



## Office of Hon Judith Collins

MP for Papakura  
Minister of Corrections  
Minister of Police

19 October 2016

Ti Lamusse  
fyi-request-4174-f95e3290@requests.fyi.org.nz

Dear Ti Lamusse,

I refer to your email of 22 June 2016, which was transferred in part from Corrections, requesting *All current policy documents, advice to the Minister and Chief Executive, proposed amendments to policy and policy working documents pertaining to Lesbian, Gay, Bisexual, Transgender and Intersex Prisoners since 2008*. Of note, I was not Minister of Corrections at the time these briefings were submitted.

Your request has been considered in accordance with the Official Information Act 1982 (OIA).

I can advise that two documents fall within the scope of your request, and I am releasing them to you in their entirety. These documents are:

- *Placement of Transgender Prisoners*, dated 27 February 2013
- *Regulations of Submission to Cabinet Legislation Committee*, dated 5 December 2013.

If you have any concerns with this response you may raise them with the Office of the Ombudsman. The contact details are: Office of the Ombudsman, PO Box 10152, Wellington 6143.

Yours sincerely



Hon Judith Collins  
Minister of Corrections



27 February 2013

Minister of Corrections

## Placement of Transgender Prisoners

### Purpose

- 1 This paper advises you of recent work within the Department on the placement of transgender prisoners. It seeks your agreement to develop a more flexible approach.

### Current situation

- 2 A small number of prisoners are "transgender", meaning that their gender identity (sense of being, typically, either male or female) does not align with their biological sex. The Department's approach to placement has been based on whether the prisoner has male or female genitalia. Currently transgender prisoners who have completed gender reassignment surgery must be placed in accommodation that accords with their new gender (regulation 190 of the Corrections Regulations 2005). Transgender prisoners who have not completed gender reassignment surgery are accommodated according to their birth sex, regardless of whether other changes have been made, such as a change of the gender recorded on their birth certificate.

### Changing approaches to the placement of transgender prisoners

- 3 Historically, many comparable jurisdictions have adopted an approach that is similar to New Zealand's, with transgender prisoners placed solely on the basis of their physical characteristics. However, there has been growing concern internationally that this approach to placement is discriminatory and places transgender prisoners at risk of sexual assault. On the basis of such concerns, a United Nations handbook published in 2009 argues that "it is crucial that decisions on allocation [of transgender prisoners] are taken on a case-by-case

B2274

basis, with safety considerations and the wishes of the individual being paramount.”<sup>1</sup>

- 4 For similar reasons, a number of jurisdictions comparable to New Zealand have updated their approaches to placement. In 2011, England and Wales issued detailed instructions on the treatment of transgender prisoners. With regard to placement, the instructions have two main elements:
  - a *In most cases prisoners must be located according to their gender as recognised under UK law*
  - b *If a prisoner requests location in the estate opposite to the gender which is recognised under UK law, a case conference must be convened to consider the matter.*
- 5 Over a similar period, Australian jurisdictions have also moved from determining placement on the basis of physical characteristics to a more flexible approach. Current policy documents relating to transgender prisoners were obtained from New South Wales, Victoria, Queensland, and ACT. None of these Australian jurisdictions make the completion of gender reassignment surgery a prerequisite for placement in accordance with self-identified gender. Rather, there is discretion to place transgender prisoners either in accordance with their self-identified gender or their biological sex, and specification of factors that should guide the decision. These factors include such matters as the prisoner’s preference, the safety and welfare of the prisoner, and the safety and welfare of other prisoners.
- 6 Furthermore, current New Zealand Police instructions on the management of transgender people in their custody emphasise self-identity rather than biological sex as the basis for decisions about placement. The instructions include a list of categories of prisoners who must be separated from other prisoners, including “transgender prisoners, where identified or made known.” The instruction is: “place them with the gender they identify with”.<sup>2</sup>

#### **Decision to give further consideration**

- 7 The Office of the Ombudsmen’s Investigation into the provision, access and availability of prisoner health services, raised concerns about the treatment of transgender prisoners. The report stated that “transgender prisoners are particularly vulnerable to abuse and/or sexual assault, in part because of the general policy of housing them according to their birth gender, regardless of their current appearance or gender identity.” It recommended “that the Department review its policy regarding the placement of transgender prisoners. For [male to female] transgender prisoners who have not completed full sexual

<sup>1</sup> United Nations Office on Drugs and Crime *Handbook on the treatment of prisoners with special needs* (2009), p 116.

<sup>2</sup> *Police manual, chapter on managing prisoners*, p 18.

.....reassignment; consideration should be given to their placement in a women's prison, if it is their wish to do so".<sup>3</sup>

- 8 The Department's initial response to the final report, which was presented to Parliament on 16 February 2012, was that it would not be appropriate to change its policy, essentially because of the risks that could arise in placing a person who is still biologically male into a women's prison. This was reflected in the response to an oral Parliamentary Question of 29 February 2012.
- 9 These responses reflected earlier thinking within the Department, and the fact that a case for change had not yet been articulated. However, there was a growing understanding that the Department should give further, more in-depth consideration to policy on the placement of transgender prisoners. This was timely in view of developments in similar jurisdictions. It was also consistent with the Department's efforts to improve public safety and reduce re-offending by introducing a more offender-centric approach that is tailored to the needs of individual prisoners.
- 10 Accordingly, when the Chief Ombudsman made further representations to the Department on this issue in a letter dated 13 March 2012, the Chief Executive replied on 3 April 2012 undertaking to "consider further if our policy is appropriate to provide for the safety, care and rehabilitation of our vulnerable prisoners". This reconsideration has now been completed.

### Balancing the risks

- 11 There are well-documented risks to male-to-female transgender prisoners of being housed with male prisoners. A 2007 survey of prisoners in California found that 59 percent of a sample of transgender prisoners reported having been sexually assaulted during their incarceration history, compared with 4.4 percent of a sample of male prisoners.<sup>4</sup>
- 12 Placing male-to-female transgender prisoners who are anatomically male could also involve risks. The main risks that have been identified are of sexual assaults against female prisoners, pregnancies, and that female prisoners may not accept the transgender prisoner, based on perceptions that their privacy or safety has been breached.
- 13 We have located two documented cases, one in the United States and one in Canada, of female prisoners objecting to the presence of a male-to-female transgender prisoner. In both of these cases, the prisoner concerned had been convicted for sexual violence against a female. However, while the risk of sexual assaults cannot be discounted, we did not locate any documented case of sexual assault where transgender prisoners have been placed in women's prisons.

<sup>3</sup> Chief Ombudsman Beverley Wakem and Ombudsman David McGee *Investigation of the Department of Corrections in relation to the provision, access and availability of prisoner health services*, Office of the Ombudsmen (2012) pp 105 & 107.

<sup>4</sup> Jenness, V. *Transgender inmates in California's prisons: an empirical study of a vulnerable population*, Presented at the California Department of Corrections and Rehabilitation Wardens' meeting (April 2009).

- 14 We are proposing a revised approach that significantly reduces risks to the safety and welfare of transgender prisoners arising from their placement, while also mitigating any potential risks to the other prisoners with whom they will be housed. Consistent with the Department's overall direction in offender management, it involves the guided exercise of professional judgement, not just reliance on rules.

### Proposed revision of New Zealand policy

- 15 The proposed approach is broadly similar to that of England and Wales, but adapted to the New Zealand legal environment. It has two elements:
- a. In general, prisoners should be accommodated in accordance with the sex recorded on their birth certificate. This includes transgender prisoners who have met the statutory criteria to have their birth certificate changed to record a sex different from that assigned at birth.
  - b. Prisoners may apply to the Chief Executive of the Department to be placed in accommodation that does not accord with the sex recorded on their birth certificate. The Chief Executive would determine such applications after considering a range of relevant factors. These factors could include:
    - whether the prisoner has lived as their nominated gender<sup>5</sup> and, if so, for what period of time
    - whether the prisoner intends to live permanently as their nominated gender
    - expert advice including, where available, advice from the prisoner's treating physician
    - whether the prisoner has undergone, or is undergoing, medical and/or surgical treatment to conform to the physical characteristics of the nominated gender
    - any other matters raised by the prisoner in support of their application
    - in relation to each placement option:
      - any risk that the prisoner may pose to the safety of other prisoners and the security of the prison, based on the nature of their offending and other relevant factors
      - any risk that other prisoners may pose to the safety of the prisoner
      - whether it is likely that the prisoner will need to be subject to restrictive management measures, for safety or other reasons

<sup>5</sup> The term "nominated gender" means the gender that accords with the accommodation in which the prisoner wishes to be placed.

the impact on the prisoner's rehabilitation including, where relevant, the availability of special treatment programmes.

by CEO in consultation with Chief Custodial Advisor and Chief Medical Officer.

- 16 The Department's view is that these decisions would be made on delegated authority, by the Chief Custodial Adviser. The expertise of the decision-maker, and the range of factors he is required to consider, should minimise the likelihood of making inappropriate placement decisions and mitigate any risks associated with the proposed approach. For example, if a prisoner claims to be transitioning from a male-to-female identity, but cannot provide evidence of having lived as their nominated gender, and is not receiving hormone treatment, then they would be unlikely to be placed in a women's prison under the above criteria. Similarly, where the applicant had committed serious sexual offences against female victims, placement in a women's prison may not be appropriate, both for safety reasons and because the prisoner may need to attend rehabilitation programmes that are only available in men's prisons.

is not appropriate under law at all!

### Regulatory Implications

- 17 The Department could adopt a somewhat more flexible approach without any amendment to regulations. However, there would be some legal risk in doing so, because the current regulations only explicitly deal with those transgender prisoners who have completed gender reassignment surgery. Therefore, the Department's preference is to amend the current Regulation 190 so that it provides clarity and better enables the approach we wish to adopt.
- 18 Amendments to the Corrections Regulations 2005 will be needed to give full effect to the Corrections Amendment Bill, which is about to receive its third reading. Provided that policy approval could be obtained without significant delay, an amendment dealing with transgender prisoners could be consolidated with those amendments.

### Next steps

- 19 If you agree, we will draft a Cabinet paper seeking policy approval for amendments to the Regulations relating to placement of transgender prisoners, and circulate it to relevant Government agencies for comment. Our aim would be to obtain policy approval in March 2013, and to have the regulations made in May 2013.

### Recommendations

20 It is recommended that you:

- a) agree that, where a transgender prisoner has had their birth certificate changed to record a sex different from that assigned to them at birth, they should generally be accommodated in accordance with the revised certificate.
- b) agree that a transgender prisoner may apply to the Chief Executive to be held in accommodation that does not accord

as long as this is a family court process. AT  
YES/NO  
AT  
YES/NO

with the sex recorded on their birth certificate, and that such applications be determined after considering relevant factors.

At  
 YES /  NO

c) note that the factors to be considered by the Chief Executive could include:

- whether the prisoner has lived as their nominated gender and, if so, for what period of time
- whether the prisoner intends to live permanently as their nominated gender
- expert advice including, where available, advice from the prisoner's treating physician
- whether the prisoner has undergone, or is undergoing, medical and/or surgical treatment to conform to the physical characteristics of the nominated gender
- any other matters raised by the prisoner in support of their application
- In relation to each placement option:

- any risk that the prisoner may pose to the safety of other prisoners and the security of the prison, based on the nature of their offending and other relevant factors

I think this should explicitly state it cannot happen if serious sexual offences are involved. At.

- any risk that other prisoners may pose to the safety of the prisoner

- whether it is likely that the prisoner will need to be subject to restrictive management measures, for safety or other reasons

- the impact on the prisoner's rehabilitation including, where relevant, the availability of special treatment programmes.

d) note that, to minimise legal risk, the Corrections Regulations 2005 should be amended to better enable the approach outlined in recommendations a) and b).

At.  
 YES /  NO

- e) agree that the Department draft a Cabinet paper seeking policy approval for amendments to the Regulations relating to the placement of transgender prisoners, and that we circulate the draft paper to relevant Government agencies for comment.

At  
**YES / NO**

*Jo Field*

Jo Field  
General Manager  
Service Development

*Anne Tolley*

Hon Anne Tolley  
Minister of Corrections

Date signed:

11/3/23

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Note 2 changes to  
commentary on Page  
5 re.  
a) Authority to make decision  
b) Inappropriate placement  
At.





5 December 2013

Minister of Corrections

B2476

## **Regulations for Submission to Cabinet Legislation Committee**

### **Purpose**

- 1 This paper provides you with two Cabinet Legislation Committee papers for submission to Cabinet office, which seek approval to make three sets of regulations. One paper seeks approval to make the Corrections Amendment Regulations (No 2) 2013, which deal with the placement of transgender and intersex prisoners. The other paper seeks approval to make the Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013, which amend forms and are consequential on the Administration of Community Sentences and Orders Act 2013. Drafts of these three sets of regulations are attached.

### **Corrections Amendment Regulations (No 2) 2013**

- 2 In September 2013, Cabinet gave policy approval for amendments to the Corrections Regulations 2005 relating, among other matters, to the placement of transgender prisoners. You recently advised that you wished to see regulations on the placement of transgender prisoners made this year. To achieve this, we have given these regulations (now the Corrections Amendment Regulations (No 2) 2013) priority over other amendments we have instructed Parliamentary Counsel to draft.
- 3 If, as anticipated, the regulations are made on 11 December 2013, we propose 10 February 2014 as the commencement date to allow sufficient time after the making of these regulations to establish a robust application process and to ensure that staff and affected prisoners are properly informed of the new provisions.

### **Sentencing Amendment Regulations 2013 and Parole Amendment Regulations 2013**

- 4 In the schedules to the Sentencing and Parole Regulations, forms are prescribed for issuing to offenders when they have a sentence imposed or on their release from prison. These forms are a record for the offender of information about their sentence or order and their responsibilities under it.

- 5 The Administration of Community Sentences and Orders Bill was passed on 22 October 2013, with its substantive provisions coming into force on 22 January 2014. These provisions amend the Sentencing Act 2002 and the Parole Act 2002 in ways that affect the content of the forms prescribed by the Sentencing and Parole Regulations. For example, forms prescribed by the Sentencing Regulations 2002 need to allow for the possibility that the sentence does not have an immediate start date because it has been deferred under new section 20A of the Sentencing Act 2002.
- 6 To ensure the accuracy of information provided to offenders at sentencing and on release from prison, minor changes to forms prescribed by the Sentencing and Parole Regulations are necessary. These changes need to come into force on 22 January 2014 with the associated provisions of the Administration of Community Sentences and Orders Act.

#### Next steps

- 7 Subject to any feedback you have on the attached papers and the draft amendments to the Corrections, Sentencing and Parole Regulations, they will be considered by the Cabinet Legislation Committee on Wednesday 11 December 2013. We understand the Committee will be given 'power to act' in order to ratify its decisions on behalf of Cabinet. All three regulations can then be submitted to the Executive Council, which is scheduled to meet on the same day. This will enable the regulations to come into force in accordance with their commencement provisions (that is, 10 February 2014 for the Corrections Amendment Regulations and 22 January 2014 for the Sentencing and Parole Amendment Regulations).
- 8 Parliamentary Counsel Office will finalise all three sets of regulations and submit them to Cabinet Office. They will not materially differ from the attached drafts.
- 9 We will liaise with your office to ensure that officials are present for the Cabinet Legislation Committee meeting if required.

#### Recommendations

10 It is recommended that you:

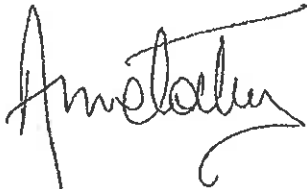
- |   |          |
|---|----------|
| a) <b>Note</b> that the draft Corrections Amendment Regulations (No 2) 2013 give effect to Cabinet decisions to introduce a more humane and flexible approach to the placement of transgender prisoners, and will come into force on Monday 10 February 2014. | YES / NO |
| b) <b>Note</b> that amendments to the Sentencing Regulations 2002 and the Parole Regulations 2002 are made necessary by provisions in the Administration of Community Sentences and Orders Act 2013 that come into force on 22 January 2014.                  | YES / NO |

- c) **Agree**, subject to any changes you might request, to lodge the two attached Cabinet papers at Cabinet Office by 10:00 am Monday 9 December 2013 for consideration by the Cabinet Legislation Committee on Wednesday 11 December 2013.

YES / ~~NO~~



Jo Field  
General Manager Service Development



Hon Anne Tolley  
Minister of Corrections

Date signed:

5/12/13

RELEASED UNDER THE  
OFFICIAL INFORMATION ACT

Chair  
Cabinet Legislation Committee

## **Sentencing Amendment Regulations 2013 and Parole Amendment Regulations 2013 for submission to the Executive Council**

### **Proposal**

- 1 This paper seeks approval for the submission to the Executive Council of amendments to the Sentencing Regulations 2002 and the Parole Regulations 2002. These amendments are consequential to the recent passage of the Administration of Community Sentences and Orders Act 2013, and must come into force with provisions of that Act on 22 January 2014.

### **Policy**

#### *Forms prescribed by the Sentencing and Parole Regulations*

- 2 The Sentencing Regulations 2002 (Sentencing Regulations) and the Parole Regulations 2002 (Parole Regulations) prescribe forms for the purposes of the Sentencing Act 2002 (Sentencing Act) and the Parole Act 2002 (Parole Act). The forms prescribed by the Sentencing Regulations are issued to offenders by the courts as orders to serve a non-custodial sentence, providing them with information about the sentence and their responsibilities under that sentence. The forms prescribed by the Parole Regulations are issued to prisoners on their release from prison, providing them with information about the order of their release and their responsibilities, including conditions of release, under that order.

#### *Changes consequential to the Administration of Community Sentences and Orders Act 2013*

- 3 In late 2010, the Cabinet Domestic Policy Committee agreed to a series of policy proposals to remove legislative barriers to the effective and efficient administration of community sentences and orders in the community [*DOM Mins (10) 11/2 and (10) 11/4, confirmed by CAB Min (10) 26/6 refer*].
- 4 In October 2011, the Administration of Community Sentences and Orders Bill was introduced, pursuant to these policy approvals, amending the Bail Act 2000, the Sentencing Act, and the Parole Act. In April 2012, some further policy changes were approved by Cabinet for inclusion in the Bill during the Select Committee process [*Min (12) 4/4, confirmed by CAB Min (12) 11/2 refers*]. The Bill was

passed on 22 October 2013, with its substantive provisions coming into force on 22 January 2014.

- 5 Some amendments to the Sentencing Act and Parole Act will affect the content of forms prescribed by the Sentencing and Parole Regulations. For example, offenders subject to a condition that confines them to an address will be required to remain within 'an area defined by a probation officer'. To ensure the information contained in prescribed forms is consistent with the law as amended by the Administration of Community Sentences and Orders Act 2013 on 22 January 2014, the Sentencing and Parole Regulations need to be amended.

#### **Timing and 28-day rule**

- 6 It is proposed that these Regulations come into force on 22 January 2014, which is the date the associated provisions of the Administration of Community Sentences and Orders Act 2013 come into force. This commencement date complies with the 28-day rule, provided the amendment regulations are made and gazetted this year.
- 7 I recommend that these regulations be made on Wednesday 11 December 2013, gazetted on Thursday 12 December 2013 and come into force on Wednesday 22 January 2014.

#### **Compliance**

- 8 The Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013 are compatible with the:
  - principles of the Treaty of Waitangi
  - rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
  - principles and guidelines set out in the Privacy Act 1993
  - relevant international standards and obligations
  - Legislation Advisory Committee: Guidelines on Process and Content of Legislation.

#### **Regulations Review Committee**

- 9 There are no grounds for the Regulations Review Committee to draw the Corrections Amendment Regulations 2013 to the attention of the House under Standing Order 315.

#### **Certification by Parliamentary Counsel**

- 10 The Parliamentary Counsel Office has certified that the Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013 are in order for submission to Cabinet.

## Regulatory Impact Analysis

- 11 A Regulatory Impact Statement was prepared and circulated to other agencies for consultation when Cabinet approval was originally sought for the policy changes resulting in the Administration of Community Sentences and Orders Act 2013.

### Publicity

- 12 No publicity is planned for the making of these regulations.

### Consultation

- 13 The Ministry of Justice and New Zealand Police have been consulted on this paper and draft regulations. The Department of the Prime Minister and Cabinet was informed.

### Recommendations

- 14 It is recommended that the Cabinet Legislation Committee:
- 1 **note** that the Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013 are consequential to the Administration of Community Sentences and Orders Act 2013 and therefore fall within 2010 and 2012 policy approvals;
  - 2 **authorise** the submission to the Executive Council of the Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013 and, having been given 'power to act', confirm this authorisation on behalf of Cabinet;
  - 3 **agree** that the Sentencing Amendment Regulations 2013 and the Parole Amendment Regulations 2013 be made on Wednesday 11 December 2013, gazetted on Thursday 12 December 2013, and come into force on Wednesday 22 January 2014, in compliance with the 28-day rule.

**Hon Anne Tolley**  
**Minister of Corrections**

Date signed:

\_\_\_\_/\_\_\_\_/\_\_\_\_

**Parole Amendment Regulations  
2013**

Governor-General

**Order in Council**

At Wellington this                      day of                      2013

Present:  
in Council

Pursuant to section 74 of the Parole Act 2002, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following regulations.

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## Regulations

- 1 **Title**  
These regulations are the Parole Amendment Regulations 2013.
- 2 **Commencement**  
These regulations come into force on 22 January 2014.
- 3 **Principal regulations**  
These regulations amend the Parole Regulations 2002 (the principal regulations).
- 4 **Schedule, form 2 amended**
  - (1) In the Schedule, form 2, section headed “Conditions of release”, first paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.
  - (2) In the Schedule, form 2, section headed “Conditions of release”, second paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.
- 5 **Schedule, form 3 amended**
  - (1) In the Schedule, form 3, section headed “Conditions of release”, first paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.
  - (2) In the Schedule, form 3, section headed “Conditions of release”, second paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.
- 6 **Schedule, form 4 amended**
  - (1) In the Schedule, form 4, section headed “Conditions of release”, first paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.
  - (2) In the Schedule, form 4, section headed “Conditions of release”, second paragraph (a), after “[address]”, insert “and remain within the area defined by the probation officer”.



Parole Amendment Regulations 2013

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Clerk of the Executive Council.

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**Explanatory note**

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations, which come into force on 22 January 2014, amend the Parole Regulations 2002, to adjust forms 2, 3, and 4 to account for changes made to the Parole Act 2002 by the Administration of Community Sentences and Orders Act 2013. The amendments clarify that an offender who is required to stay at a specified address must remain within the area defined by the offender's probation officer.

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Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These regulations are administered by the Department of Corrections.

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RELEASED UNDER THE OFFICIAL INFORMATION ACT

**Sentencing Amendment  
Regulations 2013**

Governor-General

**Order in Council**

At Wellington this                      day of                      2013

Present:  
in Council

Pursuant to section 147 of the Sentencing Act 2002, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following regulations.

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## Regulations

- 1 Title**  
These regulations are the Sentencing Amendment Regulations 2013.
- 2 Commencement**  
These regulations come into force on 22 January 2014.
- 3 Principal regulations**  
These regulations amend the Sentencing Regulations 2002 (the **principal regulations**).
- 4 Schedule, form 1 amended**
- (1) In the Schedule, form 1, replace “The start date of the sentence is the date of this order.” with:  
“\*The start date of the sentence is the date of this order.  
“\*The start date of the sentence is the date you finish serving your current sentence of [*sentence type*] (including any post-detention conditions), because your sentence of supervision has been deferred under section 20A(2)(b) of the Sentencing Act 2002.  
\*Delete whichever is inapplicable.
- (2) In the Schedule, form 1, third paragraph, replace “after your sentence of supervision was imposed” with “after the start date of your sentence of supervision”.
- (3) In the Schedule, form 1, paragraph (a), replace “after the sentence is imposed” with “after the start date of the sentence”.
- 5 Schedule, form 2 amended**
- (1) In the Schedule, form 2, replace “The start date of the sentence is the date of this order.” with:  
“\*The start date of the sentence is the date of this order.  
“\*The start date of the sentence is the date you finish serving your current sentence of [*sentence type*] (including any post-detention conditions), because your sentence of intensive supervision has been deferred under section 20A(2)(b) of the Sentencing Act 2002.

\*Delete whichever is inapplicable.

- (2) In the Schedule, form 2, third paragraph, replace “after your sentence of intensive supervision was imposed” with “after the start date of your sentence of intensive supervision”.
- (3) In the Schedule, form 2, paragraph (a), replace “after the sentence is imposed” with “after the start date of the sentence”.

**6 Schedule, form 3 amended**

- (1) In the Schedule, form 3, fourth paragraph, replace “section 57A” with “section 20A(2)(b) or 57A”.
- (2) In the Schedule, form 3, replace all the text from “\*The Court has authorised” to “you are directed to do so.” with:  
“You must report to a probation officer in the probation area in which you reside as soon as practicable, and not later than 72 hours, after the start date of your sentence of community work.  
“During the course of your sentence, you must comply with the terms of the sentence, including that you must report to a probation officer at any time you are directed to do so.”
- (3) In the Schedule, form 3, section headed “Notes:”, replace “a Judge may permit a probation officer to direct” with “a probation officer may direct”.

**7 Schedule, form 4 amended**

- (1) In the Schedule, form 4, replace all the text from “The start date of the sentence” to “specified below: [*specify curfew details*].” with:  
“\*The start date of the sentence is the date of this order.  
“\*The start date of the sentence is the date of the expiry of the sentence on which this order is cumulative.  
“\*The start date of the sentence is the date you finish serving your current sentence of [*sentence type*] (including any post-detention conditions), because your sentence of community detention has been deferred under section 20A(2)(b) of the Sentencing Act 2002.

\*Delete whichever are inapplicable.

"You must report to a probation officer in the probation area in which you reside as soon as practicable, and not later than 24 hours, after the start date of your sentence of community detention. If the 24-hour period ends on a weekend or public holiday, you must report to a probation officer in the probation area in which you reside on the next working day.

"The sentence includes a curfew period or periods starting from [*curfew start date*], to be spent at the curfew address, as specified: [*specify curfew details*].

- (2) In the Schedule, form 4, section headed "**Variation or cancellation of sentence**", after "if one of the other grounds for variation or cancellation in that section applies.", insert:

"If the curfew address becomes unsuitable, the Chief Executive of the Department of Corrections may approve an alternative curfew address under section 69JA of the Sentencing Act 2002.
- (3) In the Schedule, form 4, paragraph (c), replace "after the sentence is imposed," with "after the start date of the sentence,".
- (4) In the Schedule, form 4, after paragraph (e), insert:

(ea) the offender must, if required to submit to the electronic monitoring of his or her sentence, remain during the curfew period within the area defined by the probation officer:

**8 Schedule, form 6 amended**

- (1) In the Schedule, form 6, after the paragraph ending "The start date of your sentence is [*deferred start date*].", insert:

"\*The start date of your sentence is the date you finish serving your current sentence of [*sentence type*], because your sentence of home detention has been deferred under section 20A(2)(b) of the Sentencing Act 2002.
- (2) In the Schedule, form 6, section headed "**Variation or cancellation of sentence**", after "if one of the other grounds for variation or cancellation in that section applies.", insert:

"If the home detention residence becomes unsuitable, the Chief Executive of the Department of Corrections may approve an alternative home detention residence under section 80FA of the Sentencing Act 2002.

- (3) In the Schedule, form 6, section headed “**Standard conditions of sentence of home detention**”, after paragraph (d), insert:
- “(da) the offender must, if required to submit to the electronic monitoring of his or her sentence, remain within the area defined by the probation officer:

Clerk of the Executive Council.

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**Explanatory note**

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations, which come into force on 22 January 2014, amend the Sentencing Regulations 2002 to adjust forms 1, 2, 3, 4, and 6 to account for changes made to the Sentencing Act 2002 by the Administration of Community Sentences and Orders Act 2013.

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Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*.

These regulations are administered by the Department of Corrections.

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Chair  
Cabinet Legislation Committee

## Corrections Amendment Regulations (No 2) 2013 for submission to the Executive Council

### Proposal

- 1 This paper seeks approval for the submission to the Executive Council of amendments to the Corrections Regulations 2005. The Corrections Amendment Regulations (No 2) 2013 introduce a revised approach to the placement of transgender prisoners, which provides greater flexibility in determining the most appropriate accommodation option for these prisoners.

### Policy

- 2 Currently, the Corrections Regulations 2005 require transgender prisoners to be accommodated according to their sex at birth unless they have completed gender reassignment surgery. Internationally, there has been a recent trend away from placing transgender prisoners solely on the basis of whether they have male or female genitalia. For example, England and Wales determine placement on a case-by-case basis, taking into account a range of relevant factors, and Australian jurisdictions are adopting a similar policy.
- 3 On 23 September 2013, Cabinet agreed to align New Zealand's policy to these international jurisdictions [SOC Min (13) 21/5 confirmed by CAB Min (13) 33/5 refers]. Under this policy, transgender prisoners would be accommodated according to the sex recorded on their birth certificate (including prisoners who have been granted a Family Court declaration amending their sex details), unless they have successfully applied to the Chief Executive of the Department of Corrections to be otherwise placed. The Chief Executive would determine these placement applications based on a range of factors specified in the attached amendments to the Corrections Regulations 2005. Prisoners would be disqualified from making a placement application if they are serving, or have completed in the last 7 years, a sentence for a serious sexual offence against a person of the same gender as the prisoners they wish to be co-located with, or are facing charges for such an offence.

### Timing and 28-day rule

- 4 It is proposed that the Corrections Amendment Regulations (No 2) 2013 come into force on Monday 10 February 2014. This delayed commencement date complies

with the 28-day rule and is necessary to establish the new operational processes associated with the revised placement approach, given that much of the first 28 days falls over the Christmas and New Year period.

- 5 I recommend that the Corrections Amendment Regulations (No 2) 2013 be made on Wednesday 11 December 2013, gazetted on Thursday 12 December 2013 and come into force on Monday 10 February 2014.

### **Compliance**

- 6 The Corrections Amendment Regulations (No 2) 2013 are compatible with the:
- principles of the Treaty of Waitangi
  - rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993
  - principles and guidelines set out in the Privacy Act 1993
  - relevant international standards and obligations
  - Legislation Advisory Committee: Guidelines on Process and Content of Legislation.

### **Regulations Review Committee**

- 7 There are no grounds for the Regulations Review Committee to draw the Corrections Amendment Regulations (No 2) 2013 to the attention of the House under Standing Order 315.

### **Certification by Parliamentary Counsel**

- 8 The Parliamentary Counsel Office has certified that the Corrections Amendment Regulations (No 2) 2013 are in order for submission to Cabinet.

### **Regulatory Impact Analysis**

- 9 A Regulatory Impact Statement was prepared and circulated to other agencies for consultation when Cabinet approval was sought for the policy change on 18 September 2013.

### **Publicity**

- 10 I intend to make a statement following the making of these regulations.

### **Consultation**

- 11 The Ministry of Justice, Police, Te Puni Kōkiri, Ministry of Women's Affairs, Department of Internal Affairs, State Services Commission and Treasury were consulted on this paper and a draft of these regulations. The Department of the Prime Minister and Cabinet was informed.



## Recommendations

12 It is recommended that the Cabinet Legislation Committee:

- 1 **note** that the Corrections Amendment Regulations (No 2) 2013 introduce a revised approach to the placement of transgender prisoners, for which policy approval was given on 23 September 2013;
- 2 **authorise** the submission to the Executive Council of the Corrections Amendment Regulations (No 2) 2013 and, having been given 'power to act', confirm this authorisation on behalf of Cabinet;
- 3 **agree** that the Corrections Amendment Regulations (No 2) 2013 be made on Wednesday 11 December 2013, gazetted on Thursday 12 December 2013 and come into force on Monday 10 February 2014, in compliance with the 28-day rule.

Hon Anne Tolley  
Minister of Corrections

Date signed:

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RELEASED UNDER THE OFFICIAL INFORMATION ACT

**Corrections Amendment  
Regulations (No 2) 2013**

Governor-General

**Order in Council**

At Wellington this                      day of                      2013

Present:  
in Council

Pursuant to section 200 of the Corrections Act 2004, His Excellency the Governor-General, acting on the advice and with the consent of the Executive Council, makes the following regulations.

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Corrections Amendment Regulations  
(No 2) 2013

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65E Recognition of transgender prisoners placed in accommodation before 10 February 2014  
Regulation 190 and cross-heading revoked

**Regulations**

**1 Title**

These regulations are the Corrections Amendment Regulations (No 2) 2013.

**2 Commencement**

These regulations come into force on 10 February 2014.

**3 Principal regulations**

These regulations amend the Corrections Regulations 2005 (the principal regulations).

**4 Regulation 65 replaced (Female and male quarters)**

Replace regulation 65 with:

**“65 Accommodation of male and female prisoners**

**“(1) Male and female prisoners must be detained—**

**“(a) in separate prisons; or**

**“(b) within the same prison in separate quarters that are secured by different locking systems.**

**“(2) For the purpose of this regulation, whether a prisoner is recognised as male or female is determined by the sex of the prisoner as recorded in the official records available to the department.**

**“(B) Subclause (2) applies unless—**

**“(a) the prisoner supplies his or her birth certificate and the birth certificate records a different sex to the sex recorded in official records available to the department (in which case the prisoner must be recognised in accordance with his or her birth certificate); or**

**“(b) the chief executive makes a determination as to the prisoner’s sex under regulation 65B (in which case the prisoner must be recognised in accordance with the determination).**

**“65A Interpretation of regulations 65B to 65E**

In regulations 65B to 65E—

“**nominated sex** means the preferred sex nominated by a prisoner—

- “(a) whose birth certificate records their sex as indeterminate or contains no information at all as to the prisoner’s sex; or
- “(b) who has applied for a determination as to sex under regulation 65C

“**notional single sentence** has the same meaning as in section 4(1) of the Parole Act 2002

“**sentence expiry date** has the same meaning as in section 4(1) of the Parole Act 2002

“**serious sexual offence** means a sexual offence under Part 7 of the Crimes Act 1961 that is punishable by a period of imprisonment of 7 years or more.

**“65B Chief executive may determine sex of prisoners for accommodation purposes**

“(1) The chief executive must determine the sex of a prisoner for the purpose of regulation 65 if—

- “(a) the prisoner supplies his or her birth certificate and the birth certificate—
  - “(i) records that the prisoner is a person of indeterminate sex; or
  - “(ii) contains no information at all as to the prisoner’s sex; or
- “(b) the prisoner has applied under regulation 65C to be recognised as being of a different sex to the sex recorded in the official records available to the department; or
- “(c) the department has no official record of the prisoner’s sex.

“(2) A determination under subclause (1) must be made as soon as is reasonably practicable after the relevant birth certificate or application is received.

“(3) Before making a determination, the chief executive must consider—

- “(a) the prisoner’s nominated sex (if any); and

- “(b) any evidence provided by the prisoner about whether, and, if so, for how long, the prisoner has lived as a person of the nominated sex; and
- “(c) any evidence provided by the prisoner about whether the prisoner intends to live permanently as a person of the nominated sex; and
- “(d) the advice of—
  - “(i) a senior employee of the department with responsibility for custodial services; and
  - “(ii) a senior employee of the department with responsibility for health services for prisoners; and
  - “(iii) any other person that the chief executive considers has relevant expertise; and
- “(e) any advice from a medical practitioner who has met with the prisoner; and
- “(f) any evidence provided by the prisoner about whether the prisoner has undergone, or is undergoing, medical treatment to acquire a physical conformation that accords with the gender identity of a person of the nominated sex; and
- “(g) the safety and well-being of the prisoner; and
- “(h) the safety and well-being of other prisoners (of either sex) with whom the prisoner may be accommodated; and
- “(i) the security of the prison; and
- “(j) the availability of any restrictive management measures that the chief executive considers may be necessary for the prisoner; and
- “(k) the likely effect of any determination on the prisoner’s rehabilitation, including the prisoner’s access to special treatment programmes; and
- “(l) any other matters raised by the prisoner.

**“65C Prisoner may apply for determination as to sex**

- “(1) A prisoner may apply to the chief executive to be recognised, for the purpose of regulation 65, as being of a different sex to the sex recorded in the official records available to the department.

- “(2) However, a prisoner may not make an application under sub-clause (1) if the prisoner—
- “(a) is serving a sentence of imprisonment for a serious sexual offence against a person of the prisoner’s nominated sex; or
  - “(b) is remanded in custody charged with, or awaiting sentence for, a serious sexual offence against a person of the prisoner’s nominated sex; or
  - “(c) has served a sentence of imprisonment for a serious sexual offence against a person of the prisoner’s nominated sex, and the sentence expiry date for that sentence was within the last 7 years.

**“65D Expiry of determination made under regulation 65B**

- “(1) A determination made in respect of a prisoner under regulation 65B(2) applies until the sentence expiry date of the sentence of imprisonment—
- “(a) being served by the prisoner at the time the determination is made; or
  - “(b) that is the last sentence of a notional single sentence of which the sentence being served by the prisoner at the time the determination is made forms part.
- “(2) However, if a determination was made as a result of a prisoner applying under regulation 65C to be recognised as being of a different sex to the sex recorded in the official records available to the department, the determination expires immediately if—
- “(a) the prisoner requests to be recognised in accordance with the sex recorded in the official records available to the department; or
  - “(b) the prisoner is charged with a serious sexual offence against a person of the same sex as the prisoner’s nominated sex; or
  - “(c) the chief executive determines, on reasonable grounds, that 1 or more of the factors on which the determination was based has changed to the extent that the prisoner would be more appropriately recognised in accordance with the sex recorded on the prisoner’s birth certificate.

**“65E Recognition of transgender prisoners placed in accommodation before 10 February 2014**

- “(1) This regulation applies to a transgender prisoner who, before 10 February 2014, had completed gender reassignment surgery and been placed by the chief executive in accommodation according with the prisoner’s new gender.
- “(2) For the purpose of regulation 65, a prisoner to whom this regulation applies must be treated as a person of the same sex as the persons with whom the prisoner has been accommodated even if that sex is different to the sex recorded on the prisoner’s birth certificate.
- “(3) This regulation applies ~~until the sentence expiry date of the sentence of imprisonment~~
- “(a) being served by the prisoner at the time the prisoner was placed in accommodation according with their new gender; or
- “(b) that is the last sentence of a notional single sentence of which the sentence being served by the prisoner at the time the prisoner was placed in accommodation according with their new gender forms part.”

**5 Regulation 190 and cross-heading revoked**

Revoke regulation 190 and the cross-heading above regulation 190.

Clerk of the Executive Council.

**Explanatory note**

*This note is not part of the regulations, but is intended to indicate their general effect.*

These regulations, which come into force on 10 February 2014, amend the Corrections Regulations 2005 (the **principal regulations**) to establish a process for determining whether individual prisoners should be recognised as male or female for accommodation purposes.

The regulations provide for a prisoner to be accommodated in accordance with the sex recorded on the prisoner's birth certificate. However, if the prisoner's birth certificate records their sex as indeterminate, or if the prisoner applies to the chief executive for recognition as a person of the opposite sex to the sex recorded on their birth certificate, the chief executive must determine the sex of the prisoner for accommodation purposes.

Prisoners who are charged with, or are who are serving (or have recently served) sentences for, serious sexual offences against a person of their nominated sex are prohibited from applying to be recognised as a person of that nominated sex. However, any other prisoner may apply.

The regulations also revoke regulation 190 of the principal regulations, which required transgender prisoners who had completed gender reassignment surgery to be placed in accommodation according with their new gender. However, the regulations require that any prisoner placed in accommodation under regulation 190 its revocation must be treated for accommodation purposes as a person of the same sex as the prisoners with whom the prisoner has been accommodated.

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Issued under the authority of the Legislation Act 2012.

Date of notification in *Gazette*:

These regulations are administered by the Department of Corrections.

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