensure decisions to mix are centred on the young person's best interests.

#### *Costs and benefits*

There are no direct financial costs from the proposal other than updating practice guidance and communications to describe the change to impacted groups, which will be met from baseline funding.

### **Limitations and Constraints on Analysis**

The engagement undertaken with prisoners during public consultation was limited to two sites due to constraints on staff resourcing limiting the number of sites that had capacity to facilitate workshops with prisoners. These regulatory changes were not discussed in detail at those workshops, but as the consultation was public, prisoners did have an opportunity to submit and some of the people who submitted or met with us spoke of family with lived experience.

### **Responsible Manager**



*Marian Horan*

*Manager, Corrections Policy*

*Department of Corrections/Ara Poutama Aotearoa*

*23/5/2023*

### **Quality Assurance**

Reviewing Agency:	The RIA was assessed by a panel made up of representatives from the Department of Corrections and New Zealand Police.
Panel Assessment & Comment:	<p>A joint Quality Assurance panel with members from the Department of Corrections and New Zealand Police has reviewed the Regulatory Impact Statement and considers that it meets the Quality Assurance criteria.</p> <p>The panel noted that the proposal to support specialist teams working at height by enabling the use of speed cuffs was not publicly consulted on. However, targeted consultation was carried out, including with the Corrections Association of New Zealand, the Public Service Association, the Human Rights Commission,</p>

and the Office of the Ombudsman. This was considered sufficient to meet the Quality Assurance criteria.

The Human Rights Commission and Ombudsman now note that they consider that staff provided only initial feedback, and were not consulted on the proposals relating to speed cuffs. The RIS Panel was asked to review their QA statement in light of this feedback and has now revised its assessment of the RIS to a partially meets, on the basis that the section on supporting specialist teams working at-height by enabling the use of speed-cuffs does not meet the consultation criteria. The panel notes that while all other sections of the RIS did meet the QA criteria, this means that the RIS **partially meets** the QA criteria overall.

## **Context: We are considering regulatory changes that would enable best practice**

**What is the context behind the policy problem and how is the status quo expected to develop?**

**The corrections system includes 18 prisons across the country and the Department of Corrections manages people on sentences and orders in the community**

1. There are 18 prisons and corrections facilities across Aotearoa New Zealand (15 for men and three for women) for people who have either been sentenced to a term of imprisonment or have been remanded in custody while they wait for their case to be heard. Serco operates one of these prisons, Auckland South Corrections Facility, on contract and is bound by the same legislative framework as the Department of Corrections/Ara Poutama Aotearoa (Corrections). Corrections is also responsible for managing people on sentences and orders in the community.
2. While our prisons vary in size and specification, each of them operates under the same set of rules and must meet a certain standard that is set out in the Corrections Act 2004 (the Act) and the Corrections Regulations 2005 (the Regulations). The changes discussed in this regulatory impact statement (RIS) relate to regulatory change that would impact on how prisons operate.

**The Corrections Act 2004 is the primary piece of legislation for the corrections system, supported by the Corrections Regulations 2005**

3. Under the Act, the purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society. The Act also provides principles that guide the corrections system and specify that the maintenance of public safety is the paramount consideration in decisions about the management of people under Corrections' control or supervision.
4. The Regulations provide detailed rules to ensure the good management of the corrections system and safe custody of prisoners, in accordance with the Act. The Regulations include, but are not limited to, rules about:
  - the general duties of different corrections staff
  - the release and transport of prisoners



- the security classification of prisoners
- the placement of prisoners in correctional facilities
- the segregation of prisoners
- prisoner treatment and welfare (including health care)
- use of force, non-lethal weapons, and mechanical restraints
- discipline and order
- complaints
- special categories of prisoners.

**Corrections must operate in accordance with human rights legislation and international obligations**

5. Corrections is responsible for providing fair treatment and administering sentences in a way that is no more restrictive than necessary.
6. Corrections operations are also informed by the New Zealand Bill of Rights Act 1990 (NZBORA), the Privacy Act and the Human Rights Act 1993, which guide how the state exercises power and the relationship between the state and individuals. NZBORA recognises that there are situations where limiting rights and freedoms may be appropriate if they can be justified in a free and democratic society.
7. New Zealand is party to several international instruments that are relevant to Corrections' legislative framework, and these also guide our practices. In particular, the United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), the International Covenant on Civil and Political Rights (ICCPR), and United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment (OPCAT).
8. In addition, the United Nations Convention on the Rights of the Child (UNCRC), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), and Yogyakarta Principles, provide additional considerations for the needs of young people, women, and people with diverse sexual orientation and gender identity.
9. When considering changes to the Regulations, any impact on human rights must be carefully accounted for within Corrections' management of people and maintenance of public safety.

**There are internal and external oversight and accountability mechanisms for the corrections system**

10. Internally, oversight and accountability of Corrections' activities are provided by the Office of the Inspectorate.
11. The Inspectorate is guided by the Inspection Standards, which are derived from the Mandela Rules and His Majesties Inspectorate of Prison Expectations (the United Kingdom's equivalent inspection criteria). The Inspection Standards also include gender-responsive standards for women and transgender prisoners.
12. People in prison also have the right to make complaints and the Inspectorate investigates these.



13. Externally, Corrections' activities are scrutinised by the Office of the Ombudsman. The Ombudsman is one of four National Preventive Mechanisms (NPMs) in New Zealand that monitor the conditions of detention and treatment of detainees and makes recommendations for improvement in accordance with OPCAT. The Chief Ombudsman can enter and inspect prisons at any time and provide recommendations for improvements to the conditions of prisons or the treatment of people in prison.

**New Zealand's prison population has been declining since 2018 but Māori continue to be overrepresented**

14. New Zealand's prison population peaked at 10,820 people in prison in March 2018. This has dropped to a population of approximately 8,335 as of 18 January 2023. The men's prison population is approximately 7,794 and the women's prison population is approximately 534.
15. As of 18 January 2023, 53% of people in prison identified as Māori. 52% of men in prison identified as Māori and 65% of women in prison identified as Māori.
16. The number of Māori in prison has been falling for the last four years, along with the general prison population. However, the Māori prison population has dropped at a lower rate, resulting in Māori making up a larger proportion of the prison population.<sup>1</sup>
17. As of 18 January 2023, 45% of the total prison population were on remand. This was higher for women, with 57% of women in prison on remand.
18. The number of younger people in prison has been falling continuously since 1980. In that year, 64% of prisoners were under 25 years old. By June 2022 this had fallen to 10%. During the same time, the proportion of prisoners under 20 years old fell from 29% to just 1.2%.<sup>2</sup>

**Corrections' operations are guided by the strategic direction in *Hōkai Rangi***

19. *Hōkai Rangi*, launched in 2019, was developed with Māori to help address the overrepresentation of Māori in the corrections system. *Hōkai Rangi's* strategic approach is focussed on the whakataukī *Kotahi anō te kaupapa; ko te oranga o te iwi* (there is only one purpose to our work; the wellness and wellbeing of people).
20. A central focus of *Hōkai Rangi* is to reduce harm to people in prison, better respond to the needs of the individual and their whānau and achieve better wellbeing and rehabilitation outcomes for Māori and all people we manage.

**We are considering regulatory changes to improve safety and operational outcomes in prison**

21. We have identified some areas in the Regulations that do not support safety in prison or best operational practice. This RIS considers a package of options that respond to these problem areas, whilst supporting the strategic direction of the department under *Hōkai Rangi*.

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<sup>1</sup> Justice Sector Long-Term Insights Briefing public consultation document, 2022.

<sup>2</sup> Justice Sector Long-Term Insights Briefing public consultation document, 2022.

22. It is necessary to progress the recommended options in a timely manner to enable us to deliver the best services that we can to prisoners, their whānau, staff, and communities.
23. **Sections A, B and D** of this RIS analyse options that would ensure Corrections can better support the wellbeing and dignity of prisoners, including gender diverse and young people, as guided by *Hōkai Rangī*.
24. **Section C**, would allow Corrections to use speed cuffs to support safe at-height responses, enabling a more effective resolution to these situations when required.

#### **Corrections publicly consulted on options for six weeks**

25. Public consultation on proposed options for changes to the Act and Regulations ran for six weeks between 16 August to 23 September 2022. A discussion document was published on the Corrections website and an online survey was available for stakeholders to provide their feedback. The survey included a summary of proposals and a shorter set of questions based on the discussion document and was open for anyone to complete. Written submissions were also requested and those that were received were generally more detailed and responded to the discussion document.
26. Corrections proactively emailed over 500 partners and key stakeholders to inform them about consultation and to offer to meet with them.
27. We received 195 survey responses and 57 written submissions in total. Of those surveyed, between 145 and 189 chose to answer the questions related to the different proposed Regulations. Of the written submissions, 17 respondents submitted on the proposal that would clarify when it would be appropriate to mix young people with adults in prison, while 37 respondents submitted on the proposals to increase access to privacy screens and control over lighting in cells, and ensuring people are assigned to men's and women's prisons based on a range of factors.
28. Approximately half of written submissions were provided by organisations, including:
  - agencies and organisations such as the New Zealand Parole Board, Human Rights Commission, the Ombudsman, Office of the Privacy Commissioner and the Health and Disability Commissioner
  - iwi partners and Māori organisations, such as Ināia Tonu Nei
  - Serco
  - non-government organisations such as the Salvation Army and Anglican Action
  - sector organisations such as People Against Prisons Aotearoa and the Howard League
  - feminist groups such as Women's Liberation Aotearoa
  - other interested organisations such as the New Zealand Law Society and Professional Association for Transgender Health Aotearoa.
29. We undertook hui with a variety of individuals and groups regarding potential changes to the Regulations throughout September and October 2022, these groups included some of those above.
30. The Salvation Army also submitted the results from a customised version of Corrections' survey undertaken with 15 clients who had previously been in custody.

31. There was no public consultation on the potential use of speed cuffs for Corrections' Specialist Height Teams. The proposal was introduced later, following consultation with unions about how to better manage risks from prisoners accessing prison building rooftops. However, where possible, we have drawn on relevant themes from public consultation or recent consultation with key partners and stakeholders.

### Overarching objective

32. The overarching objective for this package of options is to enable best practice operationally in the corrections system, and to support the department to deliver on its strategic goals of improving public safety, reducing reoffending, and reducing the overrepresentation of Māori in the corrections system.

### Criteria

33. We have assessed all of the options in this RIS against six criteria:

<b>Complies with human rights obligations</b>	The extent to which the option supports the rights contained in NZBORA, the Human Rights Act, the Mandela Rules, and other international obligations.  NZBORA is the domestic articulation of our international obligations and while the Mandela Rules are non-binding, they are referenced in the Act.
<b>Transparency and accountability</b>	The extent to which the option supports transparency about what powers Corrections can exercise and provides accountability and review mechanisms of how these powers are used.
<b>Practical to implement and responsive</b>	The ease of implementation and the extent to which the options will be able to adapt to changes over time, such as new technologies, allowing for ongoing innovation and shifts in best practice.
<b>Contributes to better outcomes for Māori</b>	The extent to which the option will tangibly improve outcomes for Māori in the corrections system and contribute to Corrections supporting the Crown to meet its responsibilities under te Tiriti o Waitangi / the Treaty of Waitangi (te Tiriti).
<b>Supports oranga/wellbeing of the people we manage</b>	The extent to which the option will support the oranga/wellbeing of people in prison. In a Corrections context, this could include improvements to conditions for people in prison, for example greater opportunities to participate in activities, a greater sense of privacy, and options that will have a positive impact on mental health.
<b>Contributes to safety</b>	The extent to which the options contribute to safety, which could include the safety of prisons, including staff and people in prison, or public safety, which is a purpose of the corrections system.

34. The criteria were largely supported by submitters during public consultation. Three submitters recommended that there should be an explicit te Tiriti criterion. We reflected on that advice and consider that the criterion "contributes to better outcomes for Māori" is a tangible way for us to assess our te Tiriti obligations and align with the strategic direction of *Hōkai Rangi* and the recommendations from the Waitangi

Tribunal's *Tū Mai Te Rangi!*.<sup>3</sup> We have amended the criterion above to support our understanding of how each proposal might support Corrections to deliver on te Tiriti principles established in jurisprudence.

35. As part of this, we want to understand the impacts on Māori of each proposal. As the Waitangi Tribunal noted in its report *Tū Mai te Rangi!*, some of the initiatives that Corrections has implemented in the past produced positive results across the prison network as a whole but increased the overrepresentation of Māori in the prison population.
36. Our options have been analysed against the criteria using the following scoring method:

**Key for options analysis:**

++	much better than doing nothing/the status quo/counterfactual
+	better than doing nothing/the status quo/counterfactual
0	about the same as doing nothing/the status quo/counterfactual
-	worse than doing nothing/the status quo/counterfactual
--	much worse than doing nothing/the status quo/counterfactual

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<sup>3</sup> In its 2017 *Tū Mai Te Rangi!* report, the Waitangi Tribunal recommended Corrections:

- revise the Māori Advisory Board's terms of reference to enhance their influence
- design and implement a revised strategy
- set and commit to a measurable Māori-specific target for reducing Māori reoffending rates
- include a dedicated budget
- provide appropriate resourcing for senior level Corrections staff to receive advice and training in incorporating mātauranga Māori and the Crown's te Tiriti obligations into the Department's high level practice and operations; and
- amend the Corrections Act 2004 to state the Crown's relevant te Tiriti obligations to Māori as addressed in this report.



# Part A: Increasing access to privacy and control over lighting in prison cells

## Terminology used in this section

**Cell confinement:** this refers to a punishment that can be imposed after a disciplinary offence in prison has been committed. On cell confinement, a prisoner cannot leave their cell for up to 15 days, and may be denied some minimum entitlements, such as access to private visitors, outgoing telephone calls, and information and education.

**Mental health segregation:** this is when a prisoner's opportunity to associate with other prisoners is restricted or denied for a period of time to assess or ensure their mental health. Prisoners under mental health segregation will not necessarily have reported an intention to harm themselves.

**At-risk prisoner:** this refers to a prisoner who is reporting, indicating, or communicating a commitment to intentionally or deliberately harm themselves.

**Alternative accommodation:** this refers to specific accommodation that may be used for an at-risk prisoner, if the prison manager considers it adequate to protect the prisoner from self-harm.

**Hygiene areas:** this refers to the toilet and shower area located in a prison cell.

## Part A, Section 1: Outlining the problem

### What is the context behind the policy problem and how is the status quo expected to develop?

37. The Regulations state the mandatory features for all types of prison cells.<sup>4</sup> Different cell types have different mandatory requirements. For example, the Regulations include requirements for privacy screening and in-cell access to light switches.<sup>5</sup>
38. Most cell types give prisoners access to privacy screens over hygiene areas so that prisoners can use the toilet and shower out of sight of anyone who looks through the door window. Similarly, internal light switches are available in most cells so that prisoners can control their own lighting from within the cell. Privacy screens over hygiene areas support people's dignity and wellbeing because they conceal toileting and bathing, while in-cell light switches provide a degree of autonomy.

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<sup>4</sup> For example, existing and new cells, self-care units, cells used for accommodating prisoners at risk of self-harm, and cells used for segregated prisoners.

<sup>5</sup> Corrections Regulations 2005, [sch 2 – Items and features of cells for segregated prisoners and prisoners at risk of self-harm](#), [sch 3 – Items in cells and self-care units](#) and [sch 6 – Items and features of cells used for penalty of cell confinement](#).



39. The Regulations prevent people on cell confinement or mental health segregation from having access to privacy screens and in-cell control of lighting.<sup>6</sup> Limiting access to these privacy features gives staff continuous visibility into prisoner's cells and we understand this was intended to help protect people's wellbeing, safety, and to ensure the preservation of life. These restrictions reflected the perceived risk that prisoners could use these features to conceal problematic activities such as creating weapons, self-harming, or damaging the cell.
40. There is a lack of definitive evidence that prisoners with access to privacy screens are more likely to self-harm or act violently. A review of 5,059 'prisoner welfare/safety incident' reports over the 2016-17 to 2020-21 period found there were only two incidents where the privacy screen had a determinative impact.<sup>7</sup> The review also found just two incidents relating to light switches.<sup>8</sup>
41. In some situations, prisoners on cell confinement may have access to cells with privacy screens or in-cell light switches. This would happen if the CE deemed that it is not practicable in the circumstances for these prisoners and is often used in situations where there are no cells available without privacy features.<sup>9</sup>

#### **Cell confinement numbers are higher than those for mental health segregation**

42. On average, each year there are 94 instances of prisoners being placed on mental health segregation and 3,834 instances of prisoners being given the penalty of cell confinement.<sup>10</sup>

#### **Mental health segregation is used to assess or ensure a prisoner's mental health**

43. Prisoners can be segregated to assess or ensure their mental health. This does not mean they cannot access treatment, but that they need to be kept apart from other prisoners.
44. For example, an individual may be put on mental health segregation when they are experiencing an episode of mental health disorder or distress (i.e., psychosis, mania). They may require increased monitoring and separation from others for a time in order to stabilise, but they are not considered to be an imminent risk to themselves or others.

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<sup>6</sup> Corrections Regulations 2005, [sch 2 – Items and features of cells for segregated prisoners and prisoners at risk of self-harm](#) and [sch 6 – Items and features of cells used for penalty of cell confinement](#).

<sup>7</sup> In one instance a prisoner attempted suicide by attaching a ligature to the screen, while in the other, a prisoner hid behind the privacy screen during an incident and was not able to be identified on CCTV footage.

<sup>8</sup> In one incident, a prisoner hurt his hand punching an inoperative switch, while in the other a prisoner set a fire using the exposed wires. Neither prisoner was seriously harmed. In multiple other incidents, these features were noted as part of the cell make-up, but were not considered impactful on the events.

<sup>9</sup> Corrections Regulation 2005, [reg 157\(2\) – Cells used for cell confinement](#).

<sup>10</sup> Some prisoners may receive this penalty multiple times, so this number refers to the instances not the individual people.

*Prisoners at risk of self-harm are now managed differently from those on mental health segregation*

45. In 2020, changes to the Act and Regulations created a separate regime for managing at-risk prisoners.
46. Prisoners who are assessed as being at risk of self-harm can be accommodated in at-risk cells (without privacy screening or in-cell light switches as default), or alternative accommodation (where they may have privacy screening and light controlled from within the cell) where that is considered adequate to protect the prisoner from self-harm. This is referred to as the 'alternative accommodation rule'.<sup>11</sup> This RIS does not consider changes for prisoners assessed as at-risk of self-harm because the statutory framework is already sufficiently flexible to permit at-risk prisoners to be accommodated in cells that do have privacy screens and in-cell light switches where it is safe to do so.

**Cell confinement is used as part of the internal prison disciplinary process**

47. As part of the internal prison disciplinary process, prisoners who commit an offence against discipline may be subject to cell confinement. There are a wide range of offences against discipline, including people being out of their cell without permission, damaging prison property, or assault.

**What is the policy problem or opportunity?**

**Cells used for mental health segregation or for cell confinement can be overly restrictive**

48. The prohibition on privacy screening over hygiene areas and control over lighting for cells used for people on mental health segregation, is a requirement left over from before the at-risk framework was introduced and separated out from mental health segregation in the legislation.
49. Now that at-risk prisoners are managed and accommodated according to a different regime, the prohibitions on privacy screens and control over lighting may no longer be justified for people on mental health segregation.
50. Due to a perception of potential risk of violence and/or self-harm for people placed on cell confinement as a penalty for serious misbehaviour, this group is also prohibited from having privacy screens or in-cell access to light switches. However, there is no evidence that access to privacy screens over hygiene areas or in cell control over lighting increases the risk of violence or self-harm for this group of people.
51. Limiting access to privacy and light switches routinely attracts criticism from the Chief Ombudsman who considers the prohibitions amount to degrading treatment as they are not proportionate to risk. Changing these settings would be consistent with the rights and freedoms in NZBORA, specifically the right to not be subjected to disproportionately cruel or degrading treatment or punishment, and the right of people

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<sup>11</sup> Corrections Act 2005, [s 61B\(a\) – Initial steps that prison manager and health centre manager must take in respect of at-risk prisoner](#).

deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person.<sup>12</sup>

*The Regulations do not align with new therapeutic approaches to the management of people in prison*

52. Limiting access to privacy screening or control over lighting can cause undue stress or embarrassment. The lack of privacy for hygiene areas and control over lighting may not align with Corrections' strategic direction as outlined in *Hōkai Rangī*, which has a focus on uplifting the *oranga* of prisoners.
53. During public consultation survey respondents were asked if they thought preventing access to privacy screens and/or in cell light switches for people on mental health segregation or on cell confinement was a problem that should be addressed. Of the 195 respondents, 100 agreed or strongly agreed that it was a problem.

#### What objectives are sought in relation to the policy problem?

54. The objective is to improve the wellbeing of people in prison in a safe way.
55. The criteria used to assess the options for changing the privacy screen regulations describes the impact on the objective in the following ways:

Criterion	Objective/consideration
Complies with human rights	Extent that the option supports human rights obligations, including s 9 of the NZBORA, specifically that everyone has the right not to be subjected to cruel or degrading treatment, and s 23(5) of NZBORA, the right of people deprived of liberty to be treated with humanity and with respect for the inherent dignity of the person, and the guidance outlined in the Association for Prevention or Torture.
Transparency and accountability	Staff, prisoners, whānau /family, and oversight bodies such as the Ombudsman can see how Corrections will manage prisoners and Corrections can be held to account.
Practical to implement and responsive	The option is practical to implement within the prison environment and supports future focused prison cell design and innovative practices.
Contributes to better outcomes for Māori	The body as <i>taonga</i> is respected, prisoners have more control/ <i>rangatiratanga</i> over their personal space and needs, and <i>oranga</i> is prioritised.

<sup>12</sup> New Zealand Bill of Rights Act 1990, [s 9 – Right not to be subjected to torture or cruel treatment](#) and [s 23\(5\) – Rights of persons arrested or detained](#).

Supports oranga/wellbeing of the people we manage	Provides greater privacy but includes options to ensure safety where needed.
Contributes to safety	Extent that the option keeps prisoners and staff safe.

## Part A, Section 2: Deciding upon an option to address the policy problem

### What scope will options be considered within?

56. Given the prescriptive nature of the regulations relating to privacy features for people on mental health segregation and those on cell confinement, only regulatory options will address the problem.

### What options are being considered?

#### **Cells used for mental health segregation or for cell confinement can be overly restrictive**

##### **Option One: status quo – maintain the prohibition on privacy screens over hygiene areas and light switches for people on mental health segregation and cell confinement**

57. Under the status quo the regulatory prohibitions on privacy features for people on mental health segregation and cell confinement would remain in place.
58. Maintaining the status quo was supported by one survey respondent with the view that this would ensure that Corrections staff can keep prisoners and themselves safer.

##### **Option Two: amend the Regulations to allow access to privacy screens over hygiene areas and in-cell light switches for all people on mental health segregation and cell confinement as the default, subject to overriding safety considerations**

59. Under this option, prisoners on mental health segregation and cell confinement would have access to privacy features by default. If there is a serious overriding risk or safety consideration, then staff could decide not to provide these features.
60. For example, under mental health segregation, where someone poses a potential risk to themselves (e.g., is becoming increasingly psychotic and unable to look after themselves) but is not reporting a deliberate intention to harm themselves. In these circumstances, it could be appropriate to remove their access to privacy screens to enable better monitoring and management of risk, without it being appropriate to move them over to an at-risk cell.
61. For someone on cell confinement, an example might be where someone is assessed as posing a risk to themselves and are not considered capable of looking after themselves, but who are not considered to be at-risk of self-harm.
62. During consultation, the Human Rights Commission supported this option and said that it is consistent with the Mandela Rules and international human rights obligations that set out that the material conditions in cell confinement must mirror conditions in the rest of the prison. They also said that this option would increase in-cell prisoner autonomy.

##### **Option Three: people on mental health segregation and cell confinement cannot have access to privacy features over hygiene areas, unless an assessment has been completed showing it would be safe to enable access**

63. Under this option, staff would only give people on mental health segregation and cell confinement access to privacy screens and in-cell switches when it is considered safe



to do so. This would be informed by a risk-based assessment that considers the prisoner's history and needs. The default would still be that privacy features would not be available for people on mental health segregation and cell confinement, as is the case with the status quo, but access to these features would be available for those where it is assessed as safe to do so.

64. One challenge with this option is to have an appropriate balance of infrastructure between cells with and without privacy screens and in-cell switches to ensure adequate availability of different cells within the prison.
65. During public consultation, 58 survey respondents indicated that they preferred this option. The Auckland District Law Society preferred this option because they felt that it would give staff more choice on who has access to privacy features and who does not. One survey response said that this option will be best because it would allow for staff to make case-by-case decisions.

## How do the options compare to the status quo/counterfactual?

### Part A: Cells used for mental health segregation or for cell confinement can be overly restrictive

	Option One: status quo	Option Two: regulatory change to allow access to privacy screens over hygiene areas and in-cell light switches for all people on mental health segregation and cell confinement as the default, subject to overriding safety considerations	Option Three: people on mental health segregation and cell confinement cannot have access to privacy features over hygiene areas, unless an assessment has been completed showing it would be safe to enable access
Complies with human rights	0	<p>++</p> <p>This setting aligns with the NZBORA right not to be subjected to disproportionately cruel or degrading treatment or punishment because the use of privacy features would be proportionate to risk the individual presents. It also aligns with the right to be treated with humanity, respect, and dignity.</p> <p>This option is consistent with international human rights law guidance: the Association for Prevention of Torture has recommended that toilets should not be visible from the point of surveillance and that lights controlled by detainees should be the norm.</p>	<p>+</p> <p>This option has many of the same benefits as Option Two. However, as this option is more restrictive, fewer people on mental health segregation or cell confinement are likely to have access to privacy features as it requires staff to actively provide them.</p>
Transparency and accountability	0	<p>0</p> <p>The Regulations will make it clear that there is an expectation for staff that privacy screens and in-cell light switches will be provided, notwithstanding overriding safety circumstances. Staff would need to use their judgement about when a situation is 'exceptional', and thresholds for this may differ between sites.</p>	<p>-</p> <p>This option relies on staff to determine whether it is safe to give someone on mental health segregation or cell confinement access to privacy screens and in-cell light switches and there is no incentive on staff to actively provide these features. Operationally, this could mean different thresholds for determining safety for different staff or prison sites, which reduces transparency.</p>
Practical to implement and responsive	0	<p>-</p> <p>This would need to be supported by operational guidance that would need to be developed. This option will require retrofitting cells used for mental health segregation and cell confinement with privacy barriers and light switches, while future prison builds would need to include these privacy features. Temporary privacy screens may need to be installed in some units.</p>	<p>--</p> <p>This would need to be supported by new operational guidance. Same as Option Two but specific guidelines would need to be created around risk-based assessments and guidance on when it would be considered safe to allow someone access to privacy features (or not). This option will be harder to implement operationally, as privacy features would not be the default and it will be harder for staff managing infrastructure to cater for the wider variety of different cell requirements across the prison estate.</p>
Contributes to better outcomes for Māori	0	<p>++</p> <p>This option may help enhance mana for Māori who are on mental health segregation or cell confinement because they will likely have greater access to privacy features and have greater autonomy over their own privacy.</p>	<p>+</p> <p>Same as Option Two, but it is less likely that prisoners would have access to privacy features, which has a less significant impact on mana and self-determination.</p>
Supports oranga/wellbeing of the people we manage	0	<p>++</p> <p>This option gives more privacy to people in prison and reduces the chances of undue stress and embarrassment, particularly when using hygiene and toilet facilities.</p>	<p>+</p> <p>Similar benefits to Option Two, but because privacy features are not the default, fewer people will have access to privacy features as staff will need to take additional action to provide them.</p>
Contributes to safety	0	<p>0</p> <p>There is a marginal risk that an incident of problematic behaviour, such as creating weapons or damaging the cell, or self-harm occurs with a prisoner using privacy features to conceal their activity. However, this risk would largely be mitigated through custodial and health policy and practice, including the model of care that already exists in the intervention and support units where cells used for mental health segregation are located. There is also limited evidence that prisoners with access to privacy features are at an increased risk.</p>	<p>0</p> <p>Compared to the status quo there is a very marginal risk that an incident happens behind a privacy barrier or while lighting is turned off.</p>

Overall assessment	0	<p style="text-align: center;">+</p> <p><b>This option best achieves the objective of improving wellbeing for prisoners.</b></p>	<p style="text-align: center;">0</p> <p>This option is an improvement on the status quo in terms of prisoner wellbeing, but it would not achieve the objective as well as Option Two. It would also be more difficult to implement because privacy features would not be the default for those on cell confinement or mental health segregation.</p>
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## What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

66. Corrections' preferred approach is Option Two: amend the Regulations to allow access to privacy screens over hygiene areas and in-cell light switches for all people on mental health segregation and cell confinement as the default. This would be subject to any overriding risk and safety considerations, enabling staff to remove these features where justified.
67. This option balances wellbeing, safety, feasibility, and contributes to the strategic outcomes of *Hōkai Rangi* to focus on oranga. This is particularly important for prisoners who are on mental health segregation as they are more vulnerable than the general prison population. Prisoners on cell confinement can also experience a range of volatile emotions, and it is important to provide them with the best environment possible.
68. Under Option Two, staff would need to take an active and individualised approach when considering whether a prisoner should not be placed in a cell with privacy screens over hygiene areas and in-cell light switches. This ties in closely with Corrections' shift towards taking a more individualised, therapeutic approach across the board. In this respect, an individual's history, circumstances, and risks will be considered when deciding if they should be placed in a cell without these features, instead of a blanket ban on privacy features being imposed for these people.
69. In situations where there are safety concerns, such as risks of self-harm or violence, under Option Two, it would still be possible to limit access to privacy features where it may help support prisoners' wellbeing.<sup>13</sup> Giving people on mental health segregation or cell confinement more privacy and autonomy over their lighting, may also better support the mana and autonomy of Māori within these environments.
70. Importantly, during consultation, frontline staff indicated that there are minimal risks with enabling greater access to privacy features for people on cell confinement and mental health segregation because these people are not segregated due to the risk of self-harm.
71. While Option Three would still take an individualised approach in respect to whether a prisoner would have access to privacy features or not, the default setting would mean that privacy features would not be available. This is less desirable than Option Two as it takes a less proactive approach to supporting prisoner wellbeing.

### **Stakeholders generally supported providing prisoners with greater access to privacy features**

72. During consultation, there was strong support for Options Two and Three compared to the status quo. This was also reflected during hui with the Ombudsman, the Human Rights Commission, and Iwi representatives, and interest groups such as

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<sup>13</sup> However, there is no data showing that people on cell confinement or mental health segregation require constant observation as they are not typically at risk of self-harm. We accept that a prisoner on cell confinement could be more volatile and prone to violence toward others or prison property, but consider that providing an environment that supports their wellbeing is more likely to mitigate this risk.

People Against Prisons Aotearoa, Intersex Aotearoa or Mana Wāhine Kōrero. These groups considered privacy vital to wellbeing. The ability to toilet and bathe in privacy is a key right and part of retaining dignity.

73. While survey respondents showed a preference for Option Three (58 people), submitters that we spoke with and were able to discuss the issues in more depth preferred Option Two.

### What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
Department of Corrections	Installing privacy barriers will require changes to physical infrastructure, which is expected to cost \$800,000 to \$3 million for the screen and lighting control updates. Possible reoccurring cost of temporary privacy screens.  Time to update operational guidance around risk-based assessments and privacy screening decisions. This would be a one-off cost following Regulation changes.	Medium	Medium  Based on costings to install privacy features for 380 cells, staff salary and estimated time to complete the work. Costs will also depend on how many cells require changes.
Custodial and health staff based in prisons	Learning the new process for making decisions around placement in cells with or without privacy screening. Noting that the costs include design and delivery of learning, backfill for staff while they learn and ongoing support as change is embedded. Including privacy considerations in existing assessments will take up extra time.	Medium	Medium  Based on this not being a full change in process, but an addition of the Intervention and Support Unit (ISU) process.
People in prison	N/A	N/A	N/A
<b>Total monetised costs</b>	<i>Estimated to be \$800,000 to \$3 million for the screen and lighting updates.</i>	<i>Medium</i>	<i>Medium</i>



<b>Non-monetised costs</b>		<i>Medium</i>	<i>Medium</i>
<b>Additional benefits of the preferred option compared to taking no action</b>			
Department of Corrections National Office	Supports Corrections' strategic direction in <i>Hōkai Rangi</i> by uplifting the mana and oranga of most people who are on cell confinement and mental health segregation.	Low	Medium Based on evidence of the impacts that limited privacy has on people in prison.
Custodial and health staff based in prisons	Giving the ability for people in custody to have privacy should support frontline environments by reducing anger, trauma, and other impacts influenced by more limited privacy.	Low-medium	Medium Based on evidence of the impacts that limited privacy has on people in prison.
People in prison	Increased access to privacy in their cells should support mental health and wellbeing.	Medium-high	Medium Based on evidence of the impacts that limited privacy has on people in prison.
<b>Total monetised benefits</b>		<i>N/A</i>	<i>N/A</i>
<b>Non-monetised benefits</b>		<i>Low-medium</i>	<i>Medium</i>

## Part A, Section 3: Delivering an option

### How will the new arrangements be implemented?

#### Practice changes will be needed but only after infrastructure changes are made

74. A high-level overview has shown that privacy features would need to be made available in approximately 380 cells that are 'Separates' (for cell confinement), or intervention and support unit cells (ISU – for mental health segregation and people at-risk of self-harm).<sup>14</sup>
75. An assessment of the infrastructure is already underway and is expected to be completed in mid-2023 to understand the exact nature of the costs associated with the regulatory changes and to inform a work programme for the necessary changes. It is estimated that it could take until 2027 to incorporate privacy features into more cells across the prison network, so there will need to be provisions in the Regulations to ensure Corrections continues to comply with the Regulations before appropriate infrastructure is in place across the prison network. Transitional arrangements during drafting will need to be carefully considered, some prison sites will have features installed before others and therefore regulation changes may need to be implemented at different times across sites.
76. In 2021, it was estimated that it would cost approximately \$4,600 to install a single permanent screen in cells, while temporary foam screens (used in New Zealand Mental health facilities) were estimated to cost \$800 each. The installation of anti-ligature curtains hung between anti-ligature hooks, was estimated to cost \$360 per cell. The fiscal impact would vary depending on which configuration is progressed and the configuration could vary for mental health cells compared to cells used for cell confinement.
77. Operational guidance to frontline staff will be updated, through normal operational channels, such as updating the Prison Operations Manual and developing some new sections in existing forms that staff use to place people on mental health segregation or assign a cell for cell confinement.
78. Staff will need to be trained on the new process to place prisoners in cells with privacy screening and in cell light switches as the default. The cost of this will largely be covered under 'business as usual' activities.
79. Under this option, there will need to be more understanding and expertise of mental health needs and whether someone should be placed in a cell without privacy features. Hence, there will need to be some training to ensure staff can make appropriate and evidence-based decisions when needed. This training should assist staff to make placement decisions appropriately when deciding if there are circumstances where someone cannot be placed in a cell with privacy screens and in-cell light switches.

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<sup>14</sup> Approximately 170 separates cells, and 210 intervention and support unit cells across the prison network. However, the actual number fluctuates with need and availability, as the chief executive may approve the use of other cells for unplanned situations.

### How will the new arrangements be monitored, evaluated, and reviewed?

80. To monitor the new arrangements, we will establish a system to identify how often prisoners are placed in cells without privacy and lighting. Depending on the numbers, we will review all instances or a sample across representative prison sites to understand staff decision making. The installation of privacy features across prison sites will likely be phased, and we will review each site six months after the screens have been implemented. We will review the efficiency and effectiveness of forms and processes to ensure the processes are efficient, aid effective decision making, and adequately support prisoners' safety and wellbeing.
81. We will continue to discuss these matters with key oversight entities such as the Office of the Ombudsman.

## Part B: Ensuring the rehabilitation needs and wellbeing of gender diverse prisoners can be considered when determining prison accommodation

### Terminology used in this section

**Sex:** this refers to the physical characteristics of a person as determined by their genitalia and chromosome composition. People are assigned a sex at birth (male, female, or intersex) based on these physical characteristics.

**Gender:** this refers to a person's identity. Gender is a broad spectrum and is distinct from a person's assigned sex. People can identify with gender at any point on the spectrum or outside of it altogether. Examples of genders include (but are not limited to) male, female, tangata ira tāne/wāhine, whakawāhine, transgender, non-binary, agender and genderqueer.

**Transgender:** this term describes a wide variety of people whose gender is different from the sex they were assigned at birth. Transgender people may be binary or non-binary.

**Takatāpui:** this is a traditional term reclaimed by Māori to encompass both their culture and spirituality, as well as their diverse sexual orientations, gender identities and expressions, and sex characteristics.

**Intersex:** this is an umbrella term used to describe people born with physical or biological sex characteristics (including sexual anatomy, reproductive organs, hormonal patterns and/or chromosomal patterns) that are more diverse than stereotypical definitions for male or female bodies.

**Non-binary:** this refers to people whose gender cannot be defined within the margins of gender binary. Non-binary is an umbrella term that can be used by people of any genders that are not solely male or female.

**Gender diverse:** this is an umbrella term used for a varied range of gender identities, including culturally specific identities. This term also includes people who do not want to be defined by the constrictions of the gender binary.

**Nominated sex:** this term aligns with existing language in the Act and Regulations. Nominated sex means the sex, whether male or female, nominated by a prisoner.

### Part B, Section 1: Outlining the problem

**What is the context behind the policy problem and how is the status quo expected to develop?**

82. New Zealand prisons operate using a binary form of sex, with the Regulations requiring male and female prisoners to be detained in separate prisons or in the same prison with separate locking systems.



83. At any one time, Corrections manages 30 to 40 transgender or non-binary people in prison. As of 31 July 2021, 35 people in prison were recorded as non-binary, or were transgender male or female. This number has increased from around 10 to 20 in 2014. It is unclear whether this reflects more gender diverse people coming into prison, or people becoming more comfortable in disclosing their gender to Corrections. Almost all these people are transgender women.
84. When there is doubt about whether a prisoner should be placed in a men's or women's prison, the CE must determine whether the prisoner should be placed in a men's or women's prison for the purposes of accommodation.<sup>15</sup> While the Regulations do not explicitly identify the factors that the CE may consider, in practice they are likely to consider the impact the accommodation will have on the prisoner's safety and wellbeing and the safety and wellbeing of other prisoners.

#### **The initial determination can be reviewed**

85. If a prisoner is not satisfied with the initial determination of accommodation (e.g., they have been determined to be a man and detained in a men's prison but believe they should be in a women's prison to accord with their self-identified gender), they can apply to the CE for a review of their accommodation.<sup>16</sup>
86. When the CE reviews a determination of accommodation, the Regulations require that they must take into account particular matters, including for example:
- the person's nominated sex
  - the person's safety and wellbeing
  - the safety and wellbeing of other prisoners with whom the prisoner may be accommodated
  - the security of the prison
  - the likelihood of the placement resulting in the person being segregated from the general prison population, and
  - the likely effect of any determination on the prisoner's rehabilitation, including the prisoner's access to special treatment programmes.<sup>17</sup>
87. There have been approximately 40 applications submitted to the CE for review since 2014 when these Regulations were introduced, all of which resulted in the prisoner being accommodated in a different prison.

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<sup>15</sup> Corrections Regulations 2005, [reg 65\(2\) – Accommodation of male and female prisoners](#); Doubt can arise at any time and occur a number of ways including something the prisoners says; information from a third party (e.g. NZ Police, birth certificate, or other documentation); observations (e.g. prisoner's conduct / strip search); or as a result of checking the prisoner's property.

<sup>16</sup> Corrections Regulations 2005, [reg 65 – Accommodation of male and female prisoners](#) and [reg 65B\(1\) – Prisoner may apply for a review of determination as to sex](#).

<sup>17</sup> Corrections Regulations 2005, [reg 65C\(3\) – Review of determination as to sex](#).



88. However, the Regulations prohibit a prisoner serving a sentence for a serious sexual offence against the prisoner's nominated sex from applying for a review.<sup>18</sup>

**Nevertheless, if a prisoner presents a birth certificate, they must be accommodated according to the sex on their birth certificate**

89. The Regulations currently state that if a prisoner supplies a birth certificate that records their sex as female or male, they must be accommodated in a prison that aligns with the sex on their birth certificate. We refer to this as the "birth certificate rule".<sup>19</sup> If a prisoner supplies a copy of their birth certificate that records their sex as indeterminate, or records no sex, the CE must then undertake a review of the initial determination.
90. Prisoners prohibited from applying for a review could use the birth certificate rule to compel a particular determination of their accommodation in a men's or women's prison.
91. To date, no prisoner has been accommodated in a particular prison as a result of formally using the birth certificate rule.<sup>9(2)(g)(i)</sup>
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

**The Births, Deaths, Marriages, and Relationships Registration Act 2021 streamlines the process to change sex on a birth certificate**

92. The current process for amending the sex on a birth certificate is to be streamlined when the Births, Deaths, Marriages, and Relationships Registration Act 2021 (BDMRR Act) comes fully into force. The BDMRR Act introduces a simpler process for people to amend the sex recorded on their birth certificate and is expected to be in place by 15 June 2023.
93. This change will make it easier for people to amend the sex marker on their birth certificates, meaning they can have their gender recognised on birth certificates if their gender is different to the sex they were assigned at birth. Markers available on birth certificates will include female, male, a non-binary gender, and another gender. The new process is designed to be much more accessible and is intended to improve people's control over how their gender is recognised and ensure that people can assert their identity when accessing services. This is part of a shift in government services being more inclusive to the needs of transgender and non-binary people.<sup>20</sup>
94. In approving amendments to the BDMRR Act, Cabinet was informed that the birth certificate rule in the Corrections Regulations was "out of step with the intent that birth

<sup>18</sup> Corrections Regulations 2005, [reg 65B\(2\) – Prisoner may apply for a review of determination as to sex](#).

<sup>19</sup> Corrections Regulations 2005, [reg 65\(3\) – Accommodation of male and female prisoners](#).

<sup>20</sup> The National Council for Women Gender Attitudes study (2019) reflects shifts in attitude to transgender, non-binary and cisgender people. The study showed that people aged 18-34 have a much stronger understanding of the terms 'transgender, non-binary and cis-gender' than older people.

certificates should not be considered as conclusive evidence of a person's sex or gender" [SWC-21-SUB-0063 and CAB-21-SUB-0164 refer]. Cabinet was made aware that Corrections would review the rule in light of the BDMRR Act changes. While examining the BDMRR Act amendments, the Governance and Administration Select Committee was also advised that the Corrections Regulations 2005 are the only example of where a birth certificate is used as the sole determinant of sex or gender and that it was under review to ensure it aligned with the BDMRR changes.<sup>21</sup>

### **Our current practice is different to other comparable jurisdictions**

95. Internationally, the placement of transgender and gender diverse prisoners is guided by a range of factors, and we have not identified jurisdictions with a rigid "birth certificate rule" similar to ours. Some jurisdictions maintain a self-identification policy. For example, in Australian Capital Territory, self-identification is the only requirement for prison placement. Similarly, in Canada prisoners are placed according to their gender identity in either a men's or women's prison, if that is their preference, regardless of whether their sex/gender matches their identification documents. This policy has only been in place since 2017, when Canada amended their human rights legislation to explicitly prohibit discrimination against people due to their gender identity.
96. In England and Wales, prison placement is based on a person's legally recognised gender, which is confirmed via a birth certificate or a Gender Recognition Certificate (GRC). Following initial placement, a prisoner can seek to be transferred to a different site and a Transgender Case Board is established to assess this. Birth certificates or GRCs are one of the factors considered in the decision-making process.
97. In some Australian states, such as Western Australia, Queensland and New South Wales, placement is generally dictated by biological sex, but prisoners can apply to have their placement decision reassessed. Decisions are made on a case by case basis, depending on health, safety, and welfare concerns.

### **What is the policy problem or opportunity?**

#### **The birth certificate rule does not give Corrections sufficient flexibility when determining a prisoner's accommodation in a men's or women's prison**

98. The birth certificate rule has not yet been formally relied on for the purposes of determining a prisoner's accommodation in a men's or women's prison but changes to the BDMRR Act may mean that it will be invoked more often in the future. For this reason, Corrections is likely to encounter more prisoners supplying birth certificates in an effort to be accommodated in a different prison.
99. Under the current Regulations, if the birth certificate rule is used, Corrections would be compelled to accommodate a prisoner in the prison that aligns with the nominated sex on their birth certificate. In practice this may prevent Corrections from best

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<sup>21</sup> See also the "Births, Deaths, Marriages, and Relationships Registration Bill Supplementary Order Paper Departmental Report," 11 October 2021, paras 29-33, 182-184.

supporting the wellbeing and needs of gender diverse prisoners, as ordinarily Corrections would consider a range of factors when determining a gender diverse prisoner's accommodation. For the initial determination of accommodation, this may include the impact on the safety and wellbeing of all prisoners, or the security of the prison.

100. The strict application of the birth certificate rule could result in gender diverse prisoners being accommodated and managed in a prison through segregation, which may not support their needs and their rehabilitation journey. For example, a prisoner who has been charged with or convicted of a serious sexual offence against someone of their nominated sex could present their birth certificate, with Corrections then being required to accommodate them in accordance with the sex stated on the certificate. To manage the risks associated with this prisoner and their offending history, they may need to be accommodated in directed segregation to ensure the safety and security of the prison. On the other hand, it is possible that a prisoner could be placed in a prison that does not support their safety and wellbeing and would need to be managed in protective segregation to protect them from other prisoners. In both situations the prisoner's wellbeing and rehabilitative needs would not be well supported as they would not be able to mix with other prisoners easily or have access to programmes.

*The birth certificate rule may not always support gender fluidity and align with legislation that supports shifting societal conceptions of gender*

101. The birth certificate rule does not recognise that people may be gender fluid and therefore change their nominated sex on a semi-regular basis. This may also be because they do not feel safe in the prison they have been placed in at their request or wish to access programmes at another site.
102. Accommodating transgender people in a prison that reflects their gender identity is important. Research shows that when transgender people are accommodated in a prison that does not align with their gender identity, they can be at greater risk of experiencing sexual and physical violence, and in turn, adverse mental and physical health issues. It has also been found to aggravate feelings of isolation, risky behaviour, and risk of self-harm.<sup>22</sup>
103. However, sometimes the most appropriate prison will not be the prisoner's preferred prison, as a range of factors are taken into account when determining where they are accommodated, including the prisoner's offending, the risk of them spending long periods of time segregated to protect themselves or others, and the needs of other prisoners.
104. As noted, the birth certificate rule does not align with the policy intent of the BDMRR Act, which is that the birth certificate should not be considered as conclusive evidence of a person's sex or gender.

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<sup>22</sup> E. Ledesma and C.L. Ford (2020), "Health Implications of Housing Assignments for Incarcerated Transgender Women," *American journal of public health*, 110(5), pp. 650–654.  
<https://doi.org/10.2105/AJPH.2020.305565>. Last accessed 28/03/2022.

*Under the Regulations, it is unclear what factors Corrections would consider when determining a prisoner's initial placement if a determination is required*

105. Sometimes it can be unclear whether an arriving prisoner should be assigned to a men's or women's prison. In these situations, Corrections must make an initial determination about where the prisoner should be accommodated.
106. Under operational policy, staff must consider all available information, and consult with Health Services as part of this process. In practice, this likely involves considering how the prison accommodation will impact on the prisoner's wellbeing and safety and the wellbeing and safety of others in prison.
107. However, the Regulations do not state what factors staff may consider when making this assessment, which reduces transparency in Corrections' decision making. In contrast, and as noted, the Regulations state what requirements must be considered when a review is undertaken. Operationally these two processes are very different, with staff in a prison receiving office having only a matter of hours, alongside other constraints, when making an initial determination, compared to a longer time period for the review when requested by the prisoner. Nevertheless, there could be more transparency about what is considered at the initial placement point when a prisoner arrives in a prison receiving office.

#### **Public consultation**

108. During consultation, 127 survey respondents agreed or strongly agreed that the birth certificate rule was a problem that should be addressed (not all respondents answered this question). The Auckland District Law Society, for example, agreed that the rule was a problem and described it as discriminatory and unfair.
109. One respondent, Women's Liberation Aotearoa, stated that the birth certificate would no longer be a reliable document to determine sex following changes to the BDMRR Act, which introduce a more streamlined process for people to change the sex or gender on their birth certificate. This group indicated that sex was not something that could be changed and opposed transgender women being placed in women's prisons. This view was shared by other groups, including Mana Wāhine Kōrero and Stand Up for Women.
110. Conversely, 52 survey respondents either disagreed or strongly disagreed that the rule was a problem. Te Ngākau Kahukura, the Human Rights Commission and the Professional Association for Transgender Health Aotearoa supported the birth certificate rule because they consider that it respects self-determination and rangatiratanga in respect of a person's identity.

9(2)(g)(i)

#### **What objectives are sought in relation to the policy problem?**

112. We seek to ensure that Corrections can consider a range of relevant factors, including a prisoner's birth certificate, when reviewing accommodation placements to support the rehabilitation needs and wellbeing of gender diverse prisoners. We also seek to ensure that a range of factors, including birth certificates, can be considered at initial placement, if a birth certificate is presented.



113. The criteria used to assess the options for changing the birth certificate rule are:

Criterion	Objective/consideration
Complies with human rights	The extent to which the option impacts on international human rights obligations, including the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), s 9 and s 23(5) of NZBORA, and the principles on the application of international human rights law in relation to sexual orientation and gender identity (principle 3 of the Yogyakarta Principles).
Transparency and accountability	That prison accommodation decisions that Corrections makes are transparent to prisoners and all parties including staff.
Practical to implement and responsive	The ease of implementation and the extent to which the options will be able to adapt to changes over time, including being responsive to individual gender fluidity.
Contributes to better outcomes for Māori	The extent to which the option will tangibly improve outcomes for takatāpui in the corrections system, such as upholding their tino rangatiratanga.
Supports oranga/wellbeing of the people we manage	The extent to which the option will support the oranga/wellbeing of gender diverse, sex diverse and transgender people in prison. This includes how the option will impact on improvements to their conditions, including greater opportunities to participate in rehabilitation, and less feelings of isolation.
Contributes to safety	The extent to which the options will contribute to safety, including the safety of transgender and gender diverse prisons, and the safety of the wider prison population.

## Part B, Section 2: Deciding upon an option to address the policy problem

What scope will options be considered within?

9(2)(f)(iv)

### Options ruled out of scope

118. During public consultation we heard from some submitters, such as Mana Wāhine Korero, that separate prisons, or wings inside existing prisons, should be created for people who identify differently to the sex they were assigned at birth.<sup>23</sup> This suggestion has been ruled out of scope because it is contrary to a human rights-based approach that seeks to ensure vulnerable groups are not segregated from others in prison, which could lead to further stigmatisation and discrimination.
119. Of the 195 survey respondents, 71 said that biological sex as assigned at birth should alone determine where a prisoner is accommodated.<sup>24</sup> Such an approach would not enable Corrections to respond to the safety and wellbeing of all prisoners and is also out of scope of this particular change.

### What options are being considered?

#### Option One – status quo: keep the birth certificate rule in place and have an operational response to manage people when required

120. Under this option, the birth certificate rule would still apply. If there was a possibility of harm to or from other prisoners because of where a prisoner was accommodated, Corrections would need to manage this with an operational response. For example, it may be necessary to segregate the prisoner concerned if accommodating them in a prison in accordance with the sex on their birth certificate posed a risk to the person themselves or other prisoners.
121. Sixteen respondents preferred keeping the status quo, including the Human Rights Commission and Te Ngākau Kahukura (see discussion under Option Two for more on the commission's views).

#### Option Two: Amend the birth certificate rule and provide Corrections with more flexibility when determining accommodation for gender diverse prisoners

<sup>23</sup> Thirty five survey respondents held this view and we understand that many of these were affiliated with the feminist groups who submitted during public consultation.

<sup>24</sup> See also meeting notes from LAVA, Mana Wāhine Kōrero, and Stand up for Women, September and October 2022.

122. Under this option, the regulations compelling Corrections to accommodate a prisoner in accordance with a birth certificate would be amended. Instead, a birth certificate may be considered as part of the initial accommodation decision where provided by a prisoner. However, the birth certificate must be considered alongside other factors in regulation 65C(3) if a prisoner seeks a review of their accommodation in a men's or women's prison, where the prisoner chooses to provide the certificate.
123. Under this option, if it is unclear whether a prisoner should be placed in a men's or women's prison at initial placement, the Regulations will make it clear that any relevant factors, such as those set out in 65C(3), may be considered to determine where that prisoner is accommodated. This could include taking into consideration the prisoners nominated sex and the safety and wellbeing of the prisoner.
124. Under this option, if someone was to present a birth certificate that had a sex marker as a non-binary gender or another gender, which will be options available under the new BDMRR changes, Corrections could take this into consideration at initial placement or during a review, and could consider it alongside other factors set out in Regulation 65C(3).
125. There were 31 survey responses and 14 written responses that supported ensuring that birth certificates, where provided, would be one of a range of considerations. This included groups such as Intersex Aotearoa, Serco, and the Howard League Canterbury. The general sentiment was that being able to consider multiple factors when determining sex will likely lead to appropriate accommodation decisions being made for an individual, including for non-binary and gender fluid people.
126. Under this option people who have been convicted of serious sexual offences would still be ineligible to apply for a review of their placement, irrespective of whether they had changed the nominated sex on their birth certificate. As noted, this is already in place in the Regulations.
127. 9(2)(f)(iv) [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] However, in post-consultation discussions, the Human Rights Commission agreed that the birth certificate rule may not always support the wellbeing of gender diverse prisoners, as it could prevent them from moving between prison when needed and result in them being managed in segregation to protect the or other prisoner's safety.

**Option Three: revoke the birth certificate rule, and do not add birth certificates as a consideration in the Regulations, but introduce an operational requirement that birth certificates may be considered, where presented, when a review of determination of accommodation is being made or at initial prison placement**

128. Under this option, Corrections would not be compelled to consider a birth certificate, if it is presented at initial placement or when a review is underway.
129. A prisoner could still present their birth certificate and Corrections may consider it as a relevant factor for initial placement or for a review of their accommodation. However, this consideration would not be prescribed in the Regulations, but would be incorporated into operational policy.

130. As in Option Two, under this option people who have been convicted of a serious sexual offences would be ineligible to apply for a review of their accommodation, irrespective of whether they had changed the nominated sex on their birth certificate.
131. If someone was to present a birth certificate that had a sex marker as a non-binary gender or another gender, Corrections would take this into consideration at initial placement, or alongside other factors considered during a review if an application for a review of placement had been made.



## How do the options compare to the status quo/counterfactual?

### Part B: The birth certificate rule does not give Corrections sufficient flexibility when determining a prisoner's accommodation in a male or female prison

	Option One: status quo	Option Two: amend the birth certificate rule and provide Corrections with more flexibility when determining accommodation for gender diverse prisoners	Option Three: revoke the birth certificate rule, and do not add birth certificates as a consideration in the Regulations, but introduce an operational requirement that birth certificates may be considered, where presented, when a review of determination of accommodation is being made or at initial placement
Complies with human rights obligations	0	<p>0</p> <p>This option would contribute to effective and safe accommodation decisions and still aligns with s 9 and s 23(5) of NZBORA, which state that everyone has the right not to be subjected to cruel or degrading treatment or punishment and the right to be treated with humanity and with respect for the inherent dignity of the person. This is because prisoners would be less likely to be segregated to be managed safely.</p> <p>It also aligns with rules 40 to 41 of the Bangkok Rules because it ensures Corrections can respond to a gender diverse prisoner's gender identity, gender-specific needs and circumstances.</p> <p>The Yogyakarta Principles require that states take all necessary legislative, administrative, and other measures to legally recognise each person's self-defined gender identity. Under this option if a prisoner presented a birth certificate that aligned with their gender identity, Corrections would be required to consider this when reviewing a prisoner's placement, while they could consider it when determining initial placement. However, gender identity on a birth certificate would not be the only factor used to determine placement. For this reason, this option rates lower than the status quo for aligning with this principle.</p> <p>On balance we consider that this option has positives and negatives and equates with the status quo.</p>	<p>0</p> <p>Same as Option Two.</p> <p>This option is less aligned to the Yogyakarta Principles because it does not take all necessary measures to legally recognise a prisoner's self-defined gender identity, as stated on a birth certificate. This is because even if a prisoner supplied their birth certificate, it might not be considered during an initial determination, or when an application for a review of placement is submitted.</p>
Transparency and accountability	0	<p>+</p> <p>This option provides greater transparency around the factors Corrections considers when it is unclear where the prisoner should be placed when arriving in prison or when a prisoner has applied for a review of their accommodation, by further developing the list of considerations that have been in use since 2014. This option provides greater transparency around what factors may be considered during initial placement.</p>	<p>-</p> <p>This option makes it clear that birth certificates do not need to be considered when determining a prisoner's initial accommodation or reviewing that accommodation after an application has been made, because it is not required in the Regulations. The certificate may be considered where it is provided.</p>
Practical to implement and responsive	0	<p>+</p> <p>This option aligns with best practice as Corrections must consider a person's birth certificate alongside other factors when an application for a review of a prisoner's accommodation has been submitted. The birth certificate might not however be considered when determining initial placement. This option will be more practical to implement in situations where we have safety or wellbeing concerns that under the status quo could result in a gender diverse prisoner being managed in segregation. This option is responsive to prisoners who have changed their birth certificate to reflect their gender as it must be considered when a review of accommodation is requested.</p>	<p>0</p> <p>This option is less responsive to prisoners who have changed their birth certificate to reflect their gender identity as the certificate might not be considered during an initial determination or when a review of that determination is underway. However, this option will be more practical to implement because it allows for more factors to be considered.</p>
Contributes to better outcomes for Māori	0	<p>0</p> <p>This option supports tino rangatiratanga for takatāpui because when prisoners present their birth certificate it must be considered where they have applied for a review of their accommodation. However, this would not necessarily mean that they would be accommodated in the prison that aligns with their identity.</p>	<p>-</p> <p>This may further marginalise takatāpui as someone may have changed their birth certificate to align with their gender identity but would not necessarily have their birth certificate explicitly considered when their accommodation is being determined or reviewed.</p>
Supports oranga/wellbeing of people in our management	0	<p>+</p> <p>This option should better support oranga for people in our management as Corrections may consider sex on a birth certificate at initial placement alongside other factors, and must consider the birth certificate, alongside other factors, when an application for a review of a prisoner's accommodation has been submitted. While this would not necessarily result in all</p>	<p>+</p> <p>Same as Option Two however consideration of the birth certificate during initial placement and reviews of placement, would be an operational requirement only.</p>



		<p>people being accommodated in a prison that aligns with their gender identity, their identity may be considered during the initial determination (if necessary), or when a review is underway.</p> <p>Prisoners' orange would be supported because they would more likely be accommodated in a prison without needing directed or protected segregation.</p>	
Contributes to safety	0	<p style="text-align: center;">+</p> <p>This option supports prison safety because Corrections would consider the birth certificate alongside a range of factors where an application to review a prisoner's accommodation has been submitted. The birth certificate would also not compel Corrections to place a prisoner in either a men's or women's prison at initial placement. Amending the birth certificate rule means that prisoners clearly changing the sex on their birth certificate for disingenuous reasons would not necessarily be placed in a different prison, which should contribute to the safety for all prisoners.</p>	<p style="text-align: center;">+</p> <p>Same as Option Two.</p>
Overall assessment	0	<p style="text-align: center;">+</p> <p><b>Option Two is the preferred approach because it ensures that Corrections can balance self-identification alongside prison safety and the wellbeing of all people in prison when making or reviewing placement decisions. It also ensures that a prisoner's birth certificate will be considered during a review, where presented, and can be considered when required at initial placement. It also provides greater transparency around what factors may be considered during initial placement decisions if it is not initially clear whether the prisoner should be placed in a men's or women's prison.</b></p>	<p style="text-align: center;">+</p> <p>This option would not ensure that Corrections will be able to consider a prisoner's birth certificate when determining where a gender diverse prisoner should be accommodated, if presented.</p>

**What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?**

132. Corrections' preferred option is Option Two: amend the birth certificate rule and provide Corrections with more flexibility when determining accommodation for gender diverse prisoners.
133. Under this option, birth certificates may be considered alongside other relevant factors when an initial determination is required, provided the prisoner supplies their birth certificate. It will also ensure that Corrections must consider a prisoner's birth certificate, if presented, when a review of this determination occurs. The key change is that Corrections would not be compelled to assign a prisoner to a specific prison based solely on the sex in the certificate. This will help to support the safety and wellbeing of the prisoner themselves and the general prison population.
134. Option Two will ensure that Corrections' practices respond to changes to the BDMRR Act, which are intended to support gender diverse people to more easily have their gender recognised, while still allowing for public sector agencies to consider other factors such as safety and wellbeing when responding to sex or gender.
135. Option Two also ensures that Corrections can continue to adapt to further shifts in societal views towards gender and self-identification, without the birth certificate dictating if a person is accommodated in a men's or women's prison as is the case under the status quo with the birth certificate rule.
136. During public consultation we heard that Option Two was generally preferred, most submitters considered that it was important to consider a wide range of factors to support a decision that is in the best interests of the person and other prisoners.
137. Submitters such as the Human Rights Commission emphasised the importance of the sex specified on a person's birth certificate where that supported a nominated sex. In response, we consider that Option Two strikes a better balance than Option Three, as it continues to give weight to the birth certificate and respect the importance of the birth certificate where prisoners choose to present it.
138. Option Three was not publicly consulted on as it was formed post consultation as we worked to understand the implications of feedback from the Human Rights Commission about the importance of respecting people's birth certificates in the placement process. Option Three, which does not give as much importance to the birth certificate, usefully highlights how our preferred option appropriately weights the birth certificate.

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9(2)(f)(iv)

## What are the marginal costs and benefits of the option?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
Department of Corrections National Office	Time to update operational guidance around determining prisoner's accommodation. This would be a one-off cost following regulation changes and met out of baselines.	Low	Medium Based on previous changes to operational guidance.
Transgender, non-binary, takatāpui, and intersex people in prison	In response to changes to the BDMRR Act, which makes it easier for people to have their gender identity recognised on their birth certificate, there may be more gender diverse people who may want to use the birth certificate rule to change accommodation and this change would prevent them from doing this.	Medium	Low
All other people in prison	N/A	N/A	N/A
<b>Total monetised costs</b>		N/A	N/A
<b>Non-monetised costs</b>		Low-medium	Low-medium
<b>Additional benefits of the preferred option compared to taking no action</b>			
Department of Corrections	Limits the possibility of prisoners seeking different accommodation for other reasons. Staff will have greater clarity around how to incorporate the birth certificate into decision-making. Better enables Corrections to support safety and wellbeing of all people in prison.	Low-medium	Low
Transgender, non-binary, takatāpui and	These prisoners have a wide range of factors considered when placed in men's and women's prisons so that their	Low-medium	Low



intersex people in prison	needs can be met and the risk of segregation to protect themselves or others is minimised.		There is limited supporting evidence on this point.
All other people in prison	This change better protects the safety of all prisoners' as it reduces the risks associated with someone presenting a birth certificate that has been changed for other reasons to be accommodated in a different prison, and any associated risks. In addition, it reduces the likelihood of prisoners being placed in directed or protective segregation, which should support better wellbeing outcomes.	Low-medium	Low There is no supporting evidence on this point.
<b>Total monetised benefits</b>		<i>N/A</i>	<i>N/A</i>
<b>Non-monetised benefits</b>		<i>Low-medium</i>	<i>Low</i>

## Part B, Section 3: Delivering an option

### How will the new arrangements be implemented?

141. Operational guidance to frontline staff will be updated, through normal operational channels, such as updating the Prison Operations Manual and operational guidance to frontline staff about birth certificate changes. This would be supplemented by staff training, where necessary. Prisoners would be informed of the changes especially those more directly impacted.

### How will the new arrangements be monitored, evaluated, and reviewed?

142. To monitor the new arrangements, in the year following enactment of any changes the placement of transgender, intersex, and people of another gender will be analysed to identify if there has been a difference in placement outcomes, compared to previous years.
143. This will include specifically identifying where prisoners have presented their birth certificates and evaluating whether this has influenced the placement process. We will evaluate how many people have been placed in a prison aligning with their birth certificate, where it is presented, and what reasons are given where this does not occur.

# Part C: Supporting specialist officers working at height by enabling the use of speed cuffs

## Part C, Section 1: Outlining the problem

**What is the context behind the policy problem and how is the status quo expected to develop?**

### **Corrections staff can use mechanical restraints on prisoners in limited circumstances**

144. Mechanical restraints are devices that can be applied to a person's body or limb to restrict movement. They can be used by a corrections officer or security officer as a use of force or to escort a prisoner to another place.<sup>25</sup>
145. The Act enables regulations to be made authorising the use of any kind of mechanical restraint if the Minister is satisfied that the use of that kind of restraint is compatible with the humane treatment of prisoners and the potential benefits from the use outweigh the potential risks.<sup>26</sup>
146. The Act and Regulations also set out restrictions on the use of mechanical restraints:<sup>27</sup>
- they must not be used with more force than is reasonably necessary in the circumstances, and
  - they must be used in a manner that minimises harm and discomfort to the prisoner.
147. When mechanical restraints are used for any non-escorting purpose, they must be recorded and reported to the CE.<sup>28</sup>

### **There are restrictions on general use and emergency use handcuffs**

148. The most commonly used form of mechanical restraint are handcuffs. Depending on the situation, "general" or "emergency use" handcuffs can be used.
- **general use handcuffs** are able to be applied in a manner that minimises discomfort to the prisoner for long periods if necessary. The type of handcuffs authorised for general use have a flexible chain between the cuffs

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<sup>25</sup> Corrections Act 2004, [s 83 – Use of force](#) and Corrections Regulations 2005, [reg 125 – Additional circumstances for use of handcuffs and waist restraints](#).

<sup>26</sup> Corrections Act 2004, [s 87\(3\) – Restraint of prisoners](#).

<sup>27</sup> Corrections Act 2004, [s 83\(2\) – Use of force](#), and [s 87\(2\) – Restraint of prisoners](#).

<sup>28</sup> Corrections Act 2004, [s 88 – Reporting on use of force, weapons, and mechanical restraints](#) and Corrections Act 2004, [s 127 – Reporting use of mechanical restraints](#).

- **emergency use handcuffs** can only to be used for short periods and only if general use handcuffs are not available.<sup>29</sup>
149. The handcuffs must not impede circulation.<sup>30</sup> When emergency use handcuffs are used, they must be regularly checked to ensure circulation is not being impeded, and they must be removed and replaced with general use handcuffs as soon as practicable.<sup>31</sup>
150. While the kind of mechanical restraint (i.e., handcuffs, waist restraints etc) is authorised by the Minister, the type of handcuffs for either general or emergency use are approved by the CE. The test that the CE needs to meet is similar to that which the Minister must satisfy when authorising a mechanical restraint, i.e., they can be safely and humanely applied.

**The CE has approved a range of handcuffs for emergency use only, including speed cuffs**

151. The CE has approved a number of different types of handcuffs for emergency use in prisons, including solid steel centre handcuffs (“speed cuffs” or rigid-bar handcuffs).<sup>32</sup> This also includes disposable plastic handcuffs, Velcro handcuffs, and steel wire-linked handcuffs.
152. Speed cuffs are a specific type of handcuff with a rigid design that offers a strong grip. In the Corrections context, they are considered an effective tool for gaining prisoner compliance when needed. They can be applied easily using only one-hand, whereas two hands are typically required to apply steel chain-linked handcuffs, which are the only handcuffs approved for general use
153. While speed cuffs have been approved for emergency use only, they are very rarely used because the CE has not authorised them for “use of force” or “control and restraint” situations. An additional restriction on emergency use handcuffs are that they may only be used if general use handcuffs are unavailable.<sup>33</sup> In practice, this means that speed cuffs are rarely used, if ever.
154. We understand that speed cuffs are only approved for emergency use to limit the risk they may pose to prisoners. This is because these handcuffs are considered more likely to cause injury than other general use handcuffs because of their rigid design and the potential for them to be applied more tightly. In this respect, they may be more likely to cause nerve damage and break bones, compared to general use handcuffs. However, as the policy intent behind this decision is not recorded in policy documents, we have made this assumption.

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<sup>29</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints](#). Note security officers are only able to use general use handcuffs.

<sup>30</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints, cl 12-13](#).

<sup>31</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints, cl 13](#).

<sup>32</sup> This includes steel chain-linked handcuffs, disposable plastic handcuffs, steel wire-linked handcuffs, Velcro restraint handcuffs, and steel solid centre handcuffs (“speed cuffs”).

<sup>33</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints, cl 13](#).



## **The legislative framework for mechanical restraints is consistent with our human rights obligations**

155. Internationally, restrictions on the use of restraints are derived from the prohibition of torture or cruel, degrading, or inhumane treatment. Any use of restraints needs to be prescribed in law and can only be used if it is reasonably necessary and proportionate in the circumstances.
156. The Mandela Rules state the mechanical restraints may only be used when authorised by law and in the following circumstances:
- as a precaution against escape during transfer
  - by order of the prison director, if other methods of control fail, in order to prevent a prisoner from injuring themselves or others or from damaging property.<sup>34</sup>
157. The Mandela Rules further states that mechanical restraints may only be authorised if the following principles apply:
- no lesser form of control would be effective to address the risks posed by unrestricted movement
  - the method of restraint shall be the least intrusive method that is necessary and reasonably available to control the prisoner's movement, based on the level and nature of the risks posed
  - instruments of restraint shall be imposed only for the time period required, and they are to be removed as soon as possible after the risks posed by unrestricted movement are no longer present.<sup>35</sup>
158. As noted earlier, there are clear regulatory parameters regarding the use and circumstances where mechanical restraints can be used (including handcuffs) in line with these international obligations.

## **In recent years, there has been an increase in at-height incidents in New Zealand prisons, which can harm prisoners and result in extensive property damage**

159. Over the past three years, there have been 26 "at-height" incidents where one or more prisoners have climbed up onto a roof or other elevated position. The most notable recent examples are the Waikeria prison riot beginning in December 2020, and the incident at Hawkes Bay Youth Unit in 2022.
160. These incidents tend to result in damage to property and key infrastructure. Over the past three years, at-height incidents are estimated to have cost Corrections over \$60 million.

*Corrections is working on building its capability to respond effectively to at-height incidents*

161. Until very recently, Corrections has not had the ability to operate at height, which has hampered it from responding quickly and effectively to at-height incidents including being able to negotiate with prisoners effectively.
162. With this in mind, Corrections has recently trained **36** existing staff (from Advanced Control and Restraint Units) to respond to at-height situations. These staff have been

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<sup>34</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners, [rule 47\(2\)](#).

<sup>35</sup> The United Nations Standard Minimum Rules for the Treatment of Prisoners, [rule 48\(1\)](#).

trained to cordon, contain, and negotiate with prisoners to help resolve an at-height incident.

**The Act and Regulations detail the tactical options available to the Specialist Heights Team**

163. The use of force and equipment available to staff, and the parameters around their use, are specified in the Act and Regulations – they may only be used by a Corrections Officer or staff member when there are reasonable grounds to believe it is necessary:
- in self-defence, in the defence of another person, or to protect the prisoner from injury
  - in the case of an escape or attempted escape
  - in the case of a corrections officer:
    - i. to prevent the prisoner from damaging any property, or
    - ii. in the case of active or passive resistance to a lawful order.
164. No more physical force than is reasonably necessary in the circumstances may be used.

**Specialist Height Teams need appropriate equipment to respond to altercations during at-height incidents**

165. Specialist Height Teams will need appropriate equipment to defend themselves if there was to be an altercation when they are at height. In particular, they may need access to an appropriate baton and handcuffs.
166. General use handcuffs have some important limitations that mean they are not always suitable for use as part of a response to an at-height incident. First, the chain between two general use handcuffs is more likely to get tangled up in other at-height equipment, including the cables and harnesses used to keep staff safe. Second, the correct application of general use handcuffs typically requires the use of two hands, and can require the support of at least one other staff member.
167. Speed cuffs are considered more suitable because they:
- have a rigid, sturdy design and are unlikely to get tangled up in other equipment
  - rapidly grip to someone when applied
  - can be applied quickly
  - can be applied one-handed
  - reduce risks to staff as an individual staff member can restrain a prisoner quickly in a one-on-one situation with low risk of losing control.
168. Once secured and appropriately handcuffed, Specialist Height Teams will lower the prisoner to the ground. Compliant prisoners will be given the option of walking down a ladder without handcuffs, while non-compliant prisoners would need to be lowered down using a large harness. Once safely on the ground, speed cuffs would be replaced by general use handcuffs if a restraint is still required.

## **Speed cuffs are used by fishery officers in New Zealand and some overseas prisons**

### *Domestically fishery officers use speed cuffs*

169. In New Zealand, fishery officers are responsible for gathering information on aspects of the fishing industry and enforcing fisheries laws. At times, they may be required to apprehend people breaking these laws before handing them over to Police.
170. Over the past 15 years, speed cuffs have been the preferred mechanical restraint for fishery officers because they offer greater flexibility than chain-linked handcuffs. For example, they can be used effectively during one-on-one altercations, can be operated with one hand, and offer greater control than chain-linked handcuffs.
171. While fishery officers are said to use speed cuffs rarely, likely to be six to 12 times a year, it is understood that there have not been any notable injuries associated with their use since they were introduced.

### *Some comparable jurisdictions already use speed cuffs in prison, such as the United Kingdom*

172. In the United Kingdom (UK), the National Tactical Response Group, and Regional Search and Dog teams use speed cuffs, while trained prison officers in both the UK and Western Australia can use speed cuffs.
173. The UK introduced speed cuffs to the prison service in 2020.<sup>36</sup> They replaced ratchet cuffs because they offer additional functionality enabling prison officers to more rapid gain control over prisoners and resolve violent incidents – with the flow on effect being that this would help reduce injury to staff and prisoners.
174. The UK's operational guidance indicates that there is no one specific way to apply speed cuffs, as the appropriate application depends on the circumstances, including the prisoner's actions, demeanour, and the number of staff available at the time.
175. However, in the UK, any use of handcuffs is considered a use of force, and must only be used when necessary, reasonable, and proportionate in the circumstances (similar to in New Zealand). Following the use of handcuffs, staff are required to complete a statement to justify their decision, with the use of speed cuffs being discussed at a Use of Force Committee meeting and any lessons learned shared with staff.<sup>37</sup>

## **What is the policy problem or opportunity?**

### **The current Regulations prevent specialist officers from using speed cuffs during at-height incidents**

176. The Regulations set restrictions on emergency handcuffs, including speed cuffs, including the proviso that they can only be used when general use handcuffs are unavailable.<sup>38</sup>

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<sup>36</sup> Independent Monitoring Board, *'Annual report of the Independent Monitoring Board at HMP Usk and Prescoed: For reporting year 1 April 2019 – 31 March 2020'*, published October 2020, p.13; <https://www.poauk.org.uk/news-events/news-room/posts/2020/february/circ-13-pava-roll-out/>.

<sup>37</sup> Prisons: Restraint Equipment, Question for Ministry of Justice, [UIN 77400](#), tabled on 18 November 2021.

<sup>38</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints](#).



177. In addition, while at-height incidents are considered to be an emergency, Corrections responses will always be planned, with staff needing to undertake a risk assessment and plan before moving to height. As such, general use handcuffs are always likely to be available. However, in practice, this would prevent Specialist Height Teams from using speed cuffs – the handcuffs most suitable to the situation.
178. This does not support best practice in the at-height environment because staff need be prepared and adequately resourced to respond to a charging prisoner or a prisoner attempting an assault. This is all the more important because in the at-height environment staff members are more likely to find themselves in a one-on-one situation without immediate support available to them.

**We have not publicly consulted on the proposal to enable Specialist Height staff to use speed cuffs**

179. We have not publicly consulted on the possible introduction of speed cuffs for Specialist Height teams because the options were developed by a working group that includes union members, which followed our public consultation on in August and September 2022. Representatives from the Corrections Association of New Zealand (CANZ) and the Public Service Association (PSA) who are members of that working group have been a important to understanding the problem.
180. However, a common theme from our public consultation was that we must have measures in place to protect people's safety and that any powers that infringe more on people's rights should be reserved for higher-risk prisoners and activities. This feedback has provided further impetus for us to consider expanding the range of equipment available to specialist staff.
181. The possible introduction of speed cuffs, and the circumstances surrounding their potential use, has recently been discussed with some representatives of the Human Right Commission and the Office of the Ombudsman. They suggested that trained staff should not be required to use speed cuffs when working at height, and instead should have the discretion to use general use handcuffs if appropriate, and speed cuffs if not. There should be clarity that if the use of speed cuffs was enabled, it should not be a requirement. In addition, they indicated that if speed cuffs are used in the future, they should only be used for the minimum amount of time as necessary in the circumstances.

**What objectives are sought in relation to the policy problem?**

182. There is one overarching objective sought in relation to the policy problem:
- **Safety of staff and people in prison.** Given the increasing frequency of at-height incidents and the limited range of tools available to Specialist Height Teams, it is important to ensure they have all the equipment to safely respond to these incidents.
183. The criteria used to analyse the options supports our understanding of the objectives in the following ways:

Criterion	Objective/consideration
Complies with human rights obligations	Consistency with New Zealand's international obligations, such as the Mandela Rules and the United Nations Human Rights Guidance on the use of mechanical restraints, including the principles of necessity and proportionality.



Transparency and accountability	Provides clarity as to the types of handcuffs Corrections staff can use, in what circumstances, and the criteria for approval.
Practical to implement and responsive	Provides Corrections staff with the appropriate equipment and processes to apprehend prisoners effectively during an at-height incident.
Contributes to better outcomes for Māori	Understands and mitigates negative impacts on Māori and considers Te Tiriti principles such as active protection.
Supports oranga/wellbeing of the people we manage	Supports prisoners' wellbeing as far as possible by ensuring that handcuffs are used as humanely as possible, and that at-height incidents are resolved effectively to support positive environments for prisoners to live in.
Contributes to safety	The extent to which the options contribute to safety, including safe prison environments and Corrections' ability to quickly and safely resolve at-height incidents.

## Part C, Section 2: Deciding upon an option to address the policy problem

### What scope will options be considered within?

184. While there are other tactical options that could help enhance the safety of staff and prisoners at height, for example, extendable ASP batons, this RIS is focused on the equipment available to staff to secure individuals during at-height incidents, namely speed cuffs. Other handcuffs and mechanical restraints, such as Velcro handcuffs and wire-linked handcuffs were not seriously considered because they cannot easily be administered quickly or by one person with one-hand.
185. Initially, there was some consideration about reclassifying speed cuffs as handcuffs for general use. However, this was not deemed appropriate given the test is that general use mechanical restraints “be safely and humanely applied in a manner that minimises discomfort to a prisoner, for long periods if necessary”.<sup>39</sup> As indicated above, speed cuffs would likely not meet this definition due to their rigid design and the fact that there is a greater chance that they could cause injury to prisoners.

### What options are being considered?

#### Option One: status quo

186. Under Option One, Specialist Height Teams would only be able to use general use chain-linked handcuffs to apprehend individuals during a planned at-height incident.

#### Option Two: amend the Regulations to enable specialist officers to use speed cuffs when appropriate

187. Option Two would enable Specialist Height Teams to use speed cuffs when general use handcuffs are not appropriate for the circumstances, such as when responding to an at-height incident.
188. There would be clear restrictions on the use of speed cuffs – the Regulations would limit the use of speed cuffs to situations where general use handcuffs are either inappropriate to the situation or are unavailable for use. There will also be additional regulatory restrictions in place to ensure that only Specialist Height Team members (with sufficient training in the use of speed cuffs) would be able to use speed cuffs and for at-height incidents only.
189. Before speed cuffs are deployed for at-height incidents, either the prison manager or the incident controller would need to formally agree to their use, which will protect against their overuse for at-height incidents. This reflects existing operational practice, as Corrections plans responses to these situations, and need either the prison manager or the incident controller to sign off on the plan, including the use of appropriate equipment.
190. There are no changes proposed to the reporting requirements currently outlined in the Act and Regulations.

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<sup>39</sup> Corrections Regulations 2005, [sch 5 – Mechanical restraints, cl 3\(a\)](#).

191. However, before they are used for at-height incidents, the CE would need to lift the existing restriction on use, where speed cuffs cannot be used for control and restraint purposes. This would be a one-off authorisation.
192. Under this option, speed cuffs would technically continue to be available for emergencies when general use handcuffs are unavailable, provided they are not used for control and restraint purposes (in accordance with the current authorisation). In practice, though, it is very unlikely that a suitable situation would arise where speed cuffs would be appropriate to use or be available to staff.



## How do the options compare to the status quo/counterfactual?

### Part C: The Regulations prevent specialist officers from using speed cuffs during at-height incidents

	Option One: status quo	Option Two: enable Specialist Height Teams to use speed cuffs when appropriate
<b>Complies with human rights obligations</b>	0 There are clear legislative parameters around the use of general use and emergency use handcuffs that align with our international obligations around instruments of restraint including rules 47 and 48 of the Mandela Rules, as their use must be proportionate in the circumstances.	0 Clear legislative parameters and operational processes would mean that speed cuffs would only be used in very limited circumstances and for short periods. This would ensure they are only used when necessary and in a manner proportionate to the situation and help prevent situations from escalating further. This is in line with our international obligations around instruments of restraint including rules 47 and 48 of the Mandela Rules.
<b>Transparency and accountability</b>	0 The parameters for the use of general and emergency handcuffs are set out clearly in the Regulations, so the overarching framework for their use is clearly available to interested stakeholders. Under this framework, speed cuffs will not be used, although there is a possibility that general use handcuffs would be used if they are considered appropriate in the circumstances.	0 Minimal change from the status quo as the only notable change would be that an additional mechanical restraint could be used to apprehend individuals during an at-height incident. The authorisation for use, reporting and monitoring mechanisms will remain the same as other mechanical restraints.
<b>Practical to implement and resilient</b>	0 General use handcuffs would rarely be a suitable option for Specialist Height Teams to use during at-height incidents because they require certain conditions to be met – very unlikely to occur.	++ Provides Specialist Height Teams with handcuffs that are practical to use alongside other equipment during at-height incidents.
<b>Contributes to better outcomes for Māori</b>	0 Māori are disproportionately affected by the use of mechanical restraints compared to the general prison population.	- Māori are likely to be disproportionately affected by the use of speed cuffs, as data indicates that mechanical restraints are more likely to be used on Māori compared to the general prison population. This means they may be disproportionately impacted by speed cuffs and any associated negative externalities. However, wider changes under <i>Hōkai Rangi</i> are working to help address the disproportionate impacts Māori experience in the corrections system.
<b>Supports oranga/wellbeing of the people we manage</b>	0 If there was no other alternative, specialist staff may use general use handcuffs. However, as they are harder to apply, it could result in more struggles at height, which would not support prisoner or staff wellbeing and risks falls.	- There are risks of injury to the individual being apprehended if speed cuffs are used incorrectly or if they struggle once they have been applied, which could impact their wellbeing as they recover from the injury.
<b>Contributes to safety</b>	0 General use handcuffs are unlikely to be used and do not support staff safety (they may get tangled up in other at-height equipment and are unlikely to be a safe option).	+ This option would enable Specialist Height Teams to apprehend individuals involved in an at-height incident safely and efficiently without becoming tangled in other necessary equipment. This should also enhance safety for staff and the general prison population as it would help prevent at-height incidents from escalating further, as they will be more easily resolved by Specialist Height Teams.  There are also risks of injury to individuals being apprehended if the speed cuffs are incorrectly used or if a prisoner struggles once the speed cuffs have been applied.
<b>Overall</b>	0 The status quo does not adequately support the safety of prisoners and staff during at-height incidents.	+ While this option has some risks involved in terms of potential injury to the individual being apprehended, it is a more practical and safe option overall compared to the alternative chain-linked handcuffs when used alongside the other equipment needed for working at height. They will also be used rarely due to the very sporadic nature of at-height incidents.



### What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits

193. Option Two is most likely to support the safety of both staff and people in prison compared with the status quo.
194. This will enable Specialist Height Teams to use speed cuffs for use during at-height incidents, which are a more effective and safe way of restraining a person alongside the other equipment they will be carrying.
195. As indicated above, there are risks associated with the potential for injury of the person being apprehended or restrained compared with the general use chain-linked handcuffs. However, this is outweighed by the risks associated with the general use handcuffs, including the risk of becoming entangled with other equipment or having to discard other equipment to successfully secure a prisoner. It also limits the risk of staff and prisoners engaging in behaviour that could also result in a fall from height.
196. As with any mechanical restraint, the risks of injury can be mitigated by providing staff with appropriate training, ensuring only a proportionate amount of force is applied when they are used, and limiting their use once the prisoner is down from a height. In addition, staff would be required to issue careful warnings to the prisoner about the risks of excessive movement once they have been secured and replace the speed cuffs with general use handcuffs as soon as it is practicable to do so.

### What are the marginal costs and benefits of the option?

	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
<b>People in prison</b>	There is potential for injury either through the misapplication of speed cuffs or during movement before they are removed or replaced with general use handcuffs.	Medium	Low  There is limited independent research on the risks of speed cuffs. However, to date speed cuffs have not caused any injuries by fishery officers.
<b>Department of Corrections, including staff</b>	There will be some minor costs associated with purchasing the speed cuffs (\$22,500) and training staff to use them. These costs are expected to be small, and managed within baseline, given they will only be available to the Specialist Height Teams.	Low	Medium  Based on costs of speed cuffs quoted to Corrections.
<b>Wider public, including whānau and</b>	No costs.	Low	Low

friends of people in prison			No public consultation has been undertaken on the use of speed cuffs.
Total monetised costs		\$22,500	Medium
Non-monetised costs		Low-medium	Low
<b>Additional benefits of the preferred option compared to taking no action</b>			
People in prison	At-height incidents are more likely to be resolved quickly because staff would have access to more appropriate equipment, which would result in resumption of normal operations quicker.  Less damage to prison and prisoner property.	Low	Low  No public consultation has been undertaken on the use of speed cuffs.
Department of Corrections, including staff	Staff working at height will have access to appropriate equipment for them to do their job safely.  Access to speed cuffs would support the safe resolution of an at-height incident thereby minimising disruption and damage associated with these types of incidents.  Less damage to prison and staff property.	Medium	Low  This is an assumption based on our own experiences and training of at-height staff.
Wider public, including whānau and friends of people in prison	Gives whānau, friends and the wider public confidence that Corrections staff have the right tools to do their job safely, including to resolve at-height incidents .  Less damage to prison and staff property.	Low	Low  No public consultation has been undertaken on the use of speed cuffs.
Total monetised benefits		N/A	N/A
Non-monetised benefits		Low-medium	Low

## Part C, Section 3: Delivering an option

### How will the new arrangements be implemented?

#### These regulatory amendments will come into force in mid-2023

197. Specific guidance on when and how speed cuffs should be used will be set out in the Custodial Practice Manual.

#### This guidance will be supplemented by careful training, including the appropriate use of speed cuffs for Specialist Height Teams

198. Corrections is working to improve its ability to respond to at-height incidents and has trained **6C** specialists to support with 'at-height responses'. The number of specialist staff with this capability will expand over the next year to 68 staff members, which will enhance Corrections' ability to respond effectively to at-height incidents across the prison network.
199. To date, Specialist Height Teams have had some training on how to cordon, contain, and negotiate with prisoners in the at-height environment. Once authorised, this training will be supplemented to include the safe use and application of speed cuffs, including how to minimise the risk of injury, the limited circumstances where they could be used, how to take them off safely, and how/what to communicate to prisoners when they are being used.
200. The at-height training will continue to be rolled out for new staff over a two-week period, with a four-day refresher course to take place every three months – designed to ensure staff are always well practised to respond appropriately to at-height incidents, including the correct technique to apply speed cuffs.

#### Corrections has a firm idea on the speed cuffs that will be used and associated costs

201. **9(2)(b)(ii)**  
[REDACTED]  
[REDACTED]  
[REDACTED]
202. Following the determination of the type of speed cuffs that are the most appropriate for use by our Specialist Height Teams, authorisation will be sought from the CE in accordance with the existing regulatory framework.
203. In terms of the use of speed cuffs themselves, responses to at-height incidents are always planned. In practice, this will mean that either the prison manager or the incident controller will sign off on the plan and the equipment that will be permitted during the response. Planned responses typically involve in depth planning and risk analysis.

### How will the new arrangements be monitored, evaluated, and reviewed?

204. Under the proposed change, speed cuffs will only be used to support safe at-height responses, when it is considered appropriate in the circumstances by the incident controller or the prison manager. As such, the reviews for the incident itself will contain a specific evaluation/review for the use of speed cuffs, if they are used.
205. As part of this review process, we will evaluate the use of speed cuffs, alongside other equipment used to respond to at-height incidents. This approach would help



ensure there is a level of assurance over why and how speed cuffs are used, and whether there should be any changes in training and operational practice.

206. Reviews will focus on operational decision making around the use of the speed cuffs and provide advice/expertise on lessons or potential areas for improvement and whether the deployment was proportionate and necessary in the circumstances. This could include gathering the views and experiences of specialist at-height staff and people in prison. The reviews will consider the:
- frequency of use of force, including the use of force on Māori, vulnerable people, and women
  - injuries sustained from speed cuffs
  - effectiveness of speed cuffs in successfully apprehending prisoners and resolving at-height incidents, and
  - complaints made and upheld on the use of speed cuffs.
207. Our internal review process would also be supplemented by monitoring by the Inspectorate and the Office of the Ombudsman. The Office of the Ombudsman, in particular, has independent oversight of Corrections and examines the conditions and treatment of people in prisons and in the custody of Corrections.



## Part D: Clarifying that young and adult prisoners may mix if it is in the best interests of the young prisoners

### Terminology used in this section

**Young person:** this refers to a person between 14 and 17 years of age. This differs to the definition used in the United Nations Convention on the Rights of the Child (UNCROC), where a person is categorised as a child if they are aged under 18.

**Adult:** this refers to any person aged 18 or older.

**Young adult:** this refers to an adult who is aged 18 or 19.

**Youth Unit:** this refers to a separate area in a prison that houses young people. However, in some circumstances, young adults may also be assessed as suitable for being placed in a Youth Unit.<sup>40</sup>

## Part D, Section 1: Outlining the problem

### What is the context behind the policy problem and how is the status quo expected to develop?

#### There is a convention that young people in prison are separated from adults

208. New Zealand is party to a range of international conventions and treaties that set minimum requirements for prisoners, including the rights of children or young people in prison. Internationally, there is a convention that children and/or young people are separated from adults in prison.
209. Article 37(c) of UNCROC states that 'every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and every child deprived of liberty shall be separated from adults unless it is in the child's best interests not to do so'.<sup>41</sup> Similarly, rule 11(d) in the Mandela Rules states that young prisoners should be kept separate from adults.<sup>42</sup>

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<sup>40</sup> We do not currently have Youth Units in women's prisons due to the smaller size of the female prison population. A female checklist must be filled out for all female prisoners under the age of 18 to determine if it is in their best interests to be mixed with adults.

<sup>41</sup> United Nations Convention on the Rights of the Child, [article 37\(c\)](#).

<sup>42</sup> United Nations Standard Minimum Rules for the Treatment of Prisoners, [rule 11\(d\)](#). Removing NZ's reservations to three articles of the UNCROC is a 2020 labour party manifesto commitment. This would include a reservation that we currently have to Article 37(c)- not mixing children with adults when deprived of liberty (e.g., in Police cells and youth justice residences). Corrections does not foresee any issues in being able to comply with the removal of this reservation and it does not impact the regulatory change proposed in this RIS.

210. This is reflected in New Zealand's regulatory framework, as the Regulations outline that young people and adults must be kept separate in prison, unless the CE believes that it is in the best interests of the prisoners concerned to mix the young person with adults.<sup>43</sup>
211. The overarching rationale for separating young people from adults is the vulnerability of young people. This aligns with the key principle underpinning the Oranga Tamariki Act 1989 – that the wellbeing and best interests of the young person are the first and paramount consideration in all matters relating to the administration and application of the Act.<sup>44</sup> Corrections and Oranga Tamariki will ideally remain aligned on the management of youth in the justice system.

*Generally, young people in prison are accommodated in Youth Units, which can involve mixing with young adults*

212. In practice, most young people in Corrections facilities are accommodated in Youth Units that manage people aged under 18. However, young adult prisoners who have been assessed as vulnerable through an Assessment of Placement for Young Adults process (APYA), may also be placed in a Youth Unit.<sup>45</sup> This means that young people in Youth Units are generally separated from older adults and are only likely to mix with vulnerable young adults close to them in age who may share similar life experiences.
213. Currently, the decision to mix young people with young adults in a Youth Unit is based on our operational policy, the APYA. This is a holistic assessment, where Corrections reviews the young person or young adult's files and reports, consults with the young person or young adult, their whānau, and others associated with their situation, such as their case manager. It is completed by trained custodial staff who use it to assess young people and young adults and to determine their suitability for Youth Unit placement.
214. Since changes to the Oranga Tamariki Act in 2019, which expanded the youth jurisdiction to include young people aged 17, no more than five people aged under 18 have been in prison at any one time. As at 23 December 2022, there is only one young person in prison.

*However, in some situations, it may be in the best interests of young people to mix with the general prison population*

215. Due to our obligation to separate young people from adults and the fact that there are so few young people in Youth Units, there is a risk that young people in prison could become isolated over time, with limited opportunities for mentoring, or contact and communication with anyone other than staff. In these situations, separating young people from the general prison population may impact negatively on their wellbeing.

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<sup>43</sup> Corrections Regulations 2005, [reg 179 – Young and adult prisoners to be kept apart](#) and [reg 180 – Chief executive may approve mixing of young and adult prisoners](#).

<sup>44</sup> Oranga Tamariki Act 1989, [s 4A – Well-being and best interests of child or young person](#).

<sup>45</sup> The APYA must be applied to young adults, but it can also be used to support the identification of custodial placement options for older adults aged 20 to 24.

216. In practice, the obligation to separate young people from adults could also prevent young people from participating in appropriate programmes important to their rehabilitation and reintegration into society. Hence, it may be in the best interests of young people for them to mix with older adults in the general prison population.
217. In addition, there may be situations where it is inappropriate for a young person to be accommodated in a Youth Unit. For example, if a young person has particularly high and complex needs, it would be inappropriate for them to be managed in a Youth Unit, and it would be in their best interests to be managed alongside older adults in the general prison population.
218. For these reasons, it can be important for young people to mix with adults in prison, as opposed to being managed in a Youth Unit. However, as noted above, being managed in a Youth Unit can still involve mixing.

### What is the policy problem or opportunity?

#### **Corrections should only mix young people and adult prisoners in prison if it is in the best interests of the young person**

219. As the Regulations are currently drafted it appears that the CE can only mix young people with adults when it is assessed as being in the best interests of both young people and the adult prisoners. The implication of this provision is that when determining whether to mix young people with adults, equal weight is given to the best interests of young people and adults.
220. This does not align with the original policy intent of the Regulations, our international obligations such as UNCROC, or our operational practices, as mixing should only occur if it is in the young person's best interests.
221. While the best interests of young people should be the primary consideration when deciding whether to mix, operationally, the CE can still consider other matters relevant to the decision, such as whether it would be in the best interests of adult prisoners for mixing to occur.
222. During public consultation, the majority of submissions agreed that only the best interests of the young person should be taken into account when determining whether young people and adults should be mixed in prisons. Many of the submissions noted that young people are particularly vulnerable, and their needs should be protected as much as possible in the prison environment. A number of submissions also noted that adults may not always be a good influence on young people in prison.
223. There were a few submissions suggesting that the current provision should be retained, but that if anyone's needs must be prioritised, it must be the young person's.
224. A small number of submissions also noted that the interests of all prisoners should be considered rather than just the interests of the young people. The Human Rights Commission and New Zealand Law Society both submitted that if there is any indication that mixing may have adverse consequences to any individual, the preferable course of action would be to keep them separate or find other suitable arrangements.



## What objectives are sought in relation to the policy problem?

225. The objective sought in relation to this policy problem is to ensure the original policy intent is captured effectively in the Regulations and aligns with our international obligations. This will ensure that young people, and their wellbeing, are at the centre of our decision making.
226. The criteria used to analyse the options supports our understanding of the objectives in the following ways:

Criterion	Objective/Consideration
Complies with human rights obligations	Aligns with international obligations, such as UNCROC and the Mandela Rules.
Transparency and accountability	Corrections can be held accountable for decisions where young people mix with adult prisoners, and it is transparent that we are prioritising the best interests of young people.
Practical to implement and responsive	Practical for Corrections to implement and responsive to any changes to best practice in how young people might be mixed.
Contributes to better outcomes for Māori	Contributes to better outcomes for Māori young people in prison.
Supports oranga/wellbeing of the people we manage	The wellbeing of the young people in Corrections' care is always at the forefront of decision making.
Contributes to safety	Contributes to the safety of young people who may be mixed in prison and makes them more likely to contribute to a safer society once they are released.



## Part D, Section 2: Deciding upon an option to address the policy problem

### What options are being considered?

227. As noted in public submissions, we are aware that some adults can be more vulnerable than the young person being considered. We have therefore updated the options below to make sure that it is clearer that the adults' needs will also be considered on an operational level.

#### Option One: status quo

228. Under the status quo, the Regulations would continue to state that young people and adults must be kept separate in prison, but there is the ability to mix if the CE considers that it is in the best interests of all people concerned.<sup>46</sup> This implies that equal weight would be given to young people and adults' best interests when deciding to mix the two groups together.

**Option Two: amend the Regulations to clarify that greater weight must be given to young people's best interests when determining whether to mix young people with adults in prison i.e., mixing will only occur if it is in the best interests of the young person.**

229. Option Two would state that while the best interests of both adults and young people will be considered when deciding whether to mix, greater weight would be attached to the young person's best interests, as they are likely to be more vulnerable than adults in prison.
230. In practice, this could mean that mixing would occur when it is in the best interests of the young person, but not necessarily in the best interests of all adults in the prison.
231. This option reflects some points made by the Human Rights Commission, who indicated that there should be some consideration of the best interests of both the young person and the adults concerned. Sections 5 and 6 of the Act also require this. This is important because adults in prison may also have disabilities, other health, or mental health needs should factor into these decisions. However, while adults' best interests would be considered, mixing could occur if it is in the young person's best interests.

**Option Three: amend the Regulations to clarify that young people and adults may mix in prison if it is in the young person's best interests to do so.**

232. Under Option Three, the Regulations would be amended to clarify that young people and adults may mix in prison if it is in the young person's best interests to do so.
233. In practice, this would codify the practice that young people's best interests are the primary consideration when deciding whether to mix with adult prisoners. However, on an operational level, we will also consider whether this decision would be in adult

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<sup>46</sup> Corrections Regulations 2005, [reg 180 – Chief executive may approve mixing of young and adult prisoners](#).

prisoners' best interests. When it is not necessarily in adults' best interests, we will take steps to manage adults' best interests.

Released under the Official Information Act 1982

## How do the options compare to the status quo/counterfactual?

### Part D: the Regulations do not currently reflect the original policy intent or international obligations for mixing young people with adults

	Option One: status quo	Option Two: amend the Regulations to clarify that greater weight must be given to young people's best interests when determining whether to mix young people with adults in prison	Option Three: amend the Regulations to clarify that young people and adults may mix in prison if it is in the young people's best interests to do so
Complies with human rights obligations	0	<p>+</p> <p>This option complies with our human rights obligations, as mixing would only occur if it is assessed as being in the best interests of young people. However, this option may appear to provide more emphasis on adults' best interests than is reasonably necessary, particularly given the obligations contained in article 37(c) of UNCROC.</p>	<p>++</p> <p>This option would be more clearly align with our international obligations, particularly in article 37(c) of UNCROC, which states that children /young people should be separated from adults in prison, unless it is in the children/young people's best interests to mix with adults.</p>
Transparency and accountability	0	<p>0</p> <p>This option clarifies that when a decision is made to mix young people with adults more weight is given to young people's interests, which enhances transparency and accountability. However, it is unclear how much weight the best interests of adults would have.</p>	<p>+</p> <p>Greater transparency that young people's best interests are the primary consideration when deciding whether to mix with adults.</p>
Practical to implement and responsive	0	<p>-</p> <p>This option is less clear than the status quo, as it is not clear how much weight must be given to the best interests of young people, and it is not clear how much weight must be given to adults' best interests, therefore the option is less practical to implement.</p>	<p>+</p> <p>This option is transparent and practical to implement as it is clear that the young people's best interests are the primary consideration when deciding whether young people should mix with adults.</p>
Contributes to better outcomes for Māori	0	<p>0</p> <p>This option is not expected to significantly impact Māori young people more than other young people in prison. However, it does give us the ability to ensure that whānau are able to be placed together in Youth Units where appropriate.</p>	<p>0</p> <p>Same as Option Two.</p>
Supports the oranga/wellbeing of the people we manage	0	<p>+</p> <p>Though we do not manage a large number of young people in prisons, their wellbeing will be supported by clarifying that their interests will be the primary interests considered.</p>	<p>0</p> <p>This option will support the wellbeing of young people, as the legislative framework would explicitly requires mixing decisions to be made in the best interests of young people.</p> <p>Operationally, there will also be some consideration of adults' best interests, which will go some way towards supporting their wellbeing.</p>
Contributes to safety	0	<p>+</p> <p>Requires the safety of the young people we manage to be prioritised during placement decisions.</p>	<p>+</p> <p>Same as Option Two.</p>
Overall assessment	0	<p>+</p> <p>This option is an improvement on the status quo as it highlights that more weight should be attached to young people's best interests when deciding on whether to mix young people with adults. However, it does not neatly tie in with New Zealand's obligations in UNCROC and is more complicated to follow than Option Three.</p>	<p>+</p> <p><b>This option more clearly aligns with New Zealand's human rights obligations, particularly in UNCROC, while still providing Corrections with the flexibility needed to manage adults' best interests at an operational level.</b></p>



### What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

234. Corrections' preferred option is Option Three – amend the Regulations to clarify that young people and adults may mix in prison if it is in the young person's best interests to do so.
235. Option Three is preferred because it clarifies the original policy intent behind mixing and more explicitly aligns with New Zealand's international obligations – that the best interests of young people are the most important consideration when deciding whether to mix.
236. On an operational level, the best interests of adults can still be managed when mixing occurs, as Corrections can consider the impact that mixing will have on adult prisoners before making a decision to mix. If necessary, Corrections can also provide alternative ways to manage the wellbeing of adult prisoners while mixing occurs.
237. Option Two is also less clear, as it refers to greater weight needing to be placed on the best interests of young people, but it is not clear how this would work in practice.

### What are the marginal costs and benefits of the preferred option?

Affected groups	Comment	Impact	Evidence Certainty
<b>Additional costs of the preferred option compared to taking no action</b>			
Department of Corrections, including staff	Minimal costs to update operational guidance	Low	Medium
People in prison	Unlikely to have a material impact on people in prison as this is largely in line with current operational practice. While some adults may consider their needs are minimised, they would still be managed at an operational level to support their wellbeing.	Low	Low We have not consulted with people in prison on this option.
Wider public and whānau	This strengthens existing processes rather than creating an entirely new process.	Low	Medium
<b>Total monetised costs</b>		<i>N/A</i>	<i>N/A</i>
<b>Non-monetised costs</b>		<i>Low</i>	<i>Low-medium</i>



Additional benefits of the preferred option compared to taking no action			
Department of Corrections, including staff	<p>This increases clarity to existing processes for staff.</p> <p>This option will bring us closer in line with our international obligations.</p>	Low	Medium Based on this strengthening existing processes.
People in prison	Greater assurance that young people's best interests are the primary consideration when making decisions to mix young people with adults.	Medium	Medium Based on this strengthening existing processes.
Wider public and whānau	Assurance that young people's best interests are the primary consideration when making decisions to mix young people with adults.	Low	Medium
<b>Total monetised benefits</b>		N/A	N/A
<b>Non-monetised benefits</b>		Low	Medium

## Part D, Section 3: Delivering an option

### How will the new arrangements be implemented?

- 238. The proposed regulatory amendment will be included in our 2023 Regulations package, to come into effect in mid-2023.
- 239. The relevant sections of our operational policy would be updated to ensure it complies with the new Regulations and our international obligations. This includes sending email updates to prison managers along with any other regulatory changes made once the changes come into effect.

### How will the new arrangements be monitored, evaluated, and reviewed?

- 240. The proposed amendment should strengthen existing process that are already followed in practice. However, after 12 months we will undertake a practice review to see if further changes to operational practice are needed. This is to ensure we are effectively monitoring the impact on both young people and adults, as well as the wider prison population.
- 241. We will also continue to ask staff to record any reasoning behind mixing young people and adults in prisons, to ensure that the placement of the young people continues to be in their best interests. The decision would continue to be signed off by the CE.

# Summary of implementation for all proposals

## How will the new arrangements be implemented?

242. Across the four areas for change analysed in this RIS, there will be similar aspects of implementation that will need to occur.
243. The main change required will be to operational guidance as it will need to be updated and the changes communicated to staff in relation to all areas for change. For some of the changes, particularly the introduction of speed cuffs, additional staff training will be needed.
244. As noted in each section, we anticipate that in most cases the costs of updating guidance and providing additional training will be covered within baselines. We already have a custodial practice team who are responsible for developing guidance and prisoner communications. As the regulatory changes are relatively straightforward, it is unlikely that changes to the guidance will require a significant amount of time to implement.
245. Additional training for staff will also be needed as part of implementation to inform robust decision making on accommodating gender diverse prisoners, decision making on when to preclude prisoners from having access to privacy features, and how and when Specialist Height Teams can use speed cuffs.
246. Two of the changes will need to be communicated to prisoners – ensuring the rehabilitation needs and wellbeing of gender diverse prisoners can be considered when determining prison accommodation and increasing access to privacy features for more prisoners. The communications will likely involve signage that is targeted to the relevant groups within prison. For example, changes relating to accommodation in men's or women's prisons, will need to use neutral and appropriate language and be capable of being understood easily by the prison population.
247. Corrections will also develop additional communications material for other interested groups and stakeholders, including lawyers and the Office of the Ombudsman.
248. In addition, for the introduction of privacy features, Corrections will continue its feasibility study to understand the exact nature of the costs of introducing privacy features in more cells before they are installed. Only after the study will Corrections determine a plan for phasing in the installation of the privacy features.
249. Specialist Height Teams will continue their specialist height training, with the team expanding from 9(2)(b) members in 2023. The initial training will be completed over a four-week period, with refresher training courses being completed quarterly. Important, the training will include how to cordon, contain, and negotiate with prisoners, as well as how to apply speed cuffs correctly to protect staff and prisoner safely.

## The benefits of the total package of proposals outweigh the costs

250. The proposals outlined in this RIS will not require additional funding, as the costs to implement them will form part of Corrections' business-as-usual activity and will be managed within baseline funding.
251. There are also possible costs associated with enabling the use of speed cuffs for Specialist Height Teams – if they are misapplied or if prisoners struggle after they

have been applied, they may experience nerve damage, or potentially broken bones. Robust training will minimise this risk and we understand from New Zealand's fishery officers that injuries from these cuffs are rare.

252. There are also opportunity costs associated with implementing the proposals, as staff in multiple teams across the organisation will be involved in updating practice guidance, delivering training, and creating and sharing information with staff, prisoners, and other stakeholders about the changes. While this is business-as-usual activity, it will mean less time can be spent on other work.
253. These proposals are also expected to have significant benefits to prisoners' oranga. In particular, the rehabilitation needs and wellbeing of gender diverse prisoners can be considered when accommodation decisions are required, which should reduce the possibility of these people being managed in directed or protective segregation. Similarly, greater access to privacy features should provide more prisoners with greater privacy and dignity when they need to use the hygiene areas of their cell.
254. The two other proposals have different material benefits. The proposal clarifying that young people would only mix with adults when it is in the young person's best interests would bring New Zealand closer to being in line with existing international obligations, could improve decision making, as well as giving prisoners and the public greater assurance that young people's best interests would always be the primary consideration.
255. Enabling Specialist Height Teams to use speed cuffs will aid Corrections' response to at-height incidents and ensure these staff can safely secure and apprehend prisoners if there is a one-on-one altercation on the roof.

#### **How will the new arrangements be monitored, evaluated, and reviewed?**

256. We will phase our reviews of these changes, depending on how long they may take to have an impact following implementation.
257. Corrections will carefully evaluate the new arrangements for accommodating gender diverse prisoners annually. This will include determining whether the changes affect accommodation outcomes for gender diverse prisoners compared to previous years, and the extent to which these decisions were influenced by the presentation of prisoners' birth certificates.
258. Similarly, once privacy features are retrofitted into more cells, Corrections will assess the frequency of prisoners being placed in cells without privacy features and the reasons behind this. This data will be used alongside other information to evaluate the efficiency and effectiveness of Corrections processes for placing prisoners in cells without privacy features and whether the processes should be modified in some way.
259. Corrections will continue to record the instances when young people mix with adults but will also clearly record the reasons behind why these decisions were made. If necessary, this will be used to inform any further changes to operational practice to ensure Corrections continues to effectively monitor the impact of mixing young people and adults in prison.
260. In accordance with current practice, Corrections will continue to record and evaluate how it responds to at-height incidents. Corrections will also note any injuries incurred following the use of speed cuffs (or clearly attributable to speed cuffs) to determine whether speed cuff training should change, or whether other handcuffs would be more appropriate in the future.



## Appendix One: Level of general risk, restrictiveness and where changes are proposed by placement type (privacy screens and in-cell access to light switches)

Types of directed segregation or placement that can be directed	Level of general risk of self-harm / risk to staff or others (average – by definition of their placement or segregation)	Can they access privacy barriers or have in-cell access to lighting: <ul style="list-style-type: none"> <li>Green – Default is access to both.</li> <li>Pink – Default is access to neither privacy screening nor lighting.</li> <li>Orange – Default is access to neither privacy screening nor lighting, but alternate placement available.</li> </ul>	Where are we proposing changes are made?
58 (1) (a) for the purpose of security and/or good order of the prison.	High risk of assault, low risk of self-harm.	They can access both <ul style="list-style-type: none"> <li>Artificial lighting, and</li> <li>Privacy screening consistent with safe custodial management</li> </ul>	No changes proposed.
58 (1) (b) for the purpose of safety of another person or prisoner.	High risk of assault, low risk of self-harm.	They can access both <ul style="list-style-type: none"> <li>Artificial lighting, and</li> <li>Privacy screening consistent with safe custodial management</li> </ul>	No changes proposed.
59 (1) (b) for the purpose of protective custody (non-voluntary).	Low risk of harm to others, low risk of harm to self.	They can access both <ul style="list-style-type: none"> <li>Artificial lighting, and</li> <li>Privacy screening consistent with safe custodial management</li> </ul>	No changes proposed.
60 (1) (a) for the purpose of medical oversight in order to assess or ensure the prisoner's physical health.	Low risk of harm to others, low risk of harm to self.	They can access both <ul style="list-style-type: none"> <li>Artificial lighting, and</li> <li>Privacy screening consistent with safe custodial management</li> </ul>	No changes proposed.
60 (1) (b) for the purpose of medical oversight in order to assess or ensure the prisoner's mental health.	Medium risk of self-harm or risk to others.	They cannot access either <ul style="list-style-type: none"> <li>Artificial lighting, or</li> <li>Privacy screening</li> </ul>	Changes proposed.
61B (a) for the purpose of protecting the prisoner from self-harm.	High risk of self-harm, low risk of harm to others.	They cannot access either <ul style="list-style-type: none"> <li>Artificial lighting, or</li> <li>Privacy screening</li> </ul> Unless: <ul style="list-style-type: none"> <li>The prison manager considers alternative accommodation adequate to protect the prisoner from self-harm</li> <li>Whereby they can access both <ul style="list-style-type: none"> <li>Artificial lighting, and</li> <li>Privacy screening</li> </ul> </li> </ul>	No changes proposed.
Section 137 (3) (c) and 133 (3) (c) for any offence against discipline as judged by a visiting justice or hearing adjudicator.	Low risk of self-harm, medium risk to others.	They cannot access either: <ul style="list-style-type: none"> <li>Artificial lighting, or</li> <li>Privacy screening</li> </ul>	Changes proposed.