

Hon Kelvin Davis
Minister of Corrections

Corrections Amendment Bill
16 October 2019

These documents have been proactively released in accordance with Cabinet Office Circular CO (18) 4.

Some information has been withheld on the basis that it would not be released if requested under the Official Information Act 1982. Where that is the case, the relevant section of the OIA has been noted.

Documents	Comment
<p>Considering Changes To The Corrections System Following The Attack On Christchurch Mosques <i>Cabinet paper</i> Minister of Corrections</p>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none">• 6(c) - as releasing the information would be likely to prejudice the maintenance of the law• 9(2)(f)(iv) - maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials• 9(2)(h) - maintain legal professional privilege• 9(2)(g)(i) - maintain the effective conduct of public affairs through the free and frank expression of opinions
<p>Considering Changes To The Corrections System Following The Attack On Christchurch Mosques <i>Minute of Decision</i> Cabinet Office</p>	<p>Some information has been withheld in accordance with the following sections of the OIA:</p> <ul style="list-style-type: none">• 9(2)(f)(iv) - maintain the constitutional conventions for the time being which protect the confidentiality of advice tendered by Ministers of the Crown and officials

In Confidence

Office of the Minister of Corrections

Chair, Cabinet Social Wellbeing Committee

CONSIDERING CHANGES TO THE CORRECTIONS SYSTEM FOLLOWING THE ATTACK ON CHRISTCHURCH MOSQUES

Proposal

1. This paper seeks approval to amend the Corrections Act 2004 (the Act) to strengthen the Department of Corrections' (Corrections) powers to withhold mail to and from prisoners.

Executive Summary

2. Following the attack on the Christchurch mosques, Corrections has identified two areas – prisoner mail and the 9(2)(f)(iv) – where provisions in the Act do not appear to be sufficient to manage emerging issues.
3. I previously proposed amending the Act to give Corrections explicit authority to withhold mail where it is likely to promote or encourage hostility towards any group of persons on the grounds listed in section 21 of the Human Rights Act.
4. In light of recent events involving prisoner mail, I am concerned that this change would not go far enough to strengthen the Act.
5. As a result, this paper seeks approval to amend the Act to:
 - 5.1. lower the threshold that must be met before mail can be withheld under the existing grounds
 - 5.2. provide Corrections with an explicit legislative authority to withhold mail sent to and from prisoners that may directly or indirectly encourage or promote hostility towards any groups of people on the grounds set out in section 21 of the Human Rights Act
 - 5.3. broaden an existing withholding ground to enable mail to be withheld on the grounds that it threatens or intimidates any person
 - 5.4. introduce additional considerations that Corrections must take into account when managing prisoner mail that reference:
 - the need to consider the interests of the victims

- the need to consider the potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material online
 - the potential for messages to be disseminated through coded references that would otherwise be withheld.
6. As recent events have demonstrated, the need to ensure that Corrections' powers to withhold mail are fit for purpose is an issue that needs to be addressed quickly.
 7. I propose that legislative provisions to give effect to this change be incorporated into the Corrections Amendment Bill which is already before the House, by way of a Supplementary Order Paper.

Background

8. Following the attack on the Christchurch mosques, I asked my officials to review the current legislative and policy settings for the corrections system to ensure that Corrections is well placed to manage the accused, and to respond to other individuals under its management who may share some similar characteristics.
9. As a result of this work, two areas were identified as requiring legislative amendments. These involve:
 - 9.1. **prisoner mail** – specifically the need to withhold mail that promotes or encourages hostility towards identified groups
 - 9.2. [REDACTED] 9(2)(f)(iv) [REDACTED]
10. This paper seeks agreement to amend the Act to address the first issue.
11. It also advises Cabinet about work I have commissioned to address the second issue. I intend to report back to Cabinet with proposals related to the 9(2)(f)(iv) [REDACTED]

Prisoner communications

12. It is important for prisoners to have contact with the outside world, as connection with family and friends can assist in their rehabilitation and eventual reintegration into the community. Further, under the New Zealand Bill of Rights Act 1990, all persons (including prisoners) have the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind and in any form — subject only to such limitations as can be reasonably justified in a free and democratic society.
13. Under the Act, every prisoner is allowed as a minimum entitlement:
 - 13.1. at least one outgoing telephone call of up to five minutes duration per week
 - 13.2. to send and receive as much mail as the prisoner wishes

- 13.3. to receive at least one private visitor each week for a minimum duration of 30 minutes.
14. In practice, Corrections generally provides prisoners with greater access to the outside world than the minimum levels required by legislation.
15. Corrections is permitted to withhold mail sent into and out of prison, where it is likely to:
 - 15.1. threaten or intimidate a person it is being sent to by a prisoner
 - 15.2. endanger the safety or welfare of someone
 - 15.3. pose a threat to the security of the prison
 - 15.4. promote or encourage the commission of an offence, or facilitate the possible commission of an offence
 - 15.5. prejudice the maintenance of the law
 - 15.6. breach an order or direction of any court or constitute contempt of court.
16. Access to other forms of communication is also subject to some limitations. For example:
 - 16.1. Corrections can refuse permission for someone to visit a prisoner if this will not maintain family and social relationships that promote the prisoner's rehabilitation and re-integration.
 - 16.2. Corrections is permitted to monitor all phone calls, except those placed to Members of Parliament, lawyers, and other people who have a role in providing independent monitoring and oversight of the corrections system.

Current provisions for withholding mail are not robust enough to manage emerging issues

17. Following the attack on the Christchurch mosques, attention has moved to consider how activities that seek to foster and promote hostility towards certain groups can be addressed. This is of particular relevance to Corrections, because it is responsible for managing people who can hold extreme views, including the person accused of the March 15 attack.
18. While it is hard to give exact numbers, Corrections believes there are at least 150 people in prison who hold extreme views (including, but not limited to, white supremacists). Corrections also believe that it is managing more than 50 people in the community with these sorts of views, who may return to prison at some stage.
19. A heightened awareness of behaviour that promotes hostility towards certain groups in society, coupled with greater action by enforcement agencies, is also expected to result in more people coming under Corrections' management that have extreme views.

20. Experience from overseas has shown that individuals with extreme views in prison may seek to communicate these views in an attempt to influence (and potentially radicalise) others, both in prison and in the community. These individuals can also become a focal point for sympathetic individuals and groups in the community, who may seek to draw attention to and amplify their views.
21. While Corrections has powers to withhold mail sent to and from prisoners (on the grounds described in paragraph 15):
 - 21.1. the threshold for withholding and whether indirect consequences are covered as well as direct consequences, could be clarified
 - 21.2. the grounds for withholding do not recognise the harm of material that promotes or encourages hostility towards certain groups
 - 21.3. the ability to withhold on the basis of threatening or intimidating only applies to the recipient of mail from prison, for example, there is no recognition that mail can be used to threaten or intimidate third parties
 - 21.4. the additional considerations to be taken into account in deciding whether to withhold mail do not address important factors such as victim interests, online publication, and the use of coded references.
22. Amending the withholding provisions in this way also lead to greater legal clarity as to what may be withheld, due to making this more explicit.
23. I am concerned that if the legislative provisions related to withholding mail are left as they are, there is a risk that:
 - 23.1. material that promotes or encourages hostility against particular groups will be sent from prison into the community (including publication online), from the community into prison, and between prisoners
 - 23.2. material that promotes or encourages hostility against particular groups may contribute to violence in prison, putting the safety of prisoners and staff at risk
 - 23.3. people in prison and/or in the community may be radicalised by such material
 - 23.4. individuals or groups in society may be harmed and/or revictimised and that such harm may be amplified by, for example, material sent to a sympathetic contact outside of the prison being subsequently published online.

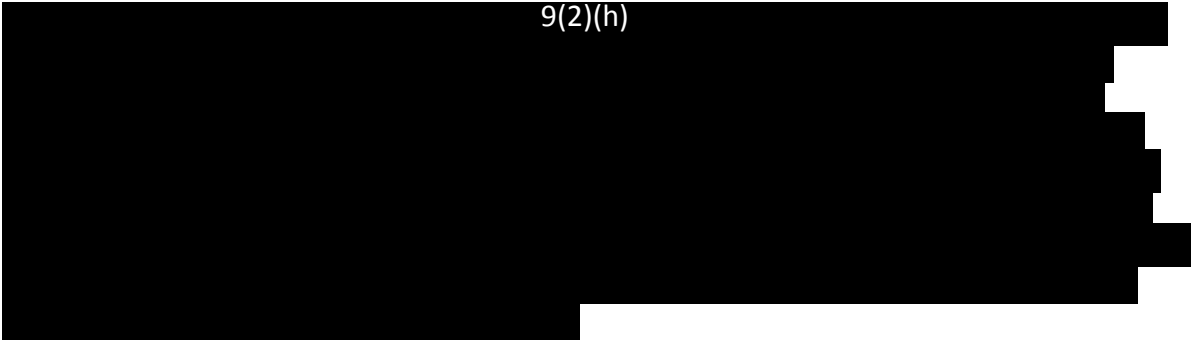
Proposal

24. I previously proposed amending the Act to give Corrections explicit legislative authority to withhold mail that is likely to promote or encourage hostility towards any groups of people on the grounds listed in section 21 of the Human Rights Act.¹

¹ Prohibited grounds of discrimination listed in section 21 include religious belief, ethical belief, colour, race, ethnic or national origins, and sexual orientation.

25. This amendment would give Corrections the ability to withhold mail that could cause serious harm if disseminated, but which may not fall within the current statutory criteria.
26. In light of recent events, I do not believe that this proposal goes far enough to strengthen Corrections powers to prevent the dissemination of material that seeks to promote hostility towards certain groups in society.
27. As a result, I am also seeking to amend the Act to:
 - 27.1. lower the threshold that must be met for withholding mail
 - 27.2. broaden an existing withholding ground to enable mail to be withheld on the grounds that it threatens or intimidates any person
 - 27.3. introduce additional considerations that Corrections must take into account when managing prisoner mail that reference:
 - the need to consider the interests of the victims
 - the need to consider the potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material online
 - the potential for messages to be disseminated through coded references.

Lowering the threshold for withholding mail

28. Currently, a prison manager can withhold mail if they believe on reasonable grounds that it *is likely to* lead to the harms referred to under section 108(1)(d).
29. I propose lowering the threshold that must be met to withhold mail so that a prison manager only needs to believe on reasonable grounds that the mail *may directly or indirectly* result in one of these harms arising.
30. This change reflects the fact that the harms identified under section 108(1)(d) may arise as a direct or indirect consequence of correspondence being sent (e.g. publication of material online).
31. 9(2)(h)
32. Making this change will lower the threshold for withholding mail on all grounds listed under section 108(1)(d), including giving Corrections a broad authority to withhold

mail that may directly or indirectly promote or encourage hostility towards any group of people on the grounds listed in section 21 Human Rights Act.

Broaden an existing ground for withholding mail that threatens or intimidates

33. I propose making an amendment to section 108(1)(d)(i) of the Act. Currently, only mail that is sent from a prisoner can be withheld if it is likely to threaten or intimidate a person.
34. I believe this ground should be amended so that mail which seeks to threaten or intimidate any person can be withheld, regardless of whether the person is the intended recipient of the correspondence. This change will also broaden the scope of this ground so it applies to mail that is sent both to and by prisoners.
35. This proposal was included in the previous paper but has been strengthened.

Introducing additional considerations that Corrections must take into account when managing prisoner mail

36. I also propose amending section 104 of the Act to introduce additional considerations that Corrections must take into account when managing prisoner mail.
37. Currently, section 104 requires Corrections to consider the following:
 - 37.1. the need to protect the privacy of prisoners and their correspondents
 - 37.2. the benefits to prisoners of maintaining contact with persons and organisations outside of prison
 - 37.3. the need to maintain the security and order of the prison
 - 37.4. the need to prevent the commission of offences
 - 37.5. the need to ensure the safety of any person
 - 37.6. the need to prevent the entry of unauthorised items into the prison.
38. To ensure that this provision reflects wider changes that have occurred since the Corrections Act was introduced in 2004 (for example, the rise of social media), I am seeking to add additional considerations to section 104 that reference:
 - 38.1. the need to consider the interests of the victims (this is referenced in the principles for the Corrections Act, but could also be explicitly mentioned here)
 - 38.2. the need to consider the potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material online
 - 38.3. the potential for messages to be disseminated through coded references, for example, there are particular phrases that have particular meanings among certain groups that, on their face, may appear benign to others. Those

meanings may be harmful to members of those groups and or may be used to incite criminal activity among others.

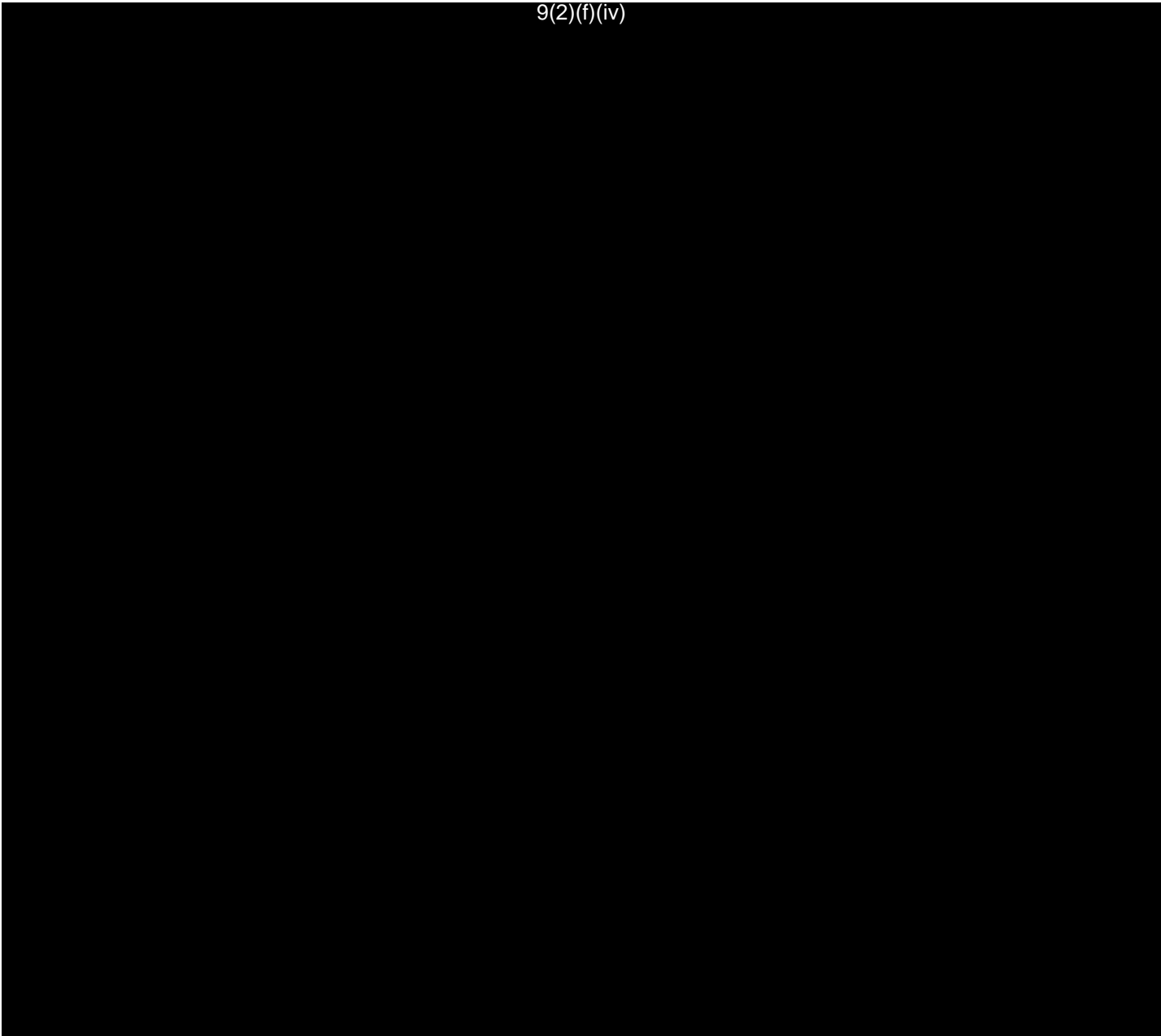
Progressing through a Supplementary Order Paper

39. As recent events have demonstrated, the need to ensure that Corrections' powers to withhold mail are fit for purpose is an issue that needs to be addressed quickly.

40. 6(c)


41. I therefore propose that legislative provisions to give effect to this change be incorporated into the Corrections Amendment Bill which is already before the House, by way of a Supplementary Order Paper.

9(2)(f)(iv)



Consultation

Paper considered at Social Wellbeing Committee on 21 August 2019

51. The following agencies were consulted during the development of the initial proposal that was considered at the Social Wellbeing Committee on 21 August 2019: Ministry of Justice, New Zealand Police, Crown Law Office and Treasury.
52. The Office of the Ombudsman and the Human Rights Commission were also consulted. The Office of the Ombudsman had no comment, and the Human Rights Commission advised that a Bill of Rights Act assessment should be obtained.
53. The Department of Prime Minister and Cabinet and the Parliamentary Counsel Office were informed.

Paper to be considered at Social Wellbeing Committee on 28 August 2019

54.

9(2)(h)

55. The Ministry of Justice were also consulted and have provided feedback on the paper.
56. Given time pressures, it was not possible to consult more widely on this paper. The following agencies were informed of this paper: Ministry of Justice, New Zealand Police, Treasury, the Department of Prime Minister and Cabinet and the Parliamentary Counsel Office.

Financial Implications

57. Strengthening Corrections' powers to withhold mail is not expected to directly increase costs, as Corrections' staff already check prisoner mail. The costs associated with developing additional guidance and training for staff regarding the proposed provision is likely to be minimal and will be met from within Corrections' baseline funding.
58. Given recent events, I am considering whether Corrections is likely to require additional resource to allow for a greater proportion of mail to be checked.

Legislative Implications

59. There is an opportunity to progress these proposals through the Corrections Amendment Bill, which is currently before the House.
60. Following policy approval, a Supplementary Order Paper will be required to give effect to the proposal in this paper.

Impact Analysis

61. A Regulatory Impact Assessment has been prepared and is attached to this Cabinet paper. This analysis is an updated version of a Regulatory Impact Analysis developed to 15 August, and provided to Cabinet Social Wellbeing Committee on 21 August.

62. 9(2)(g)(i)

Human Rights

63. As the proposed change will be incorporated into the Corrections Amendment Bill through a Supplementary Order Paper, the Attorney-General will not have considered whether the proposals are consistent with the New Zealand Bill of Rights Act.

64. The Attorney-General has instructed officials from the Ministry of Justice, with support from Crown Law, to vet any proposed Supplementary Order Paper(s) amending the Corrections Amendment Bill for consistency with the Bill of Rights Act.

Possible limitations on rights affirmed by the Bill of Rights Act

65. The proposals to strengthen Corrections powers to withhold mail could be a significant limitation on the right to freedom of expression in the New Zealand Bill of Rights Act. The following rights may also be engaged by the proposal:

65.1. Section 19 – Freedom from discrimination

65.2. Section 21 – Right to be secure from unreasonable search and seizure

66. However, I consider the limitations may be justifiable:

66.1. to ensure that Corrections upholds its responsibility to protect public safety (both domestically and internationally) and the safety of prisoners

66.2. to ensure that Corrections upholds its responsibility to promote the rehabilitation and reintegration of people in prison

66.3. to ensure that views which seek to promote or encourage hostility towards certain groups are not publicly amplified or glorified. This will help to ensure the safety and wellbeing of the community and people in prison – i.e. those who are likely to be the target of such views and people who have previously been subject to harm and may be re-victimised

66.4. to protect victims from being re-traumatised generally.

Gender Implications

67. This proposal does not have any significant gender implications.
68. It may, however, provide some benefits for women in prison and in the community, as the proposed change would allow for mail to be withheld where it is likely to promote or encourage hostility towards women, as sex is recognised as a prohibited ground of discrimination under section 21 of the Human Rights Act.

Disability Perspective

69. This proposal does not have significant implications for people with disabilities.
70. It may, however, provide some benefits for people with disabilities, as the proposed change would allow for mail to be withheld where it is likely to promote or encourage hostility towards people with disabilities, as disability is recognised as a prohibited ground of discrimination under section 21 of the Human Rights Act.

Proactive Release

71. I intend to proactively release this Cabinet paper with redactions, given the sensitive nature of the material contained within, in accordance with the Official Information Act 1982.

Recommendations

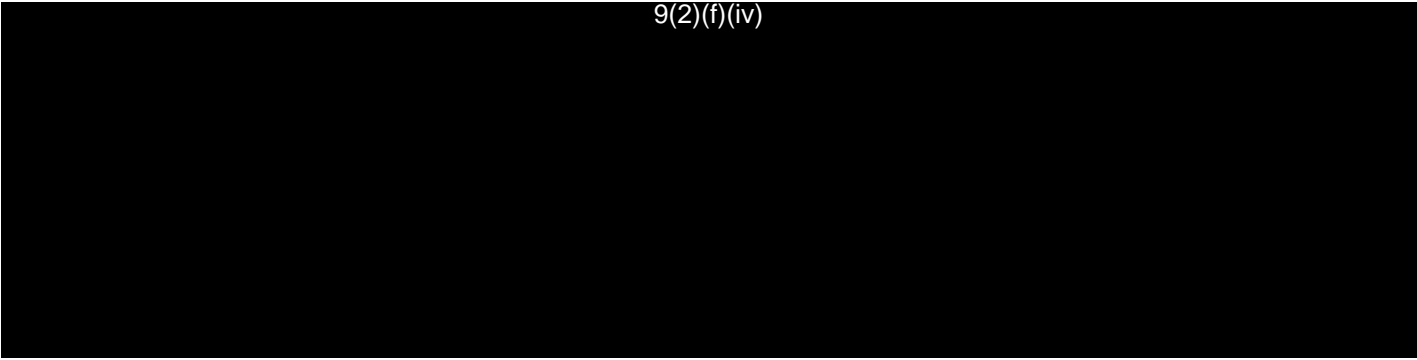
The Minister of Corrections recommends that the Committee:

Prisoner mail

1. **note** that the Corrections Act 2004 does not provide an explicit authority for the Department of Corrections to withhold mail that seeks to promote or encourage hostility towards certain groups
2. **note** that if the Department of Corrections withholds such mail without legislative support, this could be successfully challenged in court, attracting attention to these views, and potentially resulting in the Department of Corrections being required to pay compensation
3. **agree** to lower the threshold that must be met to withhold mail by stating that the prison manager needs to believe on reasonable grounds that the correspondence *may* (replacing *likely to*) satisfy the statutory criteria under section 108(1)(d) of the Corrections Act 2004
4. **agree** to include the addition of *directly* or *indirectly* in section 108(1)(d) of the Corrections Act 2004
5. **agree** to amend the Corrections Act 2004 to give the Department of Corrections a power to withhold mail where the content may directly or indirectly promote or encourage hostility towards any group of persons on the grounds listed in section 21 of the Human Rights Act 1993
6. **agree** to amend section 108(1)(d)(i) of the Corrections Act 2004, which refers to people being threatened or intimidated, by replacing '*a person to whom it is being sent by the prisoner*' with '*any person*'
7. **agree** to amend section 104 of the Corrections Act to require the Department of Corrections to consider the interests of victims when dealing with any mail sent to or from a prisoner
8. **agree** to amend section 104 of the Corrections Act to require the Department of Corrections to consider potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material when dealing with any mail sent to or from a prisoner
9. **agree** to amend section 104 of the Corrections Act to require the Department of Corrections to consider the potential for messages and information to be disseminated through coded references when dealing with any mail sent to or from a prisoner
10. **agree** to give effect to these policy changes through a Supplementary Order Paper for inclusion in the Corrections Amendment Bill, which is already before the House
11. **authorise** the Parliamentary Counsel Office to develop a Supplementary Order Paper to give effect to the decisions in this paper

12. **authorise** the Parliamentary Counsel Office to make minor or technical changes necessary to ensure that the Corrections Amendment Bill achieves its legal purpose

9(2)(f)(iv)



Authorised for lodgement

Hon Kelvin Davis

Minister of Corrections



Cabinet

Minute of Decision

This document contains information for the New Zealand Cabinet. It must be treated in confidence and handled in accordance with any security classification, or other endorsement. The information can only be released, including under the Official Information Act 1982, by persons with the appropriate authority.

Considering Changes to the Corrections System following the Attack on Christchurch Mosques

Portfolio **Corrections**

On 2 September 2019, following reference from the Cabinet Social Wellbeing Committee (SWC), Cabinet:

Prisoner mail

- 1 **noted** that the Corrections Act 2004 does not provide an explicit authority for the Department of Corrections to withhold mail that seeks to promote or encourage hostility towards certain groups;
- 2 **noted** that if the Department of Corrections withholds such mail without legislative support, this could be successfully challenged in court, attracting attention to these views, and potentially resulting in the Department of Corrections being required to pay compensation;
- 3 **agreed** to lower the threshold that must be met to withhold mail by stating that the prison manager needs to believe on reasonable grounds that the correspondence *may* (replacing *likely to*) satisfy the statutory criteria under section 108(1)(d) of the Corrections Act;
- 4 **agreed** to include the addition of *directly or indirectly* in section 108(1)(d) of the Corrections Act;
- 5 **agreed** to amend the Corrections Act to give the Department of Corrections a power to withhold mail where the content may directly or indirectly promote or encourage hostility towards any group of persons on the grounds listed in section 21 of the Human Rights Act 1993;
- 6 **agreed** to amend section 108(1)(d)(i) of the Corrections Act, which refers to people being threatened or intimidated, by replacing ‘*a person to whom it is being sent by the prisoner*’ with ‘*any person*’;
- 7 **agreed** to amend section 104 of the Corrections Act to require the Department of Corrections to consider the interests of victims when dealing with any mail sent to or from a prisoner;
- 8 **agreed** to amend section 104 of the Corrections Act to require the Department of Corrections to consider potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material when dealing with any mail sent to or from a prisoner;

- 9 **agreed** to amend section 104 of the Corrections Act to require the Department of Corrections to consider the potential for messages and information to be disseminated through coded references when dealing with any mail sent to or from a prisoner;
- 10 **agreed** to give effect to these policy changes through a Supplementary Order Paper to the Corrections Amendment Bill;
- 11 **invited** the Minister of Corrections to issue drafting instructions to the Parliamentary Counsel Office to develop a Supplementary Order Paper to give effect to the above decisions;
- 12 **authorised** the Minister of Corrections to make minor or technical changes necessary to ensure that the Corrections Amendment Bill achieves its legal purpose;

9(2)(f)(iv)

[REDACTED]

[REDACTED]

Michael Webster
Secretary of the Cabinet

Hard-copy distribution:
Prime Minister
Deputy Prime Minister
Minister of Corrections