

# Regulatory Impact Statement: Use of pepper spray in custodial settings

## Coversheet

| Purpose of Document   |   |
|---|---|
| Decision sought:  | This analysis has been produced for the purpose of informing Cabinet policy decisions on amendments to the Corrections Regulations 2005 |
| Advising agencies:  | Department of Corrections   |
| Proposing Ministers:  | Minister of Corrections   |
| Date finalised:   | 7 September 2021  |
| Problem Definition  |   |
| <p>Pepper spray in aerosol form is currently authorised for use as a non-lethal weapon by the Corrections Act 2004 (the Act) and the Corrections Regulations 2005 (the Regulations).</p> <p>Three issues have been identified with the existing framework governing the use of pepper spray:</p> <ol style="list-style-type: none"><li>1. Decisions on the introduction of new pepper spray delivery mechanisms<sup>1</sup> are currently made at an operational level, which could result in the future authorisation of a new delivery mechanism that was not anticipated by the Minister when pepper spray was introduced. This means the Regulations are too broad and lack clarity.</li><li>2. Decisions around authorising the use of pepper spray, particularly in planned incidents, are not always being made at a high enough level of authority to provide assurance and separation from the frontline.<br/>Corrections could provide more clarity regarding the appropriate use of pepper spray in all situations, but this is especially important in situations involving passive resistance. International human rights guidance states that pepper spray should not be used in cases of passive resistance, whereas the Corrections Act authorises the use of force in response to active or passive resistance to a lawful order. It is critical for all parties to have a clear and consistent understanding of their rights and responsibilities and for the Act and the Regulations to be consistent.</li></ol> |   |
| Executive Summary   |   |

<sup>1</sup> Delivery mechanisms refers to the device used to deploy pepper spray.

## **Pepper spray is authorised for corrections officers as a use of force**

Complex situations and incidents can arise in prisons which require staff to respond. Staff have a hierarchy of responses available, starting with communication and de-escalation techniques and progressing through to uses of force, including the use of pepper spray. The key benefit of pepper spray is that it provides an alternative to other types of force, such as physical restraint, which are more likely to result in injury to staff and people in prison.

The use of pepper spray is authorised through the Corrections Act 2004 and the Corrections Regulations 2005. Pepper spray is considered a use of force, and its use must comply with both legislation and Department of Corrections policy. It may only be used if there are grounds to believe the use of it is reasonable, necessary, and proportionate in the circumstances (s 83). If the incident can be resolved using a lower level tactical option as an intervention strategy, then pepper spray must not be used. Additionally, use of force is subject to the requirement of the Crimes Act 1961, which states that any excess use of force can be subject to criminal responsibility (s 62).

These legislative and regulatory frameworks are also supported by operational guidance and training for custodial staff. This guidance supports staff to use pepper spray in a way that is safe and lawful.

## **However, the regulatory framework for pepper spray use can be improved**

Three issues have been identified with the framework for the use of pepper spray:

1. Decisions on the introduction of new pepper spray delivery mechanisms are currently made at an operational level, which could result in the future authorisation of a new delivery mechanism that was not anticipated by the Minister when pepper spray was authorised. This means the Regulations are too broad and lack clarity.
2. Decisions around authorising the use of pepper spray, particularly in planned incidents, are not always being made at a high enough level of authority to provide assurance and separation from the frontline. Corrections could provide more clarity regarding the appropriate use of pepper spray in all situations, but is especially important in situations involving passive resistance. International human rights guidance states that pepper spray should not be used in cases of passive resistance, whereas the Corrections Act authorises the use of force in response to active or passive resistance to a lawful order. It is critical for all parties to have a clear and consistent understanding of their rights and responsibilities and for the Act and Regulations to be consistent.

## **Three objectives have been sought in relation to this policy problem**

The objectives sought for this policy problem include maintaining safety for staff and people in prison; future-proofing the framework governing the use of pepper spray; and ensuring that pepper spray is used in accordance with the intent of the Corrections Act and Regulations.

## **Three amendments are being proposed to the Regulations**

Three amendments to the Regulations are recommended in response to the problems identified:

- Specify the delivery mechanisms for the use of pepper spray in the Regulations, thereby providing greater assurance for the authorisation of new delivery mechanisms in the future.
- Amend the Regulations so that only the prison manager or acting prison manager can authorise the planned use of pepper spray.
- Amend the Regulations to reiterate a requirement in the Act that non-lethal weapons may not be used where that use of force is more than reasonably necessary in the circumstances.

Once these changes are made, operational guidance will be amended to reflect the changes. Additional operational changes are being made as part of a wider piece of work at Corrections on the use of force. This includes considering providing additional training to custodial staff, as well as amending reporting and review mechanisms following each incident of pepper spray use.

### **Evaluation and monitoring will take place following changes**

Monitoring processes already exist around the use of pepper spray, which will enable Corrections to monitor the impacts of these changes. In addition, the use of pepper spray will be evaluated one year after implementation of the proposals in this paper, to understand the impacts of the changes. The Office of the Ombudsman will be consulted on this evaluation, given their statutory function to monitor places of detention.

### **Stakeholders have been consulted throughout this process**

The following organisations were approached to comment on the proposals in this paper: Police, Ministry of Justice, Oranga Tamariki, Ministry of Health, Ministry for Women, the Office for Disability Issues, the Office for Seniors, Te Puni Kōkiri, the Office of the Ombudsman, and the Human Rights Commission. The Department of Prime Minister and Cabinet and the Treasury have also been informed.

Additionally, Corrections consulted with its Wellness and Wellbeing Insights and Advisory Group and its the Tangata Whenua Committee (two groups formed by external representatives), the Māori Women's Welfare League, the Corrections Association of New Zealand, and the Public Service Association. These groups provided varying levels of feedback, which has been incorporated into the analysis in this paper.

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

Stakeholders, such as the Human Rights Commission and the Office of the Ombudsman, have suggested that the current framework for mitigating the risks involved when using pepper spray does not go far enough to protect people in prison from further harm. They have suggested investigating other ways of mitigating harm, such as through further training and reviews of operational practice.

This RIS focuses on opportunities to strengthen the regulatory framework, which is fundamental to ensuring operational changes can be made. These regulatory

amendments are taking place alongside additional operational developments that are being made as part of wider work at Corrections on the use of force.

There are some limitations with the data that was available for the analysis in this RIS. Academic and empirical research is limited to the general effects of pepper spray as a substance, rather than the effects of different delivery mechanisms used to deploy pepper spray. While the benefits and risks of pepper spray through all delivery mechanisms appear to be generally the same, more evidence about different delivery mechanisms would have been beneficial to this analysis.

Additionally, this analysis assumes that the evidence base, which is primarily from an international context, is applicable to the New Zealand context. Much of the literature also comes from police and law enforcement settings, with only a few studies focusing specifically on a Corrections context. This analysis therefore assumes that evidence from a police context is also applicable in a Corrections context.

There were some limitations on the timeframes available for this analysis. Corrections is currently facing judicial review proceedings – *Cripps v Attorney-General* – that questions the lawfulness of the use of the cell buster delivery mechanism of pepper spray. In mid-March, Corrections reached an adjournment with the Court where we agreed that we would review whether the Regulations could be amended to strengthen the framework around pepper spray.

As a result, the consultation undertaken was of a targeted nature. We engaged directly with key groups such as the Ombudsman and Human Rights Commission, and their views have informed the analysis in this RIS.

Despite these constraints, we consider that this analysis is reliable for informing decision-making by Ministers. It has been informed by Corrections data, academic research, and targeted consultation with key stakeholders.

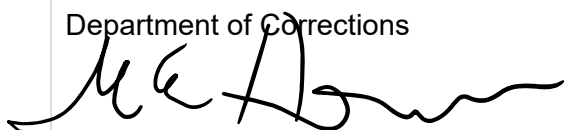
#### Responsible Manager(s) (completed by relevant manager)

Marian Horan

Manager

Corrections Policy

Department of Corrections



7/9/21

#### Quality Assurance (completed by QA panel)

Reviewing Agency:

Ministry of Justice (Chair), New Zealand Police and Department of Corrections.

Panel Assessment & Comment:

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

## Section 1: Diagnosing the policy problem

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

#### Pepper spray is a tactical option available for custodial staff in use of force incidents

1. Complex situations arise in prisons where staff may need to protect people from injury, prevent property damage, act in self-defence, prevent escapes, or respond when someone defies a lawful order.<sup>2</sup>
2. There is a hierarchy of responses available to be used by staff in these situations, starting with de-escalation techniques and progressing to use of force. The use of force hierarchy gradually increases in seriousness, from actions such as holding someone's arm and guiding their movements, through to deploying pepper spray and using physical force through control and restraint. Staff can only use force where it is necessary, reasonable, and proportionate.
3. Pepper spray is a use of force option within this hierarchy of responses that provides an alternative to other types of force, such as baton use or physical restraint. Corrections officers can use pepper spray in spontaneous and planned instances. The majority of use occurs spontaneously. The key benefit of pepper spray is that it can reduce the level of harm compared to these other types of force.<sup>3</sup> Evidence suggests that it reduces the

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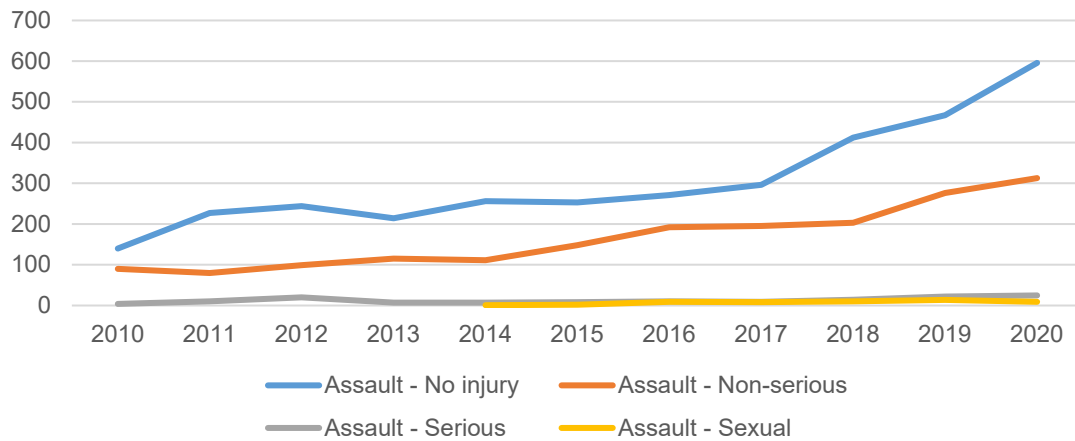
<sup>2</sup> There is no standard definition for what constitutes a 'lawful' order in the legislation. Operationally, a lawful order is any instruction, command, or direction that a staff member gives a prisoner that must be reasonable and necessary for the good running of the prison. Lawful orders should be in line with the principles of the Corrections Act 2004.

<sup>3</sup> Bowling 2000 and 2003, MacDonald et al, 2009; Bullman, 2011; Kaminski et al, 1998; Edwards et al, 1997; Olotu et al, 2010.

likelihood of significant and long-term bodily injury to both staff and people in prison by between 70 and 93 percent.<sup>4</sup>

4. The level of assaults on custodial staff has increased over recent years, as outlined in graph one, and pepper spray provides an option for resolving volatile situations without the need for physical contact between staff and people in prison. More than half of the times pepper spray is deployed in prison is due to incidents of aggressive behaviour, assault, or fighting.

*Graph one: Assaults on staff, 2010-2020<sup>5</sup>*



*Corrections manages the health impacts from the use of pepper spray*

5. There are some rare health risks associated with pepper spray, such as for people with high blood pressure, chest infections or potentially people with asthma. Additionally, there is some limited evidence of the potential for pepper spray exposure to aggravate pre-existing mental health issues. These risks are managed through operational guidance and by Corrections Health Services. For example, the health team will provide information on any medical risks involved for a specific person in prison prior to pepper spray being deployed where practicable. The health team also provide treatment as soon as possible following pepper spray exposure, assessing both their physical and mental health needs.<sup>6</sup> This includes treatment to any custodial staff effected by pepper spray exposure.
6. The health impacts of pepper spray are carefully managed because pepper spray causes significant temporary distress to people it is used on. The most intense effects generally last around 45 minutes, with skin irritation lasting for up to two hours. Effects can include

<sup>4</sup> Bullman, 2011

<sup>5</sup> Over the past three years Corrections has placed an emphasis on increased reporting for minor and non-serious assaults. This may have contributed in part to the increase in numbers due to more accurate reporting.

<sup>6</sup> See Appendix two for more information.

coughing, shortness of breath, intense burning and swelling of the skin and eyes, nausea, and vomiting.<sup>7</sup>

#### *Pepper spray is used less than physical force*

7. According to available data, from 2017-2020 there were 3,361 use of force incidents that did not involve the drawing or deployment of pepper spray. During the same period, there were 649 incidents where pepper spray was deployed, and an additional 1,119 incidents where pepper spray was drawn but not deployed. Of these 649 incidents where pepper spray was deployed, the MK-9 with extension wand or 'Cell Buster' was deployed 39 times.<sup>8</sup> These represent the only planned incidents of pepper spray use during this period. Approximately seven percent of these incidents involved women, which is reflective of their percentage of the total prison population. This means that physical force was used during this period almost twice as much as pepper spray was drawn or deployed.

#### *Māori are overrepresented in the use of pepper spray*

8. We are aware of, and stakeholders have noted, the need to investigate and address the overrepresentation of Māori. We are working to address this through operational changes and the implementation of our strategic direction, *Hōkai Rangī*. As a treaty partner, Corrections recognises its obligations to uplift Māori in our management.
9. Available data on the use of pepper spray on men and women in prison shows that Māori are disproportionately represented in pepper spray incidents. Since 1 July 2017, tāne Māori have made up 51 per cent of the male prison population, but have accounted for 67 per cent of the men involved in incidents where pepper spray was deployed. Even when figures are adjusted to only include people with high and maximum security classifications, which indicates a higher likelihood of violent behaviour, the use of pepper spray against tāne Māori men remains disproportionate.
10. Since 1 July 2017, wāhine Māori have made up 59 per cent of the female prison population, but have accounted for 83 per cent of the women involved in incidents where pepper spray was deployed. Again, when accounting for security classifications, use on Māori women remains disproportionate.<sup>9</sup>

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<sup>7</sup> UNOCHR, 2020.

<sup>8</sup> The MK-9 with extension wand is a pepper spray delivery mechanism that uses a hose to disperse pepper spray under doors or through windows. This allows for passive entries into cells when it may be unsafe to enter and deploy pepper spray through a handheld device.

<sup>9</sup> As the sample for pepper spray incidents on women is small, with only 150 occurring over the past four years, it is difficult to determine if there is any statistical significance without a larger sample size. However, when combining the figures of both tāne Māori and wāhine Māori, it appears that Māori are overrepresented in the use of pepper spray.

## **The use of force is authorised in legislation**

11. Section 83 of the Corrections Act 2004 authorises the use of force by Corrections staff, where they believe that the use of force is reasonably necessary:
  - in self-defence, the defence of another person, or to protect the prisoner from injury
  - in the case of an escape or attempted escape (including the recapture of any person who is fleeing after escape)
  - to prevent the prisoner from damaging any property, or
  - in the case of active or passive resistance to a lawful order.
12. The Corrections Act states that when using force, staff may not use any more physical force than is reasonably necessary in the circumstances. Additionally, use of force is subject to the requirement of the Crimes Act, which states that any excess use of force can be subject to criminal responsibility. The use of force can include the use of non-lethal weapons.

## **Pepper spray is also authorised in legislation**

13. The objective of regulatory frameworks around the use of pepper spray is to minimise the health impacts from its use and support the safety of staff and people in prison. Pepper spray is a non-lethal weapon, meaning it is a controlled substance and not available for general use or purchase. Its use by Corrections staff is authorised under the Arms Regulations 1992, Corrections Act 2004, and Corrections Regulations 2005.
14. Regulation 30A of the Arms Regulations authorises corrections prison staff to carry or possess pepper spray in accordance with the Corrections Regulations.
15. Section 85(3) of the Corrections Act states that Regulations authorising non-lethal weapons must be considered by the Minister. The Minister must be satisfied that the proposed non-lethal weapon constitutes safe and humane treatment, and that the benefits of use outweigh any risks. This provides a legislative check to ensure that no non-lethal weapons are authorised through the Corrections Regulations that are not compatible with the safe and humane treatment of people in prison.
16. The Corrections Regulations 123A-D provide a regulatory framework around the use of pepper spray, including:
  - defining pepper spray
  - stating that only trained Corrections Officers can use pepper spray and that pepper spray may only be issued at the direction of a prison manager, or a trained officer if it is impractical for the prison manager to issue it
  - specifying when a Corrections Officer can draw or use pepper spray (in line with section 83 of the Corrections Act concerning use of force) and that it should be used in a way that minimises pain and injury to the prisoner, so far as that is consistent with protecting prison security or the safety of any person
  - guidance on how pepper spray should be stored and secured

*There have been three previous amendments to the Regulations to enable pepper spray use*



17. Three previous amendments have been made to the Corrections Regulations to enable the use of pepper spray since 2010. These amendments all had the objective of increasing access to pepper spray as a tactical option to increase staff safety. In 2010, the then Minister was satisfied that pepper spray should be introduced as a tactical option for planned use of force incidents only, dependent on the outcome of a pepper spray trial. From 2012, following the trial, pepper spray was available across all prison sites, but was locked on site and only issued when required. In 2017, pepper spray was made available for trained staff to use spontaneously. Corrections officers who are trained on the use of pepper spray can carry individual cannisters of pepper spray while on duty or while transporting people to other sites.

### **Legislative frameworks for pepper spray use are supported by operational guidance**

18. Operational guidance supports staff to make decisions that align with the regulatory requirements for use of pepper spray. Staff receive training before they can use pepper spray and must undergo refresher training on an annual basis. Staff are taught of the risks involved with pepper spray use, including potential health risks.

19. Corrections currently use three types of aerosol delivery mechanisms: MK-3 (a hand-held device for spontaneous use/individual carry and planned use); MK-9 (a large hand-held device for planned use); and MK-9 with an extension wand (a dispersed fog delivery mechanism, otherwise known as 'Cell Buster' that can be used under doors or through windows).

20. Operational guidance notes that pepper spray must not be used in some situations, such as where a person has a firearm, where a person is pregnant, where they could fall or injure themselves or are 'at height', or where they are already restrained.

### *Examples of pepper spray use as a tactical response*

21. Planned use of force, including pepper spray, occurs where the immediate safety of all staff and prisoners involved are not at immediate risk. The situation is contained, but a response is still needed to prevent the situation from escalating. An example of this would be people refusing to leave the yard. The situation is contained and there is no immediate threat to anyone, but the situation needs to be resolved to ensure that other people get their turn in the yard and staff can be distributed safely across the prison.

22. Corrections Officers would put together a Control and Restraint team and put a plan in place for getting the people out of the yard. Corrections Officers may enter the yard to de-escalate the situation, and the prisoners may become threatening and try to attack. If this happened, Corrections Officers could then use pepper spray to defend themselves. Corrections Officers could also choose to deploy pepper spray prior to entering the yard, if they believed the risk of entering the yard was too great, based on the actions or threats being made by the prisoner.

23. Alternatively, pepper spray is used spontaneously for a number of reasons. One example may be prisoners fighting. The use of pepper spray in this scenario minimises the risk of

harm to staff where they would otherwise have to physically intervene. They are able to remain a safe distance from the fight, while also putting an end to it. This also prevents further physical harm to the people fighting.

*Operational guidance provides instructions for pre and post incident response*

24. Prior to both planned and spontaneous use, staff must consider whether other options would resolve the situation safely, and whether the use of force is reasonable, necessary, and proportionate in the circumstances. Staff are trained to make a subjective assessment based on these three principles, all of which must be present for the use of force to be lawful. This aligns with the requirements in the Corrections Act that the use of force must be reasonably necessary.
25. Prior to planned use, staff must seek prior authorisation from the prison manager, or another trained staff member if it is impracticable to seek authorisation from the prison manager. For planned use, a decontamination area must be set up in advance, with a member of the health team close by to assist. Staff should check whether a person has any conditions that may cause an adverse reaction to pepper spray (such as cardiac and respiratory conditions or allergies).
26. Following use, as soon as reasonably practicable, staff must check the person's breathing and follow decontamination procedures. The person must be seen by a member of the health team as soon as possible, but within three hours. The person must also be interviewed within three hours of the incident to identify any ongoing support needs they may have. The incident must be reported to the incident line, day or night, then followed by a written report and informing the prison director and regional commissioner within two hours.
27. The prison director must also assign a delegate (which can be any trained staff member) to review the incident as soon as possible, but within 24 hours. This is to evaluate whether the use of pepper spray was appropriate. Any video footage of the incident must be retained and provided to national office within 3 days of the incident. Further information on relevant operational policies can be found in Appendices one, two and three.

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

28. The problems detailed below are regulatory in focus, but wider consideration of operational opportunities for improvement, including reducing the overrepresentation of Māori in pepper spray incidents, are part of ongoing operational work. Among these opportunities, is consideration of the treatment of several prisoners at Auckland Region Women's Corrections Facility between February 2019 and February 2020, which led to complaints that related to, among other things, the way pepper spray was used.
29. Alongside establishing a review of the women's prison network, Corrections has subsequently undertaken a review of the Prison Operations Manual, including examining the use of force and use of pepper spray. One focus of this review has been on the reporting and monitoring process for the use of force. That part of the review concluded that more consistency is required in the review process to support staff confidence in it

and in the learning process. The current review process makes it difficult to understand changes to the use of force over time, which limits Corrections ability to understand emerging trends and respond to them.

30. These operational programmes of work will be considered alongside the implementation and monitoring stage of the regulatory changes outlined below, and as detailed later in this analysis.

*There are relevant judicial review proceedings in the High Court*

31. There is strong media and public interest around the use of pepper spray. Relevant judicial review proceedings, *Cripps v Attorney-General*, are currently making their way through the High Court. This claim focuses on the MK-9 with extension wand (also known as the Cell Buster), which the claimants consider was not specifically authorised for use under the Regulations.
32. The case is currently adjourned, partly to provide Corrections with time to review the Regulations. Following these proposed regulatory changes being made, the Court will return to hearing in early 2022. Should any proposed amendment be made to the Regulations, these would not be retrospective and would not impact the litigation proceedings.
33. The Ombudsman and Human Rights Commission have also said that the mitigations in place for pepper spray use may not be enough. Because of this, there is an opportunity to increase confidence and transparency in the use of pepper spray through change to Regulations as well as operational guidance.

**Problem one: new aerosol delivery mechanisms could be introduced under current settings without Ministerial approval**

34. The current Regulations authorise Corrections Officers to use pepper spray in the form of an aerosol, but do not explicitly specify which delivery mechanism Corrections can authorise staff to use, or whether that mechanism can be used in spontaneous or planned incidents. These decisions are made operationally.
35. Corrections is confident that the three delivery mechanisms currently in use are capable of being used lawfully in accordance with the Act. This lawful use is supported by robust operational training and guidance for Corrections Officers.
36. However, because aerosol delivery mechanisms are already broadly authorised through the Regulations, new delivery mechanisms could be introduced that were not anticipated by the Minister and Cabinet when the Regulations were approved. The Regulations are therefore too broad and lack clarity.
37. Other pepper spray delivery mechanisms technology exists, such as larger devices used for crowd control situations, or long distance pepper spray delivery mechanisms for long-range use. While Corrections does not have plans to introduce new delivery mechanisms at this time, in theory Corrections currently has the ability to introduce new mechanisms at an operational level without seeking approval from the Minister.

38. This lack of specificity in the Regulations relating to new delivery mechanisms would be mitigated to some extent by the requirements of the Act that no more force than reasonably necessary be used, as well as by requirements under the Crimes Act. However, given that pepper spray is a non-lethal weapon and causes significant short-term distress to those it is used on, it is important that the regulations support transparent consideration of the risks and benefits for the introduction of any new delivery mechanisms. This will meet requirements in the Act that the Minister is satisfied with their use. This means that Corrections needs to better ensure that the Regulations are in keeping with the Act and are clear on this point.
39. This view about the need for delivery mechanisms to be specifically authorised is shared in part by the claimants in the litigation noted above relating to the use of one specific delivery mechanism, the MK-9 with extension wand (Cell Buster). Claimants in this case have argued that the failure to specify in Regulations the delivery mechanisms makes the use of Cell Buster unauthorised and unlawful.
40. Corrections does not agree that the use of the MK-9 with extension wand or the failure to specify delivery mechanisms in the Regulations means that pepper spray is currently unauthorised or unlawful. When pepper spray was initially authorised in 2010, the Minister and Cabinet found it sufficient to authorise pepper spray as a substance, as opposed to specific delivery mechanisms. However, following a review of the Regulations and understanding the lack of specificity of delivery mechanisms identified by the claimants in *Cripps v Attorney-General*, Corrections considers that the framework for specific delivery mechanisms could be strengthened with a future focus.

**Problem two: decisions to authorise the use of pepper spray are not always being made at a high enough level of authority**

41. Pepper spray represents a serious use of force, so there is a need to ensure that authorisation for its use is subject to high levels of assurance. In considering amendments to strengthen the regulatory framework around the use of pepper spray, we think that there is also an opportunity to consider whether the existing level of approval needed to authorise the use of pepper spray is appropriate.
42. Currently, the Regulations require pepper spray to be authorised by the prison manager, or another trained staff member if it is impracticable for the prison manager to authorise it. This includes the initial authorising of pepper spray to be carried by custodial staff for spontaneous use,<sup>10</sup> as well as authorising pepper spray for planned use of force, which must occur for each planned incident. Operationally, there is no threshold for when it becomes 'impracticable' to seek the prison managers approval. We do not have data on how often this happens in practice, but it does open staff up to being placed in a decision-making position.

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<sup>10</sup>Once Corrections Officers have been authorised to carry pepper spray on their person (for spontaneous use), they use their discretion and training to make decisions about when it is appropriate to deploy pepper spray. Pepper spray can only be deployed when necessary, reasonable, and proportionate.

43. The ability for another trained staff member to initially authorise pepper spray to be carried by custodial staff for spontaneous use, as well as authorising its planned use, may not give enough assurance that decisions are being made at a high enough level and with appropriate separation from the frontline team that will use the pepper spray.
44. Stakeholders did not raise this problem as a concern, but did express the need to ensure that the pepper spray framework maintains a high level of assurance.

**Problem three: there could be greater clarity on how pepper spray can be used in cases of passive resistance**

45. Because Corrections staff are making decisions in dynamic situations, such as when people in prison are using or threatening violence, it is critical for all parties to have clear and consistent guidance about their rights and responsibilities. The Act states that any use of force must be proportionate, necessary, and reasonable, but the Regulations do not clearly include these parameters. It is important that both the Regulations and the Act support the current operational guidance for staff and provide clarity and consistency around when pepper spray can be used. Corrections staff can be subject to challenge over uses of force including pepper spray, meaning that ensuring this consistency is important.
46. This need for clarity is perhaps especially the case for situations that could be described as relating to passive resistance. The Corrections Act currently allows all use of force, including pepper spray, in cases of active or passive resistance to a lawful order.<sup>11</sup> International guidance from the United Nations states that “chemical irritants should only be deployed where a law enforcement official has reason to believe there is an imminent threat of injury” and “should not be used in situations of purely passive resistance.”<sup>12</sup> This means that Corrections’ use of pepper spray could be out of line with international human rights guidance if it is used in cases of passive resistance.
47. This perspective on passive resistance has been offered by some of the stakeholders consulted. For example, the Human Rights Commission did not agree that the Corrections Act was consistent with international human rights guidance if it allowed the use of pepper spray in circumstances where it could not be considered reasonable, necessary, and proportionate.

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

48. There are three key objectives sought in relation to the policy problem:
  - **Safety of staff and people in prison.** Given the range of incidents that staff in prisons are required to respond to, it is important that they have appropriate tactical options available to respond and to ensure their safety and the safety of people in

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<sup>11</sup>Section 83(1)(c)(ii)

<sup>12</sup>United Nations Human Rights Office of the High Commissioner, Guidance on Less-Lethal Weapons in Law Enforcement, p28.

prison. Regulations must provide a clear framework to ensure pepper spray is used appropriately and only where reasonably necessary.

- **Future proofing the regulatory framework for the use of pepper spray.** Given the significant short-term distress that is caused by pepper spray, and the need to comply with human rights guidance, it is important that the regulatory framework for its use is clear and future-proofed to manage any changes in delivery mechanism technology.
- **Use of pepper spray is in accordance with the intent of the Corrections Act and Regulations.** When the use of aerosol pepper spray was approved in 2010, it was done so with the delivery mechanisms available at that time in mind. We need to ensure that the delivery mechanisms able to be used now and, in the future, align with this policy intent, and that any new aerosol delivery mechanisms have the relevant Ministerial, Cabinet and Parliamentary approvals.

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

### What criteria will be used to compare options to the status quo?

49. Four criteria will be used to assess the options:

- **Appropriate decision making:** does the option support operational decision-making that is transparent and provide sufficient assurance?
- **Alignment with the policy intent:** does the option ensure that the policy intent approved by the Minister and Cabinet is supported?
- **Safety:** does the option support the safety of staff and people in prison?
- **Accordance with international human rights guidance:** does the option support Corrections to meet its domestic and international human rights guidance?

### What scope will options be considered within?

50. The options discussed below in the options analysis section are considered to be in scope. As highlighted in the problem section, Corrections is making operational changes that will contribute to strengthening the framework around the use of force and pepper spray. As this work is current and ongoing, it is outside the scope of this analysis. This analysis primarily focuses on the framework for authorising pepper spray in the Regulations.

51. Removing the use of pepper spray as an option for use of force was not considered in scope. This would not address the problems that have been identified. Corrections Officers work in complex and volatile environments and it is important that they are equipped with tactical options to keep themselves and people in prison safe. Removing the ability to use pepper spray would mean other options would need to be used in its place, such as hard physical force, which evidence shows is more likely to result in injuries to staff and people in prison.

52. For the problem of who should authorise pepper spray, we ruled out the options of having the Chief Executive, National Commissioner or Regional Commissioner carry out this function. This is because the authorising of pepper spray may need to be approved at short notice, and these people are not guaranteed to be available. This could delay the ability for Corrections Officers to respond when volatile situations arise. They are also not as familiar with the day-to-day operations of a prison and when the issuing of pepper spray for individual planned use of force incidents will or will not be appropriate. This is because decisions often need to be made on a case-by-case basis. Some stakeholders agreed that an amendment giving this power to someone such as a Chief Executive would hinder Corrections Officers ability to respond appropriately and make it more difficult for them to have confidence to carry out their duties.

### What options are being considered?

#### **Problem one: new aerosol delivery mechanisms could be introduced under current settings without Ministerial approval**

##### **Option One – Status quo**

53. Option One is the status quo. The Regulations authorise the use of aerosol pepper spray as a non-lethal weapon for use of force situations. Operational guidance sets out which delivery mechanisms can be used in which situations.

54. Currently, the MK-3, MK-9 and MK-9 with extension wand are approved for use operationally.

55. If new aerosol delivery mechanisms are developed in future, Corrections could make an operational decision to introduce the use of these delivery mechanisms without needing to seek approval from the Minister of Corrections or Cabinet.

##### **Option Two – Amend the Regulations to specify delivery mechanisms**

56. Option Two is to amend the Regulations to more explicitly specify the delivery mechanisms that can be used to deploy pepper spray.<sup>13</sup>

57. Corrections is confident that the three delivery mechanisms currently in use are safe and consistent with the humane treatment of prisoners.<sup>14</sup> The Regulations would be amended to state that these delivery mechanisms are approved for use, and to specify which delivery mechanisms can be used spontaneously or for planned use of force.

58. If any new delivery mechanisms are developed in future, Corrections would need to seek approval from Cabinet to change the Regulations to authorise these new delivery

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<sup>13</sup>As mentioned above, Corrections currently faces judicial review proceedings relating to the use of pepper spray through the MK-9 with extension wand. Should these proposed amendment be made, it would not be retrospective and would not impact the litigation proceedings.

<sup>14</sup>Bowling 2000 and 2003, MacDonald et al, 2009; Bullman, 2011; Kaminski et al, 1998; Edwards et al, 1997; Olotu et al, 2010.



mechanisms. This would provide more oversight around decisions to introduce new delivery mechanisms. This would also add more clarity to the Regulations and ensure that they are in keeping with the Corrections Act.

59. The Minister of Corrections would be provided with information to assess these new delivery mechanisms as per the requirements in s 85(3) of the Corrections Act. The Minister must be satisfied that the use of pepper spray through these delivery mechanisms is safe, compatible with the humane treatment of prisoners, and that the benefits outweigh the risks.

### **Option Three – Strengthen operational process for approving delivery mechanisms**

60. Option Three would be an operational change to establish a new process for how Corrections could assess new delivery mechanisms for use in the future. This option would not require the Regulations to be amended to authorise new aerosol delivery mechanisms. Instead it would create a more rigorous process for Corrections to follow to assess whether new delivery mechanisms were appropriate to be introduced.
61. This could include providing advice to the Minister of Corrections and/or Cabinet for their approval, without needing to change the Regulations.

### **Problem two: decisions around authorising the use of pepper spray are not always being made at a high enough level of authority**

#### **Option One – Status quo**

62. The status quo is that pepper spray can be issued by the prison manager, or another trained staff member if it is impracticable for the prison manager to issue it.

#### **Option Two – Only the prison manager or acting prison manager can authorise pepper spray**

63. This option would amend the Regulations to state that only the prison manager or acting prison manager may authorise the use of pepper spray. This would be initial approval to provide for spontaneous use by Corrections officers as well as approval for planned use of pepper spray. Corrections Officers would still use their discretion in spontaneous incidents, as authorisation is only required once after training for individual carry pepper spray has taken place. Whereas for planned incidents, Corrections Officers would be required to seek authorisation from the prison manager or acting prison manager for each incident.

#### **Option Three – The prison manager plus someone outside the prison must agree to authorise pepper spray**

64. This option would require the Regulations to be amended to state that the prison manager and a second person who does not work in the prison must agree to authorise pepper spray. This would be for spontaneous and planned use, however this would be more pertinent to planned incidents, which requires authorisation each time.



65. The second person could be a trained staff member from another prison, another prison manager, or someone from Corrections national office with appropriate knowledge.

#### **Option Four – Update operational guidance to state that only the prison manager can authorise pepper spray**

66. This option would update the operational guidance to state that pepper spray can only be authorised by the prison manager, without amending the Regulations. This would be for spontaneous and planned use, however this would be more pertinent to planned incidents, which requires authorisation each time.

### **Problem three: there could be greater clarity on how pepper spray can be used in cases of passive resistance**

#### **Option One – Status quo**

67. The Corrections Act states that non-lethal weapons, including pepper spray, can be used in response to both active and passive resistance to a lawful order. The Act also provides safeguards that pepper spray can only be used where reasonably necessary in the circumstances. The Corrections Regulations do not contain these requirements, but are subject to the safeguards in the Act.

#### **Option Two – Amend the Regulations to state that non-lethal weapons must not be used where it constitutes more force than reasonably necessary**

68. This option would amend the Regulations to reiterate requirements that currently sit in the Corrections Act. Namely, that non-lethal weapons may not be used where that use of force is more than reasonably necessary in the circumstances.

69. This option would provide additional explicit assurance that the Regulations supporting the use of pepper spray are better aligned with international human rights guidance, because in cases of passive resistance where there was no threat of any imminent injury, harm, or destruction of property, it is unlikely that the use of pepper spray would be reasonably necessary.

#### **Option Three – Remove the use of pepper spray in cases of passive resistance**

70. This option would be to amend the Regulations to state that pepper spray cannot be used in cases of passive resistance. This option would give explicit assurance that is better aligned with human rights guidance, as pepper spray would no longer be used in cases of passive resistance.

#### **Option Four – Strengthen operational guidance on passive resistance**

71. This option would involve introducing more robust guidance on the use of pepper spray in cases of passive resistance. This could include a review of current training practices and the introduction of new training to better support staff to feel confident in the use of pepper spray.

## Stakeholder views on the options

72. Corrections has consulted with a number of agencies on the proposals outlined in this impact analysis. Agencies such as Ministry of Justice, Police, Ministry of Health, Oranga Tamariki, Te Puni Kōkiri and the Office for Disability Issues were broadly supportive of regulatory changes that would strengthen the framework around pepper spray use and support Hōkai Rangi.
73. The Office of the Ombudsman and the Human Rights Commission were consulted during all stages of developing this analysis and proposal, including prior to briefing the Minister on the issue. These agencies have a specific interest in this issue due to the human rights implications that arise from pepper spray use.
74. Both agencies recognised the difficult role of Corrections Officers and the need for Corrections to ensure staff have adequate access to a range of options to respond safely to situations in prison. The Human Rights Commission recommended a broad review of Corrections' use of force and pepper spray, including an assessment of use on Māori and women. This recommendation was supported by the Ombudsman and the Ministry for Women. Ongoing operational changes in response to these recommendations are discussed further in the implementation section of this paper, but are not part of the regulatory changes proposed in this paper.
75. The Office of the Ombudsman felt that the use of pepper spray in confined spaces, such as cells, required further consideration and may not be justifiable in terms of New Zealand's human rights obligations. They considered that Corrections should have mitigations in place when using pepper spray in confined spaces, such as ensuring staff are appropriately trained, access to health professionals and decontamination procedures, and appropriate reporting mechanisms. These mitigations are already in place. However, based on previous Ombudsman investigations, they are not confident that these mitigations go far enough.
76. The Ombudsman, the Human Rights Commission, the Ministry for Women and Te Puni Kōkiri highlighted the use of pepper spray in cases of passive resistance as an issue, as discussed in the problem definition section of this paper. The Ombudsman and Human Rights Commission did not agree with any proposed options for problem three, and said that pepper spray should be removed as an option of force in cases of passive resistance.
77. The Ministry of Health and Oranga Tamariki were unclear if the options outlined for problem three would address the concerns around international human rights. For example, Oranga Tamariki pointed out that s 83 of the Corrections Act should already prevent the misuse of pepper spray from occurring.
78. The Ministry of Justice and NZ Police commented on the practicality the solutions for problem two, highlighting that it may cause problems operationally for the prison manager or someone above to approve the authorisation of pepper spray at every use, particularly in planned situations which require a more robust response.

79. The Ministry for Women is not supportive of the proposed regulatory changes, and instead believes that issues should be addressed at the operational level.
80. The Office for Disability Issues (ODI) has suggested the introduction of disability responsiveness training to ensure that Corrections Officers are supported to understand how people with disabilities respond in stressful settings, such as those where force or pepper spray may be required. ODI also suggested that this training could include how to respond to people suffering from mental illness. This recommendation represents an operational change and is discussed further in the implementation section.
81. The Office of the Ombudsman and the Human Rights Commission recommended further consultation before proceeding with regulatory amendments, in particular with iwi groups. In response, Corrections has undertaken targeted consultation with the Wellness and Wellbeing Insights and Advisory Group (WWIAG), the Tangata Whenua Committee (TWC), the Māori Women's Welfare League (MWWL), the Corrections Association of New Zealand and the Public Service Association. The Ombudsman and the Human Rights Commission also suggested consulting with people in prison. However due to logistical issues this recommendation was not taken up. If these regulatory amendments are accepted, Corrections will consider consulting with people in prison during the evaluation and monitoring stage.
82. The WWIAG is a group made up of four internal Corrections members and 8 external, independent members who are experts on issues relating to the Corrections system (and includes two former Chief Ombudsmen). The feedback from this group was supportive of taking regulatory and operational change, noting that it was important that pepper spray use decreased and was used as a last resort.
83. One member of the Tangata Whenua Committee provided feedback on these regulatory proposals. They recognised the need for pepper spray to enable staff the means to be safe in a highly charged environment. Conversely, they also noted the need to ensure all those in care are not dehumanised, as is outlined in Hōkai Rangi. Corrections has an obligation to protect staff and support them in the complex decisions they have to make. They also noted that the regulatory and operational framework for pepper spray use needed to be one that supported Hōkai Rangi, as well as staff and people and prison, and their whānau. They emphasised the need to ensure that any regulatory changes were progressed alongside changes in the operational space. This, along with a supportive environment that fosters trust and teamwork, would enable staff to make appropriate decisions around the use of pepper spray.
84. The Corrections Association of New Zealand and the Public Service Association were provided material on the proposed changes and chose not to provide any substantive feedback.

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

| Criteria  |  |   |  |
|---|--|---|--|
| <p><b>Appropriate decision making:</b> does the option support operational decision-making that is transparent and provides sufficient assurance?</p> | <p><b>Alignment with the policy intent:</b> does the option ensure that the policy intent approved by the Minister and Cabinet is supported?</p> | <p><b>Safety:</b> does the option support the safety of staff and people in prison?</p> | <p><b>International human rights guidance:</b> does the option support Corrections to meet its international and domestic human rights guidance?</p> |

|            |    |   |
|------------|----|---|
|            | ++ | much better than doing nothing/the status quo/counterfactual  |
|            | +  | better than doing nothing/the status quo/counterfactual       |
| <b>Key</b> | 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   |

**Problem one: new aerosol delivery mechanisms could be introduced under current settings without Ministerial approval**

|  | Option One – Status quo | Option Two – Amend Regulations   | Option Three – Strengthen operational practice   |
|--|-------------------------|--|--|
| <b>Appropriate decision making</b>             | 0                       | <p style="text-align: center;">++</p> <p>New delivery mechanisms will need Cabinet approval and be assessed according to the requirements in s 85(3) of the Corrections Act to be authorised for use.</p>  | <p style="text-align: center;">+</p> <p>A clearer decision-making process for Corrections to take to authorise new delivery mechanisms will be implemented, but Cabinet approval will not be required.</p> |
| <b>Alignment with the policy intent</b>        | 0                       | <p style="text-align: center;">++</p> <p>The Regulations will better ensure their original policy intent as new delivery mechanisms that were not originally envisaged will not be introduced without new decisions being taken by Cabinet. Additionally, regulatory changes are more transparent and accessible to the public.</p>  | <p style="text-align: center;">+</p> <p>Stronger operational practice would give greater assurance about the safety of new delivery mechanisms but would not be as stringent as option one.</p>            |
| <b>Safety of staff and people in prison</b>    | 0                       | <p style="text-align: center;">++</p> <p>The risks and benefits of new delivery mechanisms will be considered by Cabinet to ensure no new mechanisms are introduced that are not compatible with the safe and lawful treatment of people in prison. Current delivery mechanisms will be maintained, which will allow staff to keep themselves and people in prison safe.</p> | <p style="text-align: center;">+</p> <p>Stronger operational practice would give greater assurance about the safety of new delivery mechanisms but would not be as stringent as option one.</p>            |
| <b>International and human rights guidance</b> | 0                       | <p style="text-align: center;">++</p> <p>Cabinet approval is more likely to ensure robust consideration of delivery mechanisms that comply with human rights guidance are introduced.</p>  | <p style="text-align: center;">+</p> <p>Stronger operational practice would give greater assurance about the safety of new delivery mechanisms but would not be as stringent as option one.</p>            |
| <b>Overall assessment</b>                      | 0                       | <p style="text-align: center;">++<br/>(recommended option)</p>   | <p style="text-align: center;">+</p>   |

**Problem two: decisions to authorise the use of pepper spray are not always being made at a high enough level of authority**

|   | <b>Option One – Status quo</b> | <b>Option Two – Prison manager or acting prison manager authorises the use of pepper spray</b>  | <b>Option Three – Prison manager plus another person must agree to authorise the use of pepper spray</b>   | <b>Option Four – Update operational guidance to state that only the prison manger can authorise pepper spray</b>  |
|---|--------------------------------|---|--|---|
| <b>Appropriate decision making</b>          | 0                              | ++<br>Provides a higher level of assurance around decision making than the status quo, as only the prison manager could authorise pepper spray. This would also ensure that decisions around planned use are made by someone not directly involved in the situation, giving a degree of separation between the incident and the decision-maker. | 0<br>Provides a higher level of assurance than the status quo or option one. However, this does not constitute appropriate decision making as it could prevent the authorisation of pepper spray when necessary at short notice. | +<br>Provides a higher level of assurance around decision making than the status quo, as only the prison manager could authorise pepper spray. This would also ensure that decisions around planned use are made by someone not directly involved in the situation, giving a degree of separation between the incident and the decision-maker. However, as this operational change would no longer be in line with what is said in the Regulations, it may be difficult to enforce and cause inconsistencies in the practice. |
| <b>Alignment with the policy intent</b>     | 0                              | +<br>Would strengthen the original policy intent that the prison manager must authorise pepper spray unless not practicable, by only enabling the prison manager or acting prison manager to authorise pepper spray.  | 0<br>While this option provides more oversight, it does not meet the policy intent of an appropriate balance between assurance of decision making and ability to make a decision quickly when needed.                            | +<br>Would strengthen the original policy intent that the prison manager must authorise pepper spray unless not practicable, by only enabling the prison manager or acting prison manager to authorise pepper spray. However, as this operational change would no longer be in line with what is said in the Regulations, it may be difficult to enforce and cause inconsistencies in the practice.   |
| <b>Safety of staff and people in prison</b> | 0                              | +<br>The prison manager is well placed to make decisions that support the safety of staff and people in prison.   | -<br>The requirement to have two people agree to authorise the planned use of pepper spray could be harmful to safety because timely   | 0<br>The prison manager is well placed to make decisions that support the safety of staff and people in prison. However, as this operational change would no longer be in line with what is said in the Regulations, it may be  |

|  |   |  |  |  |
|--|---|--|--|--|
|  |   |  | decision-making may not be possible.   | difficult to enforce and cause inconsistencies in practice, which could impact the safety of staff and people in prison.   |
| <b>International and human rights guidance</b> | 0 | <p style="text-align: center;">+</p> <p>While the status quo aligns with human rights guidance, only allowing the prison manager to authorise pepper spray will provide a higher level of assurance that appropriate decisions are made.</p> | <p style="text-align: center;">++</p> <p>While the status quo aligns with human rights guidance, requiring the prison manager and a second person to agree to authorise pepper spray will provide a higher level of assurance that appropriate decisions are made.</p> | <p style="text-align: center;">+</p> <p>While the status quo aligns with human rights guidance, only allowing the prison manager to authorise pepper spray will provide a higher level of assurance that appropriate decisions are made.</p> |
| <b>Overall assessment</b>                      | 0 | <p style="text-align: center;">++</p> <p>(recommended option)</p>  | 0  | <p style="text-align: center;">+</p>   |

**Problem three: there could be greater clarity on how pepper spray can be used in cases of passive resistance**

|   | Option One – Status quo | Option Two – Amend Regulations   | Option Three – Remove pepper spray for passive resistance   | Option Four – Strengthen operational guidance on passive resistance  |
|---|-------------------------|--|---|--|
| <b>Appropriate decision making</b>          | 0                       | <p style="text-align: center;">+</p> <p>Reflecting the requirement that non-lethal weapons must not be used where it constitutes more force than is reasonably necessary will provide some additional support on appropriate decision making about use of pepper spray where passive resistance is involved.</p> | <p style="text-align: center;">+</p> <p>Due to the difficulties in creating a clear definition of what does and does not constitute passive resistance in every case, this could create difficulties for staff to know in which situations they were authorised to use pepper spray. Staff need to be able to make decisions at pace to respond to volatile situations. There could also be situations where a person is passively resisting but the surrounding circumstances are such that the use of pepper spray is still necessary and justified to prevent harm and physical injury. An example would be if a person is blocking access to someone else who requires medical attention.</p> | <p style="text-align: center;">+</p> <p>Strengthening the operational guidance by ensuring that there is a robust framework to support the appropriate use of pepper spray, through new or improved training, will provide additional support on appropriate decision making about use of pepper spray where passive resistance is involved.</p> |
| <b>Alignment with the policy intent</b>     | 0                       | <p style="text-align: center;">+</p> <p>The policy intent of the legislation would be further clarified in Regulations that pepper spray, and other non-lethal weapons, can only be used where reasonably necessary.</p>   | <p style="text-align: center;">0</p> <p>Contradicts the original policy intent of the Act which states that use of force can be in response to both passive and active resistance, where reasonably necessary in the circumstances.</p>   | <p style="text-align: center;">+</p> <p>The policy intent of the legislation would be further clarified in operational guidance that pepper spray, and other non-lethal weapons, can only be used where reasonably necessary.</p>  |
| <b>Safety of staff and people in prison</b> | 0                       | <p style="text-align: center;">+</p> <p>This would clarify the status quo, that pepper spray must only be used where</p>   | <p style="text-align: center;">--</p> <p>Removing the ability for pepper spray to be used in cases involving passive resistance could lead to staff</p>   | <p style="text-align: center;">+</p> <p>This would clarify the status quo, that pepper spray must only be used where reasonably</p>  |



|  |   |   |   |  |
|--|---|---|---|--|
|  |   | reasonably necessary, and no more force than is necessary in the circumstances must be used.  | needing to use other types of force, or to situations that result in harm to staff or people in prison.   | necessary, and no more force than is necessary in the circumstances must be used.  |
| <b>International and human rights guidance</b> | 0 | <p style="text-align: center;">+</p> <p>This option strengthens the Regulatory framework to comply with human rights guidance by reiterating that non-lethal weapons may not be used where that use of force is more than reasonably necessary.</p> | <p style="text-align: center;">++</p> <p>This would ensure pepper spray is never used in situations where passive resistance is involved, which would be more strongly in alignment with international human rights guidance.</p> | <p style="text-align: center;">+</p> <p>Like the status quo, this option utilises operational training and guidance to ensure Corrections Officers use non-lethal weapons only when necessary, reasonable, and proportionate. Clear operational guidance would demonstrate how Corrections gives effect to their powers to use pepper spray. However, it does not strengthen the Regulatory framework.</p> |
| <b>Overall assessment</b>                      | 0 | <p style="text-align: center;">+</p> <p style="text-align: center;">(recommended option)</p>  | -   | <p style="text-align: center;">+</p> <p style="text-align: center;">(recommended option)</p>   |

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

### **Problem one: new aerosol delivery mechanisms could be introduced under current settings without Ministerial approval**

*Recommended option: amend the Regulations to specify delivery mechanisms*

85. In response to the first problem identified, option two is the recommended option, and would amend the Regulations to specify the delivery mechanisms that can be used for aerosol pepper spray, including which mechanisms can be used in spontaneous and planned incidents. This means that any new delivery mechanisms developed in future will require an amendment to the Regulations to authorise them for use.
86. This option would ensure appropriate decision making for the introduction of delivery mechanisms at a Cabinet level, complying with s 85(3) of the Corrections Act. The original policy intent of the Regulations will be maintained, as no new delivery mechanisms would be introduced that were not anticipated by the Minister when the Regulations were authorised, without Cabinet approval being sought for new policy decisions.
87. Current delivery mechanisms will be maintained, with appropriate scrutiny being applied to the introduction of any new delivery mechanisms in future, which will support the safety of staff and people in prison while ensuring Corrections is complying with human rights guidance. We think that this will address issues raised by stakeholders about the need for higher levels of assurance around the authorisation of pepper spray delivery mechanisms.

### **Problem two: decisions around authorising the use of pepper spray are not always being made at a high enough level of authority**

*Recommended option: only the prison manager can authorise pepper spray*

88. In response to the second problem, option two is the recommended option, which proposes that only the prison manager or acting prison manager be able to authorise the (initial) spontaneous and planned use of pepper spray. This option will not change operational practice for spontaneous incidents, as following initial authorisation from the prison manager to carry pepper spray, Corrections Officers use their discretion to make decisions around use on a daily basis. Consideration is not being given to requiring approvals in cases of spontaneous use because it is not practical to require approval in those situations.
89. This option will be more pertinent to planned incidents, which can often result from volatile situations that require a more comprehensive response that enables time for planning. This option will allow decisions to be made by someone not directly involved in a planned incident, providing a degree of separation in the decision-making process. This will more closely reflect the original policy intent of the Regulations, by ensuring that decisions are being made by an appropriately senior person.

90. The safety of staff and people in prison, and compliance with human rights, will be provided greater assurance by having decisions made only by the prison manager, rather than by any other trained staff member. This will also ensure consistent decision making, particularly in planned incidents, as the prison manager will be making all decisions relating to the authorisation of pepper spray.

**Problem three: there could be greater clarity on how pepper spray can be used in cases of passive resistance**

*Recommended option: amend the Regulations to reiterate that non-lethal weapons must not be used where it constitutes more force than reasonably necessary and update operational guidance*

91. In response to the third problem, option two and four are the recommended options. This change would provide some mitigation against inappropriate use of pepper spray, without removing the ability to use pepper spray in circumstances that could fall within the spectrum of passive resistance.

92. Option four is already in the process of being implemented through work around the use of force review and investigation into new training. We are therefore recommending both a regulatory and operational option to address problem three more effectively.

93. We recommend this approach because, depending on the interpretation of the term 'passive resistance', the full removal of pepper spray in response to passive resistance would limit the ability of Corrections Officers to pragmatically and urgently respond to violent and volatile situations. There could also be situations where a person is passively resisting but the surrounding circumstances are such that the use of pepper spray is still necessary and justified to prevent harm and physical injury.

94. Reiterating in Regulations that non-lethal weapons must not be used where that use of force is more than reasonably necessary, while also incorporating operational changes, will create consistency between the Act and the Regulations and address questions raised by stakeholders and support the use of pepper spray in a way that better aligns with human rights.

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

| Affected groups<br>(identify)   | Comment<br><i>nature of cost or benefit (e.g. ongoing, one-off), evidence and assumption (e.g. compliance rates), risks.</i>   | Impact<br><i>\$m present value where appropriate, for monetised impacts; high, medium or low for non-monetised impacts.</i> | Evidence<br><b>Certainty</b><br><i>High, medium, or low, and explain reasoning in comment column.</i> |
|---|--|---|---|
| <b>Additional costs of the preferred options compared to taking no action</b> |  |   |   |
| Government policy staff and decision-makers                                   | New delivery mechanisms developed in future will require additional changes to the Regulations in order to be authorised for use. This would be a one-off cost whenever new delivery mechanisms need to be introduced. | Low (>\$0.50m)  | Medium, based on staff salary and estimated time to complete the work.                                |
| Department of Corrections National Office staff                               | Time to update operational guidance and receive sign off from the Executive Leadership Team. This would be a one-off cost whenever new delivery mechanisms need to be introduced.                                      | Low (>\$0.25m)  | Medium, based on staff salary and estimated time to complete the work.                                |
| Corrections Officers  | Learning the new process that requires the approval from prison managers.  | Low   | Medium, based on this not being a full change in process, but a narrowing of the existing process.    |
| Prison managers   | Approving all authorising of pepper spray  | Low   | Medium, based on this not being a full change in process, but a narrowing of the existing process.    |
| People in prison  | N/A  | N/A   | N/A   |
| <b>Total monetised costs</b>  | Cost of future change.   | \$0.75m   |   |
| <b>Non-monetised costs</b>  | Cost of staff time and operational updates.  | Low   |   |

| Additional benefits of the preferred options compared to taking no action |   |     |  |
|---|---|-----|--|
| Department of Corrections National Office staff                           | Increased assurance that pepper spray will only be used where reasonable, necessary, and proportionate.<br>Assurance about the introduction of new delivery mechanisms. | Low | Medium, based on this not being a full change in process, but a strengthening of the existing process. |
| Corrections Officer   | Their decision-making is better supported by a stronger regulatory framework and improved operational guidance.   | Low | Medium, based on this not being a full change in process, but a strengthening of the existing process. |
| Prison managers   | Increased oversight of decision making around the use of pepper spray that supports safety and is better aligned with human rights guidance.                            | Low | Medium, based on this not being a full change in process, but a strengthening of the existing process. |
| People in prison  | Increased assurance that pepper spray will only be used where reasonable, necessary, and proportionate.<br>Assurance about the introduction of new delivery mechanisms. | Low | Medium, based on this not being a full change in process, but a strengthening of the existing process. |
| <b>Non-monetised benefits</b>   | Increased assurance of appropriate decision making.   | Low |  |

## Section 3: Delivering an option

### How will the new arrangements be implemented?

95. Subject to approval, the regulatory amendments proposed in this paper will be made by the end of 2021.
96. The first recommendation, to specify delivery mechanisms in Regulations, will not require any immediate changes to implement as it is a confirmation of the status quo. However, any new delivery mechanisms that are developed in future will require regulatory amendments to be authorised for use in custodial environments.
97. The second recommendation will be implemented through a change to operational guidance and information that is provided to custodial staff, to advise them that the prison manager or acting prison manager must authorise the use of pepper spray. This would be a change from allowing other trained staff members to authorise pepper spray. The prison director would be supported in this change through updated practice guidance.
98. The third change is also a strengthening of the status quo. It would reinforce in Regulations the existing requirement in the Corrections Act that non-lethal weapons may not be used where it would constitute a use of force greater than reasonably necessary. Operational guidance will also promptly reviewed to ensure that this requirement is reflected.
99. These regulatory changes represent a small part of ongoing operational work, which is taking place to ensure the appropriate use of pepper spray. This includes:
  - Considering implementing further training to support a culture of continuous improvement. Further training could involve educating Corrections Officers on human rights, unconscious bias, disability responsiveness, mental illness, and trauma informed approaches.
  - Reviewing operational guidance to ensure it provides staff with the best support possible to carry out their duties.
  - A review of use of force reporting mechanisms found several issues with the process for reporting and reviewing the use of pepper spray. This has led to recommendations for improvements to the process that are being implemented.
  - Improvements on how women in prison are managed, such as integrating gender responsive policies that are customised to women and considerate of trauma-informed approaches.
100. Stakeholders highlighted the need for clear guidance and were generally supportive of further operational guidance. In one case, this included the suggestion that pepper spray training take place more than once a year. Stakeholders were supportive of reviewing use of force reporting mechanisms, with the Ombudsman and Human Rights Commission highlighting the need for Corrections to identify and address “current shortcomings.”
101. One stakeholder emphasised the need for a culture that fosters an environment of trust, between staff themselves but also between staff and people in prison. They highlighted that relationship building is a key part of managing the dangerous situations that often arise in the prison context.

102. Decisions about operational changes will be made in 2021 and any changes, such as additional training for staff, will be rolled out in 2022.

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

103. To complement existing monitoring functions, one year following implementation of the regulatory changes, Corrections will evaluate the use of pepper spray to understand what impact the regulatory changes have had. This evaluation would consider whether the rate of use of pepper spray has changed, for example whether requiring the prison manager to issue pepper spray has had an impact on how it is used. This would also identify if further regulatory changes are needed.

104. Monitoring and evaluation provisions already exist for the use of pepper spray:

- Use of force review mechanisms are intended to enable any issues to be identified and lessons learned will be implemented. This review process is being reviewed and improved as noted above.
- The Office of the Ombudsman has a statutory function to examine the conditions and treatment of people in prisons and in the custody of Corrections.

105. We will consult with the Office of the Ombudsman on this evaluation, given their statutory function to monitor places of detention. The evaluation could include gathering the views of custodial staff and people in prison, to understand what impact they feel the changes have had. Additionally, Corrections will consider consulting with other stakeholders during the evaluation process, such as talking to people in prison about their experiences.

106. If the results of this evaluation show unexpected consequences, further options for change could be considered.

**Appendix one: key legislative and operational requirements for pepper spray use**

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



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|---|--|
|   | <ul style="list-style-type: none"> <li>• Further information on training guidance for use of force is laid out below. Corrections Officers are trained using the TEN-R process. See Appendix two</li> </ul> <p><b>Procedures for use</b></p> <ul style="list-style-type: none"> <li>• Prior to both planned and spontaneous use, staff must consider whether other options would resolve the situation safely. They also need to consider whether force is reasonable, necessary, and proportionate in the circumstances. If the situation can be solved using a lower level tactical option, pepper spray must not be used.</li> <li>• Prior to planned use of pepper spray, staff must seek prior authorisation from the prison director, or a trained staff member if the prison director is unavailable. Additionally, a decontamination area should be set up with health staff close by. Staff must check whether the person has any health conditions that may cause an adverse reaction to pepper spray. This includes cardiac and respiratory conditions, allergies, pregnancy, or long-term steroid use.</li> </ul> <p><b>Requirements after pepper spray use</b></p> <ul style="list-style-type: none"> <li>• As soon as reasonably practicable, staff must check the person’s breathing and then follow decontamination procedures. A person who has been exposed to pepper spray must not be left lying face down with their hands restrained behind them. The person must be seen by a member of the health team as soon as reasonably practicable, but within three hours. The person must be interviewed within three hours of the incident to identify any other support needs.</li> <li>• Additional information on post-incident response is detailed below.</li> </ul> |
| <p><b>Health services provide medical support when needed</b></p> | <p>Corrections’ Health services teams have three roles in the use of pepper spray, which are:</p> <ul style="list-style-type: none"> <li>• to provide relevant health information on prisoners to custodial staff before planned use</li> <li>• to assess whether medical intervention is required after pepper spray use and to provide treatment, including after hours</li> <li>• to provide emergency health care to custodial staff if required.</li> </ul> <p>All health assessments prior to the planned use of pepper spray are recorded in the Patient Management System by Corrections Health services. This would include any reasons not to proceed with use.</p> <p>Corrections’ Health services policies outline how these services will be provided, and say that the potential impacts of pepper spray include:</p>  |

- intense irritation to the nose and eyes, and the potential for injury to the cornea
- coughing and shortness of breath
- burning and swelling of the skin
- nausea and vomiting
- in rare cases, people may have a cardiac or respiratory effect.

Health staff assess the person who has been exposed to pepper spray following the decontamination process. They will check for extended periods of respiratory distress, as well as pulse and blood pressure. Where the person's breathing is severely affected medical attention must be given precedence over relocating them from the area. All treatment provided to a person who has been exposed to pepper spray must be documented in their clinical records.

**Appendix two: TEN-R Operational Risk Assessment Tool**

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

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

- In remaining instances, prompt action may be required to prevent further loss or injury. Even in active situations, there must be calculated thinking and decision making supported by robust training and experience.

## Appendix three: key components of incident response

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

### IR.02.06 Spontaneous use of force

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

### IR.05.04 Incident debrief meetings

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

### IR.05.07 Post Incident Review

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

### IR.05.01 – Initial Post Control and Restraint

- Officer in charge of the incident must immediately advise the prison director, on-call officer or supervision officer immediately following incidents where use of force has been used
  - IR.05.Form.03 Report completed
- The prison director is informed of internal (prison) incident details and must approve the initial follow-up actions (e.g. immediate needs and placement).
- Contact Health Centre (Assessment as soon as practicable and within 3 hours)
- IR.05.Form.01 Debrief report (to CSM within 3 days/72 Hours)
- IR.05.Form.02 Notice of the use of mechanical restraints (report to VJ as soon as practicable)
- IR.05.Form.03 Report on the use of force – use of non-lethal weapon (to be sent to UofF@corrections.govt.nz as soon as practicable)
- OBC & CCTV footage to National Office within 3 working days of the incident
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### IR.05.05 Post incident debrief

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

### IR.05.08 Use of Force Register

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

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