# INDEPENDENT REVIEW OF

# PROCESSING OF PRISONERS' MAIL BY DEPARTMENT OF CORRECTIONS (ARA POUTAMA AOTEAROA)

MIRIAM R DEAN CNZM QC
GRANT O'FEE MNZM

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## OVERVIEW

Our task was to examine Corrections' mail processes, how consistent they are, and whether any improvements can be made. This report addresses all three points.

For many prisoners, mail is the most eagerly anticipated event in their day. It can, to quote one, "lift people's spirits, instil hope and distract from the negativity surrounding us". It is vital to encourage prisoners to maintain contact with family members, friends and whanau, consistent with Corrections' new Hōkai Rangi strategy. Equally, some mail cannot be allowed into prisons for safety and security reasons, just as it cannot be allowed out for a variety of other reasons – a point driven home by the letter written by the man accused of Christchurch's mosque killings attests.

Deciding what to let in or out is far from easy. Overall, we found that incoming mail processes work reasonably well except for variations among prisons in dealing with some limited categories of mail, and the practice in some prisons of returning certain mail to the sender, which is not deemed "withholding" mail. Outgoing mail processes work less well. They are ad hoc and involve too many individuals. Also, some prisons lack the resources to process mail properly, creating a very real opportunity for offending mail to slip through.

Some deficiencies in the legislation and regulations governing this area were immediately apparent to us (although some proposed changes are pending). The relevant Act works against a seamless process of opening, reading and withholding mail. The prohibition on copying mail is unjustifiable, particularly as it affects intelligence-gathering efforts. Mail between prisoners also needs attention, as does inconsistency in the way the law treats mail, telephone calls and visits. The manual staff consult for help provides little guidance, adding to the problem of withholding decisions made on frequently subjective grounds.

Problems we identified with outgoing mail included: the sheer volume of mail; the high proportion that is gang-related (which in turn causes a myriad of other problems); mail that is slipping through screening; the heavily sexual nature of a lot of mail; victims receiving mail because of poor reviewing processes and/or inter-agency information-sharing obstacles; foreign mail that is passed on untranslated; and difficulties with lawyer-prisoner mail.

Some very brief context: processing mail is but one of a multitude of tasks staff must perform under very trying circumstances and with limited resources. Safety is, and must be, the top priority. But mail must have a higher priority than it has to date. The considerable ambiguity in the rules does not help matters. The result is a tendency to let mail through, either out of concern for prisoners' privacy or to avoid the risk of court challenges. The view of many interviewees too, whether true or not, is that Corrections has a reactive organisational culture towards risk. Yet the greatest risks always lie ahead, not behind, making a proactive culture essential.

We recommend improvements in five broad areas: law reform; establishing dedicated mail monitoring teams; drafting clear and concise guidelines to help staff with mail processes; giving staff training in mail (and other communication) processes; and regular auditing.

## RECOMMENDATIONS

1. Corrections urgently seeks amendments to the Corrections Act 2004 and regulations to:

    - allow the copying of mail beyond the existing limited situations
    - give it the power to read, copy and store mail for intelligence gathering.

2. Corrections, together with policy and law makers, should consider whether:

    - the withholding grounds for mail should be extended to objectionable (or indecent or abusive) mail
    - prisoner-to-prisoner mail should require the prior approval of the prison manager
    - there should be greater consistency and coherency in policies and regulations relating to mail, telephone calls and visits.

3. Each prison (or a hub of prisons) should set up a dedicated mail-monitoring team (and mailroom) that opens, reads and withholds mail (and email) in one seamless process.

4. Corrections prepares new manual guidelines that are clear, concise and take staff step by step through mail (and other communications) processes.

5. Corrections gives administrative and custodial staff interim guidelines on particular problem areas, such as scanning and withholding mail, gang mail and sex talk in mail.

6. Corrections trains mail teams using face-to-face workshops, as well as e-based learning.

7. Corrections' training programme for recruits includes a module on prisoners' communications, including mail.

8. Corrections carries out regular audits of mail processes, including how staff make decisions to withhold or release mail.

9. Corrections provides prisoners with a complaint process for mail that is easy to use and results in the prompt resolution of complaints, and also analyses complaint data for training and educational purposes.

10. Mail teams apply a stamp on the back of each outgoing envelope that has Corrections' phone and email details and advises the recipient to phone or email Corrections if he or she does not wish to receive mail from this prisoner.

11. Corrections gives prisoners (and the public) clear and practical guidance on mail processes, including the grounds for withholding mail.

12. Corrections, NZ Police and the Ministry of Justice explore ways to quickly and easily share protection orders and the like.

13. Corrections explores ways to curb excessive mail.

# INTRODUCTION

On 14 August this year, a six-page letter written by the man accused of Christchurch's mosque killings appeared on 4chan, a website known for its graphic and controversial content. Much of the letter, written to a supporter in Russia, was innocuous, although it ended with a plea to like-minded individuals that, on its own, or read together with other references in the letter, could be construed as a call to carry out similar attacks.

Publication of the letter immediately attracted worldwide media attention. Less than 24 hours later, the public learned that one of the accused's supporters, who had been remanded in jail for sharing a video of the Christchurch attack, had sent hate-filled letters to individuals (and media organisations) in New Zealand and overseas. Further publicity then followed about a letter – unrelated to those from the Christchurch accused and his supporter – from a prisoner serving a sentence for two murders to a former inmate and his legal team threatening their safety.

Within 24 hours of media reports appearing about the accused's letter, Corrections issued a statement acknowledging it should have withheld the letter. It has powers under the Corrections Act 2004 (the Act) to withhold mail written by, or intended for, prisoners. Among the grounds set out in the Act for withholding mail are if prison managers (also called prison directors) reasonably believe mail could threaten or intimidate the recipient, encourage the commission of an offence or breach a court order.

The Christchurch Muslim community said it was "shocked" and "horrified" by the accused's letter. It subsequently emerged he had sent seven other letters from prison.

Against this backdrop, Corrections Chief Executive, having lost confidence in existing mail processes, initiated this review of prison mail processes and how they might be improved. In the meantime, a specialist Corrections team based in Wellington has begun more rigorously processing mail to, and from, certain prisoners. This is an entirely appropriate interim step.

## Purpose and scope

We have been asked to:

- examine how current processes operate, their consistency or otherwise at all 18 prisons (including the contract-managed prison in South Auckland), and their adequacy in achieving the intent of the Act, regulations and the Prison Operations Manual
- suggest any improvements.[1]

[1] Terms of reference (appendix one).

Specifically, we have been asked to consider:

- how to strengthen processes from end to end
- how to give staff processing prisoners' mail better support and training
- any other measures that might make the Act and accompanying regulations more effective.

Four points require emphasis. First, this review is high-level only. It is neither necessary nor practicable to understand the details of individual prison's mail processes in order to establish whether prisons generally are achieving the legislative intent of striking a balance between a) encouraging contact between prisoners and their family members and friends, and b) maintaining safety and security. This broad focus is consistent with the review's purpose of identifying improvements in mail processes, not attributing fault.

Secondly, and as the terms of reference allow, outgoing mail is the review's primary focus (just as it is Corrections' priority area for improvement). There are three reasons for this: outgoing mail prompted the review, outgoing mail poses tough practical and regulatory challenges; and incoming mail is, from our perspective, already reasonably well monitored (subject to some limited exceptions).

Thirdly, two matters, and appropriately so, are outside our scope. The first is any employment matters, and this includes any employment implications arising from the sending of the Christchurch accused's mail. The other matter out of scope relates to new processes under development for the accused's mail so both his and the public's entitlement to send and receive mail, and to be safe and free from harm, are met.

Finally, we were careful not to read any mail (not being authorised to do so), or to have the contents of any specific items of mail disclosed to us. This did not prevent us, however, from asking staff for examples of the kinds of mail received and of particular concerns with mail, both incoming and outgoing.

## Approach

Our approach has been investigative and informal. We conducted interviews with key staff in Corrections' national office in Wellington and prison directors and mail processing staff at prisons in Auckland, Wellington and Christchurch. We held telephone or video meetings with prison directors and mail staff at three regional prisons. We also observed the opening and reading of mail in several prisons. As with any review, there was no substitute for interviews. We were interested in understanding what was working well and what was not, challenges (both present and future) and the suitability of the regulatory environment in today's fast-changing internet world. All interviews were treated as confidential to ensure full and frank discussion. All interviewees answered questions openly and constructively. Their assistance is gratefully acknowledged.

Although the review was internal, we interviewed some outside organisations we considered might help with the review. They included the Office of the Ombudsman, the Office of the Privacy Commissioner, New Zealand Howard League, the Howard League Wellington

branch, Reclaim Another Woman (RAW), the Chief Victims Advisor, the Public Service Association and the Corrections Association of New Zealand.[2] We also considered information provided by two overseas jurisdictions (New South Wales and the United Kingdom) to learn about their mail processes.

We considered a wide range of written material, including relevant legislative provisions and court cases, extracts from the Prison Operations Manual, written mail processes at all 18 prisons, audit and assurance reports, training programmes and various other related material.

## Structure

The report has four sections:  Regulations and rules; Mail processing; Training, auditing and complaints; and Improvements. Each (bar the last one) sets out relevant facts and current problems. In the final section we propose solutions to the problems we have identified. This report may be made public so we have written it with the ordinary reader in mind.

## Context

The processing of mail must be viewed within the context of prison staff's broader responsibilities. To say their work is not easy is a considerable understatement. The day-to-day challenges they face are frequently extremely demanding, both professionally and personally. The prison workforce of about 4,000 must handle a prison population of about 10,000 – 35 per cent more than when the Act was passed in 2004 (when the prison population was about 6,500). Adherence to mail processes was important, staff said, but their number one priority was protecting the safety and security of other staff and prisoners.

As well as processing mail, they also had to deal with more pressing matters such as responding to fights among prisoners or distressed prisoners at risk of self-harm. There was also the managing of thousands of visits to prisons each week. Even night-shift staff, who are often left to process outgoing mail, have to check at least twice a night on prisoners, check the security of buildings and outside grounds every two hours and deal with a raft of other administrative matters.

In addition to stretched resources and the heavy demands on their time, they must also deal with what we found to be considerable ambiguity in the rules, a tendency to let mail through, either out of concern for prisoners' privacy or to avoid the risk of court challenges, and, we were told, an organisational culture that is generally reactive rather than proactive towards risk. Furthermore, we observed that Corrections' multi-layered organisational structure and complex decision-making processes make it difficult to reach practical, common-sense decisions. All of these matters are examined in more detail later on. Unsurprisingly, mail was not a priority before August this year. Equally unsurprising, the commitment among staff to ensure they adhere to mail processes is now much higher but still, in our view, far from best practice.

[2] The two Howard Leagues help respectively with prisoner services and advocacy; RAW helps female prisoners make the transition from prison to life on the outside; the Public Service Association is a public service union; and the Corrections Association is New Zealand's only prison-specific union.

# REGULATORY FRAMEWORK AND RULES

## The Act and regulations

The Act gives Corrections responsibility for administering the corrections system, as well as the power to make regulations to ensure the good management of the system and safe custody of prisoners. The Corrections Regulations 2005 (the regulations) set out in detail how the system should operate.

Corrections' responsibilities include:

- maintaining safe and secure custodial facilities
- electronically monitoring defendants and offenders in the community
- providing rehabilitation and reintegration services to offenders
- running community work parties
- considering the interests of registered victims
- providing administrative support to the Parole Board.

Corrections must operate corrections facilities in accordance with rules set out the United Nations Standard Minimum Rules for the Treatment of Prisoners, to which New Zealand is a signatory.[3] The rules permit regular, supervised communication between prisoners and family members and friends, both by correspondence and in person.

## Principles

The Act contains principles to guide Corrections' administration of the corrections system.[4]

The principles most applicable to processing mail are:

- maintaining public safety
- considering victims' interests
- treating prisoners fairly (by giving them information about rules, obligations and entitlements that affect them)
- making decisions in a fair and reasonable way
- providing access to an effective complaints procedure
- encouraging and supporting contact between prisoners and their families.

This last obligation, to support contact with families, applies in so far as it is reasonable and practicable to do so, and within the resources available to Corrections. It also applies in so far as this contact is consistent with maintaining safety and security.

[3] Standard Minimum Rules for the Treatment of Prisoners. (https://www.unodc.org/pdf/criminal_justice/UN_Standard_Minimum_Rules_for_the_Treatment_of_Prisoners.pdf)
[4] Section 6 of the Act.

## Entitlements

Communication with family members and friends is encouraged because it can help in prisoners' rehabilitation and eventual reintegration into the community. Among the minimum entitlements set out in the Act are: access to visitors, sending and receiving mail, and making outgoing telephone calls.[5] Prisoners are allowed to send and receive as much mail as they wish, subject to other provisions in the Act.[6] Corrections must pay for up to three items of mail a week, although in practice most prisons pay for all outgoing prisoner mail.[7] That, combined with the significant increase in prison numbers since the Act came into effect, has led to a huge increase in mail volumes at some prisons.

## Mail

The Act contains a set of fairly prescriptive provisions regulating mail-related matters (although there are exceptions where the language is broad). Regulations made under the Act add a further layer of provisions. Any person responsible for monitoring mail must be familiar with these provisions, as well as those relating to what property a prisoner may have. Often items of property such as magazines, books and clothing are included in mail to prisoners. A still further layer of provisions is contained in Corrections' Prison Operations Manual. And finally, individual prisons have their own administrative processes for collecting, opening and delivering mail.

Sections 103A to 110A of the Act detail how prison staff and managers are to open, read and withhold mail. The Act specifically excludes electronic messages (emails) from the definition of mail and correspondence.[8] Prison staff may not open, read or withhold mail between prisoners and official agencies, members of Parliament or their legal advisers.[9]

A staff member can, in the presence of another staff member, open mail and examine it for unauthorised items, such as drugs, tobacco, electronic communication devices or anything harmful to the prisoner or other prisoners.[10]

An authorised person (staff with a prison manager's written permission) can read mail for the purposes of ascertaining whether a prisoner's mail (incoming and outgoing) should be withheld on certain grounds.[11] These grounds include if a prison manager reasonably believes the correspondence may:

- threaten or intimidate the recipient
- endanger the safety or welfare of a person

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[5] Section 69 of the Act.
[6] Section 76 of the Act.
[7] Regulation 83(2) Corrections Regulations 2005.
[8] Correspondence means any handwritten, typed, or printed message or manuscript. Mail means any letter, package, parcel, or postcard sent or delivered to or by a prisoner.
[9] Section 110 of the Act. Note a prison manager may, however, examine mail between a prisoner and his or her legal advisor if it appears to contain an unauthorised item or other correspondence not relating to the prisoner's legal affairs.
[10] Section 106 of the Act. Note also no item will be issued to a prisoner unless it is listed on the Rules on Authorised Property made under s 45A of the Act.
[11] Section 107 of the Act.

- pose a threat to prison security
- encourage an offence
- prejudice the maintenance of the law
- breach a court order.[12]

Mail intended for nominated individuals such as those named in protection orders who wish to have no contact with a prisoner can also be withheld. Other grounds include: if a prisoner (or the other person) requests that mail is withheld; if the other person is under 16 and the guardian makes such a request; and if the other person is a prisoner, and neither prisoner has notified the prison manager of his or her intention to correspond. These grounds are reasonably straightforward to interpret and administer. Whether mail may threaten, intimidate or endanger the welfare of any person or pose a threat to prison security is, by contrast, a far more uncertain matter, both of interpretation and application.

Only a prison manager, or a member of staff to whom the manager has delegated that power, may make a decision to withhold mail. The prison manager must exercise the power to withhold mail in a manner consistent with the New Zealand Bill of Rights Act 1990.(Under section 6 of that Act, all legislation must, where possible, be construed consistently with the rights and freedoms set out in that Act.) The prison manager must advise a prisoner that he or she has withheld mail, or an unauthorised item in the mail, unless the manager is forwarding it to an enforcement officer.[13]

Grounds for withholding mail are more restrictive in some countries and less restrictive in others. Finland allows mail to be withheld only if necessary, to prevent or investigate an offence, avert a threat to prison order or protect the safety of the prisoner or others. The Australian Capital Territory allows mail to be withheld if it would re-traumatise the victim or cause distress to the community. Prisoners in New South Wales and Victoria may not send mail that is, among other things, indecent, offensive or abusive.

Staff cannot copy mail (including electronic scanning) unless it is correspondence between a prisoner and Corrections, or they make a copy to send it to an enforcement officer (for the purposes of detecting, investigating or prosecuting an offence), or they make a copy to obtain legal advice on whether to withhold it.[14]

As for disclosures more generally, staff authorised to read mail cannot disclose the contents unless it is to another authorised person to determine whether to withhold the mail (as noted above), forward it to an enforcement officer (for example, a police officer), or disclose it in compliance with another law (such as a production order).[15] [16] They may also disclose mail if they reasonably believe it is necessary for maintenance of the law, to allow legal proceedings, or to prevent or lessen a serious and imminent threat. They may also do so if authorised by the Privacy Commissioner.[17]

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[12] Section 108 of the Act.
[13] An enforcement officer is a constable or a person whose duty is to detect, investigate or prosecute an offence.
[14] Regulation 84 Corrections Regulations 2005.
[15] Section 110A of the Act.
[16] Production orders are made under section 74 of the Search and Surveillance Act 2012 and require a person or organisation (including businesses) to produce documents for evidence of specified offences.
[17] Section 54, Privacy Act 1993.

## Current problems

Four deficiencies in the Act and regulations are immediately apparent.

*Linear process:* The Act distinguishes between those who can open, read and withhold mail. This differentiation works against the seamless processing of mail. It also increases the risk that staff reading or withholding mail may not, in fact, have the necessary authority to do so – thereby technically breaching the Act. As already noted, prison managers can authorise staff to read and/or withhold mail but it nonetheless remains an untidy arrangement.

*Withholding grounds:* The Act's prescribed grounds for "withholding" mail (whatever that may mean in practice – see section two) do not necessarily cover correspondence that the public may well consider should not go beyond prison walls, such as hate speech, gang talk (as it is called in prisons) or mail containing indecent or offensive content. However, prohibiting content based on offensiveness or indecency (as some countries do) may be far from easy to apply and may also risk Corrections becoming, as one interviewee put it, the "moral police" – a role some staff said they have no wish to take on. That said, staff already have to decide whether items of property such as magazines and photos are objectionable (construed by staff to include offensive and indecent material) and if so, they will not pass them on to prisoners.[18]

*Intelligence gathering:* Staff reading mail have no right to pass it on to a prison's intelligence unit unless the purpose is to seek expert advice on whether to withhold the mail. (Note these intelligence units, which are located at each prison site and at Corrections regional and national offices, did not exist when the Act was passed, which may partly explain the anomaly.) Currently, staff must, in one interviewee's words, "piggyback off existing powers" – principally by using the disclosure provision (section 110A) to send mail to intelligence units for advice or assistance. But as already noted, that provision limits disclosure to very confined circumstances.

Staff cannot even disclose it to these units for the purpose of detecting or investigating an offence because the Act does not include Corrections staff within the definition of an enforcement officer. Yet such mail may well be relevant to detecting criminal offending in the prison and it makes sense a prison's intelligence unit can have the letter, not just the police. It may also be an invaluable source of information in identifying emerging risks that may fall short of a serious and imminent threat to prison or public safety – a threshold that does permit disclosure. Perhaps more importantly, such mail may serve wider intelligence-gathering purposes in protecting both prisoner and public safety – a vital consideration in today's world.

*Copying:* The regulations prohibit the copying of mail except in the limited situations noted above, which plainly makes it difficult for staff to consult others about withholding mail. As we heard repeatedly from prison staff, decisions about whether to withhold mail often fall into a grey area where there are no easy answers, and it is helpful if a staff member can consult a

[18] Corrections draws on the Film, Videos and Publication Classification Act 1993 to determine what is objectionable, that is, if it depicts, expresses or deals with maters such as sex, horror, crime, cruelty or violence in such a manner that the publication's availability is injurious to the public. A wide range of content is deemed to be objectionable such as torture, exploitation of children, nudity of children or young persons, to name but a few.

colleague for a second opinion. To obtain such an opinion they must send the original mail itself, or a summary of it, or discuss the matter verbally. With the first of these options, the staff they wish to consult are often in different units in a prison, or at another prison altogether, and the prohibition on copying means mail is couriered from place to place. (It is unclear, even, if mail in a foreign language can be copied to send to an accredited translation service.[19]) Sending the original, rather than a copy, only increases the risk that mail will be lost or delivered to the wrong person, and delays mail reaching its intended recipient if it is not withheld. As one staff member observed: "What's the difference between reading the original or a copy of the letter?"

The prohibition on copying also thwarts effective intelligence-gathering efforts. Without copies to refer to, intelligence staff cannot seek to detect code, patterns or simply "join the dots", especially if numerous letters pass between a prisoner and correspondent. The prohibition even obstructs the investigation of a complaint. A prisoner can complain to an independent team within Corrections that, among other things, investigates prisoner complaints. The team cannot quickly get a copy of the piece of correspondence in question (or an item of property such as a photo). Instead, it must wait to get the original, delaying the investigation into the prisoner's complaint.

Finally, we were told that children write letters to a parent in prison on which glitter or stickers are glued. These items are not authorised property because prisoners sometimes insert them into electrical outlets to start fires, stick them over security cameras or use them to jam communication devices. Some prisons, however, will pass on a coloured copy of such letters because they appreciate the importance of maintaining contact between a parent and child. The original is held until the prisoner's release when it is handed over. Strictly, this is a breach of the Act. Yet we agree with staff that copying such mail in these circumstances is, in their words, "absolutely the right thing to do". The absurdities caused by the prohibition on copying mail need, in our view, urgent attention.

As well as these immediately apparent deficiencies, we note three other areas that warrant attention in the longer term. Undoubtedly, any legislative reform will need to be preceded by good policy discussion and debate with a range of stakeholders.

*Prisoner-to-prisoner mail:* Prisoner-to-prisoner mail (or jail mail, as it's called) is permitted, subject to a requirement to notify the prison manager that one prisoner is writing to another. Many staff recalled the days before the 2004 legislation when prisoners needed the prison manager's approval to send mail to other prisoners. Staff acknowledged that such requests often received approval without much thought or consideration, but they said it nonetheless gave the prison manager the opportunity to prohibit such correspondence, especially if it was unlikely to help with a prisoner's rehabilitation.

We heard that jail mail volumes have risen enormously in recent years. Often such mail is between gang members, and all prison staff, whether dealing with incoming or outgoing mail, told us gang mail posed particular challenges. The content is often highly objectionable

[19] The issue here is whether section 107(2) of the Act, which permits translation for the purpose of reading to ascertain if mail is withheld, prevails or not over regulation 84 given that arguably mail must be copied for translation purposes. The precise legal position is far from clear.

(letters are strewn with profanities) and is frequently in code, making it impossible to know exactly what is being said. Furthermore, jail mail is used to recruit gang members, so, all in all, such mail seems far from conducive to prisoners' rehabilitation or reintegration into the community. Yet unless the mail is threatening or encourages the commission of an offence and so forth, nothing can be done to stop it. And in practice, how prisons even deal with gang mail varies considerably, and is addressed in section three. We do emphasise that gang membership itself is not the issue, rather the content of the mail.

For now, we note that it does appear that prisoner-to-prisoner mail poses some particularly difficult challenges and warrants attention. New South Wales' equivalent of Corrections told us it is about to embark on a review of such mail and to consider whether prisoner-to-prisoner mail should be limited in appropriate ways.

*Email:* The Act's mail provisions do not apply to email. Yet we heard from a number of prison staff that prisoners receive an increasing amount of email daily. (As a general rule, prisoners cannot use email for outgoing correspondence.) As discussed in section two, some prisons will apply more or less the same rules about mail to email. Others do not and may withhold email on wider grounds (because it is objectionable). In our view, the Act's silence on managing emails and indeed using newer technologies such as video calls and even the internet in certain limited circumstances is stark.

*Consistency between mail, telephone calls and visits:* Despite our focus on mail, many interviewees brought up the subject of telephone calls and visits. They emphasised that all were merely different forms of communication, and many suggested a more "holistic" approach to regulating these channels. Also, the prohibition on copying mail is in sharp contrast, for example, to the right to monitor prisoners' calls and take transcripts, and also to disclose the contents of prisoners' calls in a much wider set of circumstances than those relating to mail. Telephone calls and visits require approval; mail does not. Telephone calls and visits are limited; mail is unlimited. It is hard to understand why all these differences should be so.

We address possible solutions in section four. The first deficiency can be met by changes to the way mail is processed in each prison. The next three require amendments to the Act and regulations. The final three would require careful policy discussion and debate before any legislative reform were contemplated.

## The manual

The electronic Prison Operations Manual contains about 600 processes, forms and resource materials for the day-to-day management of prisons. One of its 12 sections relates to communication, which includes prisoners' mail and telephone calls. The mail section is divided into 10 topics: prisoner mail criteria; receiving prisoner mail; opening and examining prisoner mail; reading and withholding prisoner mail; restrictions on opening, reading and withholding mail; restrictions on mail between prisoners and lawyers; restrictions on disclosure of prisoner mail; restrictions on copying prisoner mail; sending prisoner mail; mail between prisoners; and safeguarding children and young people. Corrections notifies staff of updates to the manual weekly through its intranet and by email. Another manual, the

Custodial Practice Manual, sets out how custodial staff should perform core duties, although it contains no instructions on processing mail.

Staff do not find the manual a useful source of guidance for mail processing. Some said they seldom if ever referred to it, while others said it did little more than spell out the Act in more detail, and offered little help in its interpretation. As one interviewee said: “Knowing what the Act says is one thing, but applying it is a different thing altogether.” Many said the document’s arrangement of material was neither intuitive nor user-friendly. Furthermore, its approach was too high-level and lacked practical explanations of how to perform mail processing tasks.

Even when the manual sets out requirements and procedures (whether relating to mail or other topics) in an accessible and understandable way, the “why” is often missing, and this does not help staff develop expertise in making decisions when circumstances are other than those prescribed in the manual (see further in training). Understanding the rationale for instructions – for example, withholding mail to protect the victim – is crucial to good decision-making when instructions are silent or ambiguous about particular situations.

Updates to the manual are another source of frustration to staff. They said changes came in such a flurry of emails that for the most part they couldn’t keep up with them. Yet other staff believed changes weren’t communicated at all. They also said recent upgrades to Corrections’ intranet had made the electronic manual hard to use. Some described it as “terrible” to use. “You can't search for anything,” said one. “It doesn’t help us when we are trying to get things done, and it doesn’t help us to explain things to the prisoners.”

Where staff can exercise discretion in applying the rules and following procedures, the limits of this discretion are inconsistent from prison to prison. We heard repeated examples of decisions made at one prison that were in conflict with the decisions another prison had made, or would make, in the same circumstances. The availability of computers to access the manual, and the time to do so, were other matters of concern to staff.

### Local procedures

We found staff revert to consulting documents superseded by the manual if they consider the manual is unclear or silent on an aspect of prisoner mail. One such document is the Finance, Systems and Infrastructure CS (Corrections Services) Guidelines.[20] Staff like using the guidelines because they find them clear, concise and more comprehensive than the manual. But the guidelines are now more than 10 years old and have been overtaken by changes to a manual they were intended to provide guidance on, and also by relevant court decisions relating to prisoners’ property and mail.

[20] Finance, Systems and Infrastructure was the name of a Corrections group before its restructure in 2012. The Trust Account Manual focused on administrative aspects of prisoner mail, property and phone cards sent to prisons.

We also came across processes that individual prisons had developed (such as written instructions to staff in Word documents or emails), as well as administrative processes that met Corrections' trust accounting requirements for dealing with prisoners' property but failed to give any guidance on how to make decisions about withholding, disclosing and copying mail. We also found these administrative processes may have misled administrative staff and blurred the rules about prisoner property and mail: see section three.

## MAIL PROCESSING

This section examines incoming and outgoing mail processes, although, as noted earlier, the focus is primarily on the latter. We first look at the methods employed to open, read and withhold incoming mail. We next look at the various problems common to both incoming and outgoing mail.

Our examination confirms that the Chief Executive has good grounds to lack confidence in mail processes, particularly for outgoing mail. Consistency is lacking between prisons. Concise, clear, guidelines for staff are also lacking. And withholding decisions are largely subjective. In fairness to staff, however, the Act and regulations are far from easy to apply: one interviewee described them as a "minefield".

In short, deciding what "can come into or go outside the wire", to coin a Corrections term, is difficult indeed.

### Incoming mail

By and large, incoming mail is handled by each prison's administrative staff. The process, with some variations, is briefly as follows:

*Receipt of mail:* Mail is delivered each day to prisons by New Zealand Post and x-rayed for suspicious items. Many prisons also scatter mail on the floor for detector dogs to inspect.

*Opening:* Two staff together (as required by law) open all incoming mail for the primary purpose of detecting items of property. This includes both authorised items (for example, phone cards and money) and unauthorised items (such as homemade cards with glued attachments, stickers, Lotto tickets, gang insignia and pornographic magazines or drawings, to name but some). Staff are also on the alert for suspicious mail items (like drugs).

Our impression is that processes for opening mail and removing unauthorised items work well. Staff are vigilant in examining mail for these items, alert appropriate staff when they find anything suspicious, and diligently record the receipt of authorised items such as phone cards. As an aside, a common plea from administrative staff was for Corrections to find ways – such as digital management of prisoners' phone accounts, as occurs at Auckland South Correctional Facility and as is being piloted at Auckland Prison – to avoid the tedious process of recording and registering all phone cards received by mail. One prison told us it processed about $30,000 of phone cards each month, a task it described as "huge".

*Scanning the mail:* Administrative staff "scan" (to use their word) opened mail for anything that might warrant reading by custodial staff. As one staff member put it, scanning consists of "running our eye over the page and seeing if something stands out for referral to someone who has the power to read it". They look for, among other things, particular words or phrases (for example, "kill", "fire", "hit"), prisoner or staff names or anything that can at a glance be construed as threatening prisoner or public safety or prison security. In effect, their role is to screen or filter mail to identify letters of possible concern. Administrative staff distinguished scanning from reading mail, and many custodial staff shared this view, emphasising they were careful not to read it so as to protect prisoners' privacy: see further discussion below. In any event, all administrative staff we spoke to were authorised persons for section 107 purposes (reading mail).

*Referral for withholding decision:* If mail raises questions about whether it should be withheld, staff pass it on to custodial staff. Some give it to the unit's custodial staff where the prisoner is housed, some give it to the prison's custodial security manager, and some to their intelligence unit for the purposes of determining whether the mail should be withheld. There is little consistency about who is given the mail to decide if it is withheld. Often, the mail in question then works its way up from custodial staff and intelligence units to a more senior colleague and then finally to the prison manager for a decision. The process is, as one interviewee put it, "multi-layered in the extreme". (The same applies to outgoing mail.)

However, administrative staff in many prisons return certain mail, especially gang mail and what they call "sex talk", to the sender without disclosing this fact to the prisoner. They consider returning such mail is not "withholding" mail: see more below.

*Forwarding to prisoners:* Most mail, unless referred to custodial staff for a withholding decision, is processed and forwarded to prisoners the day it is received or the following day. This is not always the position, however, and a common complaint of prisoners to the Office of the Ombudsman concerns delays caused by mail processing.[21] Some mail is now delayed by the need to refer it to the new centralised process in Wellington.

*Emails:* Administrative staff also process incoming emails, which are growing in volume. They said emails posed less of a problem in determining whether they should be referred to custodial staff for possible withholding. Senders realise the risks in making threats or planning an offence by email, so generally do not include such content. Emails have the added advantage of being already scanned by software for particular words of concern. Problems with email seem to be confined chiefly to volume, "sex talk" and lawyer-prisoner correspondence.

In summary, incoming mail processes work reasonably well overall, except for the variation in practices among prisons for dealing with mail that is gang-related or involves sex talk, and also the practice of returning mail to senders and not considering this withholding mail.

## Outgoing mail

Custodial staff mostly monitor outgoing mail, leaving administrative staff to frank and post it. There is one exception. Some prisons' administrative staff also double-check that mail is not going to anyone with whom the prisoner cannot correspond, such as those subject to restraining orders or the victim of offending. We commend this extra precaution.

The process for outgoing mail is broadly as follows:

*Opening:* Prisoners deposit mail in a mailbox in their unit or sometimes hand it to a custodial officer in their unit. All envelopes are meant to be handed over unsealed and with the prisoner's name written on the back of the envelope (or under the envelope flap if they have privacy concerns). Most prisons said prisoners complied with this requirement. If prisoners didn't, the mail was returned to them to do correctly.

*Scanning/reading:* Prisons are not consistent about how, when, where and who scans or reads mail to decide whether it should be withheld. As far as we can tell, prisons' practices fall into three broad categories.

[21] See the discussion at p29 of this report.

In the first category are prisons with a dedicated team of custodial staff (typically established in response to the August incidents and often made up of those on light duties) to check outgoing mail to determine whether any of it should be withheld. In one of the bigger prisons, a team of day-shift staff reads – not just scans – outgoing mail to determine if any of it should be withheld. By and large, the senior staff we spoke to in these prisons were reasonably satisfied custodial staff were taking the job seriously, and that the risk of inappropriate mail leaving the prison was now much lower than before August.

In the second category are prisons where checking is generally done by either custodial staff on night shifts or the individual custodial officers to whom prisoners handed mail. Senior staff in these prisons acknowledged checking varied greatly. “Some staff,” said one officer, “will do it diligently and read the mail, others will scan it or give it a cursory glance for any language of concern, and a few – especially those diverted to deal with more pressing safety matters – may simply let it slip through.”

In the third category are prisons where senior staff simply do not know whether custodial staff are checking outgoing mail. One prison said it was down 24 staff and had no one to check mail. Those staff on duty had more pressing safety matters to deal with. Another prison told us that on any given day it had to make choices between processing mail and prison safety and security. The latter “always came first”. In such circumstances, this is entirely understandable. However, it is unacceptable that senior staff do not know whether the prison is checking mail, and this needs urgent attention.

In most cases, custodial staff are authorised to read mail for the purposes of section 107 of the Act. We are not convinced, however, that all custodial staff scanning mail have such authorisation, especially when there is a commonly held view that this is not reading (and even though the Chief Executive recently delegated this power to staff down to the level of a principal corrections officer). This needs urgent attention.

*Monitoring lists:* Prison staff we spoke to were mostly, though not always, satisfied that mail was checked to ensure it was not going to individuals with whom the prisoner should not be having contact. (One prison candidly acknowledged such monitoring was lax). At each prison Corrections maintains a register of prisoners who are respondents to protection orders, along with the names of protected individuals, where this information is known.[22] These details appear in its Integrated Offender Management System (IOMS) as an alert, along with the names of victims who have asked for no contact with the offender, or any person who has told the prison he or she does not want to receive prisoner mail.

Corrections also uses what it calls its Corrections Business Reporting & Analysis (COBRA) software to present this information in an automatically updated report available to all prisons. We are not convinced all prisons are using COBRA. One prison described it as “confusing and requiring too many clicks to access the information”. This prison, like others, had its own monitoring list for this purpose. Our concern is about the potential for mistakes caused by relying on an inaccurate list or by not using a more accurate one because access is not user-friendly.

[22] The manual refers to protected people as those persons who have requested not to receive any contact from a prisoner; remand prisoners who must not contact a particular person; protected persons under restraining or non-contact orders made under various legislation such as the Family Violence Act 2018 and the Violent Offenders Act 2014.

*Withholding:* If custodial staff consider mail should be withheld, they generally refer it to someone more senior with the power to make a withholding decision. Often this is the prison manager (or his or her deputy), although sometimes it goes first to the custodial security manager or intelligence unit. When a prison manager (or his or her delegate) decides to withhold mail, the prisoner is informed, and an entry is made in the withholding register. Sometimes, however, custodial staff return the letter and suggest the prisoner rewrites it without the offending material. This is not considered to be withholding mail. We agree. It makes perfect sense to give a prisoner the opportunity to try again.

No data is available on the proportion of mail withheld or returned to the sender. Our impression – and it can be nothing more – is that a very small, if not tiny, proportion of mail is withheld, although that proportion has risen since August. One large prison told us it was withholding at most about 5 per cent of all mail, and it estimated this was about a 90 per cent increase on what it had withheld before August. Another prison told us it might withhold about 20 letters a week. Prisons gave us extracts from their withholding registers. One register for the three months to the end of July this year showed the prison had withheld 20 letters. Another prison had withheld 17 letters during the same period, while a third had withheld 14 in a single month this year. Two prisons had withheld only two and three letters respectively since the start of the year. This tends to confirm our impression that the amount of mail withheld is minimal.

In summary, outgoing mail processes are ad hoc and involve too many people in the review and assessment stages. We accept that practices have improved since August and that some prisons are now checking outgoing mail with a reasonable degree of care and attention. However, some prisons appear to lack the necessary resources to process mail, creating a very real opportunity for offending mail to slip through.

## Centralised processing centre

A brief mention must be made of the specialist team Corrections has set up in Wellington in response to the incidents in August. The Chief Executive took this action to ensure greater scrutiny of mail to and from a select group of prisoners so there would be no repetition of the events in August. Establishing this team was, in our view, a perfectly appropriate and proportionate response.

Corrections' national office has given each prison a list of prisoners whose mail (originals, including emails, but excluding legal and official mail) must be sent to the team. We were told those on the list have a higher risk profile that demands the close management of their communications. We reviewed the team's various processes, including how it makes decisions to recommend withholding or releasing mail. These recommendations go to the relevant prison manager and are recorded in a log. The mail is couriered back for the prison manager, who makes the decision about whether to withhold or release it.

Nearly 270 prisoners are currently on the list. The team has reviewed about 1,500 items of mail and recommended about 15 per cent be withheld or reviewed in the light of some consideration requiring local knowledge. Most prisons generally follow the team's recommendation. Several have not, taking the view that there were no statutory grounds to withhold the mail, based on their knowledge of the prisoner and an examination of the item. In one instance, a prison overrode a recommendation to release the mail, based on its knowledge of the prisoner and his behaviour.

Our overall impression is that the process is working well. We were told, not surprisingly, that it was causing delays (typically three or four days or even longer) and was leading to grumbles among some prisoners.

## Current problems

We found deficiencies in eight broad aspects of Corrections' mail processing. Some are relatively minor administrative matters, others are more serious, and a few involve questions of law. Each is outlined here.

## Volume of mail

Prisoners are permitted to send and receive as much mail as they wish. Mail volumes vary according to the size and make-up of each prison. No accurate data is available. Many prisons said they averaged about 200 outgoing letters a day. For some, Mondays could be closer to 500 letters. At one of the largest prisons, the figure was about 1,000 letters. Corrections estimates the total weekly volume of outgoing mail alone at no less than 15,000 letters. Corrections' annual prison postage for the past two years has been close to $600,000. Incoming mail appears to be of similar proportions.

Given the increasing volume of outgoing mail, we discussed with interviewees whether Corrections should stick to paying for only three pieces of mail per prisoner a week, as stipulated in the regulations, with prisoners paying for additional mail. Corrections' practice of allowing, and paying for, virtually unlimited mail contrasts with the position in New South Wales where prisoners are limited to sending two letters a week and, moreover, must pay for the postage themselves. In the United Kingdom (England and Wales), prisoners can generally write as much as they wish. Governors can, however, set a limit on the length of outgoing letters, and can return excess incoming letters to senders (although prisoners are given the opportunity to select those they particularly wish to read). By and large, prisoners must pay for their own postage except for what are known as "statutory letters".[23] The United Kingdom's prison rules to curb excess or excessively lengthy letters may be one way to respond to rising mail volumes here.

Staff were divided about whether Corrections should try to reduce mail volumes. Some suggested enforcing the existing requirement to pay for only three letters a week. Others suggested a cap, say five letters a week, and said they doubted such a restriction would cause any trouble, provided prisoners received plenty of notice and were told why the change was necessary. An equal number of staff, however, felt limiting mail would do little to reduce volume and only lead to prisoner unrest. Prisoners who wanted to send copious amounts of mail – and some do – would, they said, simply find a way to pay for it. A particular concern was that prisoners might pressure family members to meet the cost. Worse still, they said, prisoners would use stand-over tactics to make other prisoners send mail on their behalf out of their own weekly entitlement. In effect, mail entitlements would become "jail currency" that could be traded among prisoners.

We are inclined to leave the current practice of paying for all mail largely – but not wholly – unchanged: we heard of some prisoners writing 10 one-page letters a day rather than a single 10-page letter, putting unnecessary pressure on the system, as well as incurring

[23] See Prison Rules1999, rule 34, Statutory letters are those sent to, or from, official agencies and the like.

unnecessary postage. We invite Corrections to find some practical ways to curb this abuse of prisoners' entitlement to mail.

One final point: the increasing volume of emails is a particularly pressing concern for administrative staff. We heard of prisoners who received a succession of one or two-line emails throughout the day from the same person about matters such as what the sender had for lunch or was watching on television. Again, we suggest Corrections look at some practical rules to avoid this needless stream of incoming emails. We were impressed with one prison's approach: it calls the sender, explains the impact of having to print off a string of emails to pass on to the prisoner, and then invites the sender to start an email in the morning, add to it throughout the course of the day and send it that evening. Pleasingly, the prison said many of those it called responded positively to the suggestion, although, as always, one or two individuals persisted in sending endless emails throughout the day.

We are also concerned that the rise in email volumes is leading, at least in some prisons, to long delays in email reaching prisoners. One prison told us it could take up to a week to check and print out emails and deliver them to prisoners.

### Mail slipping through screening

There is little doubt mail still crosses the wire that should be withheld. Practices have improved since August, but some mail that ought to be withheld is slipping through for a combination of reasons. These are insufficient resources in prison units, the priority given to safety and security by busy custodial staff, a lack of clear guidance about what can and cannot be withheld and perhaps above all, the volume of mail.

We are especially concerned that some mail finds its way to victims. RAW gave us real-life examples of current and former female prisoners who received mail that should have been withheld. One former prisoner said she would receive "hate mail" from her partner when both of them were in prison. She said this mail included "explicit illustrations that went on for ages until eventually they stopped. Even though the letters were eventually found through the 'checking process', I'd already received heaps and the damage was done".

Another said: "I can recall once getting a threatening letter from an ex-partner. It caused me to feel afraid because the threat seemed real at the time and I was young. I believed the contents so much I asked to go on protection. It's frightening because you can't do anything about it." And another still said: "Prisons aren't always on the same page, and you can usually write to that person under your own name."

Plainly, it is unacceptable that such mail finds its way to victims and perpetuates abuse, or is damaging to the welfare of the recipient. As one person said: "if abuse is able to slip through the monitoring system, lives get damaged severely." However, we acknowledge that prisoners can easily circumvent the system – a point made by both Corrections staff and former prisoners. Prisoners, they said, will simply have someone else send the mail on their behalf. This is exactly why careful monitoring and checking of mail is so important.

Equally, we heard anecdotes about mail withheld without valid grounds. One recent complaint related to a letter withheld because of sexual content. But Corrections' Office of the Inspectorate (which has a complaints-handling team) said the content was "no more extreme than could be regularly seen on late-night television or read in a modern novel".

Another complaint related to a four-month delay in receiving a letter – a letter written by the inspectorate itself offering the prisoner counselling.

All of this point to the fact that better decision-making is required in all prisons on withholding decisions. The solution, we think, is a dedicated mail processing team as discussed in section four.

## Variations in interpretation

### *Scanning*

As mentioned, many prison staff – administrative and custodial – do not regard "scanning" mail as "reading" it. In fairness to staff, dictionary meanings define "scan" as variously "examine" and "glance at or read hastily". To compound matters, section 106 of the Act says mail may be opened and "examined", while section 107 says mail (or correspondence) may be "read" for the purposes of determining whether it be withheld – suggesting that examining and reading are distinct actions.

It is certainly arguable that scanning the contents of the letter could be considered "examining" only, but the difficulty for Corrections is that, on the face of it, section 106 limits the examination of mail to the purpose of detecting unauthorised items. Where scanning, therefore, falls on the spectrum is far from clear, but there is unquestionably a risk that scanning the mail is reading it. Whatever the strict legal position, we consider it important – if only as a precautionary measure – that anyone scanning mail is an authorised person.

As to why staff consider scanning is *not* reading, it is clear staff are rightly concerned to protect prisoners' privacy and thus try to intrude as little as necessary into their private affairs. They also fear the consequences of getting a decision wrong, and of a prisoner challenging the decision via the courts or Corrections' complaint processes. In one prison, staff told us that a year or so back they had been withholding more mail than they were doing immediately before August. However, they said there had been a "ruckus about prisoner privacy and so we were scared to screen it after that and it got out". They went on: "We don't want to be caught reading and withholding mail and lose our jobs." Such comments merely reinforce to us the need for staff to have clear and explicit guidelines about what constitutes reading and what can be withheld, without fear of the consequences if they get it wrong.

### *Withholding*

Similarly, there is confusion about what "withholding" mail means. (The Act does not define the term.) Section 108 is clear that a prisoner must be informed if mail (or any unauthorised item) is withheld. We found administrative staff, in particular, are returning limited types of mail to the sender without notifying the prisoner, notably mail containing what they consider is objectionable content such as sexual or gang-related material. They said returning these letters to the sender was not withholding mail.

Our sense here is that, unsurprisingly, staff have blurred the rules relating to property and mail. They return unauthorised items, such as gang insignia and pornographic magazines,[24] to the sender and make a record in a register.[25] These are exactly the steps set out in the discontinued Finance, Systems and Infrastructure CS Guidelines that some prisons still use. It is not clear whether the Act permits this practice in relation to unauthorised prisoner property. The Act refers variously to "authorised property" (property a prisoner can be issued or can keep), "unauthorised items of property" (such as weapons, drugs or alcohol) and "unauthorised items". Whether pornographic magazines and gang insignia are property that simply cannot be *issued*, or whether they are property that is *withheld* may seem a distinction without any meaningful difference. But it is not unimportant because if it is the latter, the prisoner must be informed.

Given administrative staff at many prisons return gang material and pornographic magazines to the sender, it is understandable why they should adopt the same practice towards letters containing much the same content. After all, it would be very easy for those sending mail to prisoners to circumvent the property rules if they simply included gang insignia or pornographic photos or drawings within the letter itself. So it is no surprise staff do not distinguish between whether such content is in a letter or enclosed with a letter.

However, there is a real risk that returning a letter, on its own, to the sender is to withhold it under section 108, and as a result the prisoner must be informed and the decision recorded in the prison's withholding register, as the manual requires. There is, of course, another difficulty. If such letters are considered to be withheld, the staff concerned are not delegated to make withholding decisions. This practice also needs urgent attention.

### Prisoner-to-prisoner mail

Prisoner-to-prisoner mail now constitutes a high proportion of all mail – up to 50 per cent in some prisons and up to 90 per cent in one large prison – and a huge proportion of this is, in turn, gang mail. The size of the gang population in each prison has a big bearing on how much of the prisoner-to-prisoner mail is gang mail. In some prisons, such as Tongariro Prison and Northland Regional Correctional Facility, gang members are very much a minority. In others, such as Springhill Corrections Facility, Christchurch Men's Prison and Hawke's Bay Regional Prison, gang membership is significant. Corrections' estimate of it at these last three prisons is, respectively, 40 per cent, 41 per cent and 54 per cent.[26]

We have already noted that administrative staff exercise their judgment in deciding whether to return certain incoming gang mail. Some staff we interviewed said they applied a rough rule of thumb based on the amount of gang talk in a letter. They did not regard salutations and the like (a common one being, we were told, Sieg Heil) as constituting grounds to return a letter to the sender. But they would return a letter if a good deal of it was gang talk – including, in one case, setting out rules for gang membership. They referred any gang letters that raised safety-related concerns to the applicable custodial officer.

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[24] Staff place a sticker on the envelope, or a small leaflet within the envelope (the item is included in a new franked envelope from the prisoner) noting the reason for its return – for example "banned magazine", "prohibited photos" or "gang material".

[25] Return to Sender Mail Register.

[26] See the Ombudsman OPCAT reports: Tongariro Prison (September 2019), p58; Northland Regional Corrections Facility (July 2019), p70; Hawke's Bay Regional Prison (July 2017), pp77-78; Springhill Corrections Facility (August 2017), p66; and Christchurch Men's Prison (December 2017), p84.

We found it hard to detect any consistency in when custodial staff would withhold gang mail. We are reasonably confident they withhold outgoing gang mail that, on the face of it, reveals criminal intent. But as already noted, many staff said some gang mail is often “illegible” or “in code”. They refer gang mail almost weekly to prison intelligence units to review for the purposes of withholding, but we suspect – and this is no more than an impression – that these intelligence units may see only a small portion of such mail.

Overall, we suspect a lot of outgoing gang mail finds its way past the prison walls, more so than incoming because administration staff often work off local guidelines that instruct them to return gang-related items to the sender – an instruction they extend to mail. (And they don’t usually vet gang mail within their prison – and a good deal of this occurs apparently – on the assumption custodial staff will have checked this as outgoing mail.)

Without a doubt, gang mail poses some particular challenges, quite apart from the difficulty of deciphering it. It can be used for recruiting purposes, and we were told that receiving gang mail can thwart the genuine efforts of some prisoners to leave gang life behind them. It can lead to hostilities and violence within prisons. And, finally, as already emphasised, such mail may be far from conducive to prisoners’ rehabilitation.

Section 105 says no prisoner may send mail to another prisoner without first notifying the prison manager, but it appears this rule is rarely observed. In any event, this section requires only that the prisoner notify the prison manager of his or her intention to correspond with a fellow prisoner. It does not require the prisoner to obtain the approval of the prison manager. Most prisons treat the fact that a prisoner is writing to another prisoner as notification.

Prisoner-to-prisoner mail is, in short, a growing issue. We think it warrants attention and suggest in section four that consideration be given, as occurs in some countries, to an approval process for prisoner-to-prisoner mail.

## Sex talk

A very grey area is what prisons call “sex talk”. We were told some letters were “downright indecent”, “disgusting” or “left nothing to the imagination”. Prisoners themselves concede there is “a lot of sex talk in prison mail”. What prisons do with these letters varies considerably from prison to prison.

Administrative staff in some prisons may return such incoming mail to senders on the basis that it is objectionable or abusive. Again, as with gang mail, our impression is they do exercise judgment, but the difficulty is that what is indecent or objectionable will depend on their personal views. That, of course, is not the statutory test for mail, although it is for items of property.

The practice for outgoing mail seems to be much the same, although we have the sense – and that’s all it is – that more sex talk leaves prisons than enters them (which is the same as our impression of gang mail). Some custodial staff told us they returned some of the letters they considered “crossed the line” and invited prisoners to rewrite them without the sexually explicit material. As far as we could tell, it was rare that custodial staff would formally withhold a letter simply on the grounds that it contained sex talk.

Many staff repeatedly said the grounds for deciding whether to withhold or return mail containing sex talk were the most grey of all the categories of mail. Staff are faced with trying

to decide whether sex talk may pose a threat to prison security (especially incoming mail, which we were told was often shared around prisoners), or alternatively may endanger a recipient's welfare, particularly if posted on the internet (in the case of outgoing mail). (A decision to withold is, of course, much easier to make where the indecent mail is clearly threatening or intimidating – especially if the recipient is a victim – but these cases of sex talk are in the minority.)

And even if staff do consider indecent or offensive mail warrants withholding, they must still make their decision taking into account the Bill of Rights Act 1990, in particular prisoners' rights to freedom of expression. Recent court decisions have further complicated matters, notably those relating to prisoner Phillip Smith's challenge to Corrrections' decision to deny him the right to wear a toupe. [27] In the High Court, the judge went so far as to suggest it was not enough that Corrections, as it had argued, simply exercised its discretion in a way that was consistent with the Bill of Rights Act 1990, but rather that Corrections staff must, in each individual case, go on to specifically consider whether a decision (for example, to withhold mail) was a justifiable limit on a prisoner's freedom of expression, as permitted by section 5 of that Act. Although Corrections successfully appealed the finding to the Court of Appeal, arguing the section 14 right to freedom of expression didn't even apply in Smith's case, the Court of Appeal declined to make a finding on precisely how Corrections should exercise its decision-making powers when section 14 did apply.

Quite how Corrections staff, untrained in the law, are meant to make these difficult decisions in the grey area of indecent or offensive mail without legislative certainty – or at the very least rules to guide them – is far from clear to us.

Two final points. First, because sex talk is passed around prisoners, we were impressed with one prison's practice of contacting the sender, discussing their knowledge of the offender (sometimes they are sex offenders) and pointing out that the mail could be shared among prisoners. This prison thought it important senders understood the risk in sending prisoners sex talk. We commend this approach, which may be one other prisons could adopt.

Secondly, we were struck by the perspective of current and former female prisoners working with RAW and the impact such sex talk can have on recipients. One person expressed it in this way: "A form of abuse through mail is the sex content. Not everyone will agree with this but in my opinion it is detrimental to how women value themselves. Thousands of pornography-based written communications exist in prisons, predominantly men's units, and it is abuse because it is degrading." This female perspective needs to be taken into account in any policy debate about offensive and indecent mail (see section four).

### Protection and monitoring lists

We have already mentioned that prisons must check Corrections' IOMS system or their own monitoring list to ensure a prisoner is not attempting to send mail to a person with whom he or she is not permitted to have contact. A problem we heard of at some prisons – and this goes beyond mere process – involves issues related to information-sharing between Corrections, NZ Police and the Ministry of Justice. In general, this works very well, but protection orders are not part of the information that is automatically shared with Corrections

[27] *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704

(as best as we understand for privacy reasons).[28] The result is delays in prison staff learning about – and acting on – these orders because Corrections has no knowledge of these orders until the prison (or a victim) advises Corrections staff of the order, or staff note that the prisoner has a history of family violence and request relevant information from NZ Police. It is only after receiving this information that Corrections is in a position to manually create an alert and any necessary notes to protect that person from any form of communication with the prisoner.

One prison expressed serious concern about the delay in getting this information into Corrections' system. It cited the example of a prisoner who, according to its records, was the subject of a single protection order. But on closer inspection, it learned he was, in fact, subject to four. It was simply unaware, until the information came across from NZ Police to Corrections, that there were indeed four protection orders in place.

There is another problem. A prisoner can write to a protected person if that person consents in writing to receive mail. However, that person can withdraw consent verbally – for example, during a telephone call with the prisoner. A protected person is under no obligation to inform Corrections staff when he or she withdraws consent. In the absence of such a notification, Corrections is in no position to act on that person's wish not to receive mail. It would make sense, in our view, that protected individuals are asked to communicate that wish in writing.

In our view, it is imperative Corrections, NZ Police and the Ministry of Justice explore ways to quickly and easily share this information in the interests of protected individuals. Another vital task is to ensure the public is better informed that Corrections can stop prisoner mail quickly and effectively if the recipient does not want to receive it.

### Foreign mail

In today's increasingly multicultural society, more mail to and from prisoners is written in languages other than English. We heard that the proportion is very small but growing. The Act says an authorised person may translate correspondence into English or into Te Reo Māori. The reality, we were told, is that prisons lack the resources to translate letters on site. The uncertainty on copying means there may be a risk in emailing the letter to accredited translation services. Rather, they have to send the original, and this risks losing control of the mail, including for evidential purposes in a court where the chain of custody may be a relevant factor. There is also the cost and delay in sending mail to off-site translation services. In many instances, these letters may well be perfectly innocuous. One prison told us about a prisoner who communicates with his elderly parents in Chinese. A recent email was 50 pages. Corrections must be alert to the fact there is plainly a risk if prisoners are communicating with the outside in a foreign language that their mail could well contain criminal intent that goes undetected through practical constraints on translating mail.

### Lawyer-prisoner mail

Both Corrections and lawyers told us that lawyer-prisoner correspondence poses problems on several fronts. Corrections is concerned that prisoners, in contravention of the rules, sometimes enclose another letter within the letter to their lawyer, which they ask to have sent on. Those letters can potentially be to victims or witnesses.

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[28] See Schedule 5 to the Privacy Act 1993.

Another problem is that some lawyers are not adhering to the rule requiring correspondence with prisoners to have a covering letter addressed to the prison manager stating that they are acting in their professional capacity and that the correspondence relates to their client's legal affairs. Lawyers need to be reminded of this obligation. And if a lawyer is also a relative of the prisoner – and we came across such a case – he or she must differentiate between correspondence written in a legal capacity and that written in a personal capacity.

Conversely, lawyers told us about obstacles to timely and effective correspondence with their clients. This raises important questions about access to justice. It is no surprise many lawyers prefer to contact their clients by email, and these emails often contain substantial attachments, such as police disclosures. There are three problems here. First, Corrections does not allow attachments to emails, so attachments are immediately "stripped" from the system. We assume the attachments are ultimately mailed to the prisoner.

Secondly, Corrections is concerned about printing lawyers' emails in case they are accused of opening or reading them. We accept that Corrections staff may inevitably, but quite unintentionally, catch a few words of such emails as they print them out. This should not, however, be allowed to get in the way of printing and delivering such mail to the prisoner without undue delay. One simple solution would be for the prisoner and the lawyer to sign a short, standard waiver that makes clear Corrections may print out these emails. The question of attachments is more difficult because the system is not set up to receive them, but we are sure constructive discussion would find a way around this.

Thirdly, lawyer's must get their clients signature on any notice of appeal against conviction or sentence. There are time limits for filing such appeals. Lawyers email notices of appeal to prisons for this purpose, but they often experience long delays getting signed notices back. (These documents are not privileged.) We understand from Corrections that the problem, at least at some prisons, is a lack of resources.

We suggest a small working group made up of representatives from Corrections and some, or all, of lawyers' professional associations to find practical solutions to these problems, which include questions of cost and resources.[29] A set of guidelines could be drawn up detailing the best way for lawyers to correspond with their clients. The guidelines could also detail the rules governing lawyer-prison communications and remind them of the need to adhere to them. (They even need reminding not to use bulldog clips or paper clips because x-ray machines detect them, making it necessary to open the correspondence.) A co-operative approach between Corrections and the profession is, we are confident, likely to produce practical solutions to the current problems.

[29] There are the New Zealand Law Society, ADLS Inc, New Zealand Bar Association and Criminal Bar Association of New Zealand.

# TRAINING, AUDIT AND ASSURANCE

## Training

Newly recruited custodial staff undergo a 12-month training programme, at the end of which they receive a New Zealand Certificate of Offender Management (Level 3). The training consists of lectures, online modules and on-the-job training at the prison where recruits will be placed. Topics include searches, the use of handcuffs and pepper spray, tactical exits, legislation and policy, completing incident reports, whānau engagement and prisoner complaints.

The course offers no training on prisoners' mail or telephone calls (there is some limited training on visits). We do not think this is by design, but rather reflects the fact training must cover a wide range of topics in a limited time and using limited resources, so priority must go to core areas. Naturally, if there is no training in prisoner mail or telephone calls, there can be no explanation of why this communication helps maintain family bonds and assists with eventual reintegration. Nor can there be any explanation of why it is important to sometimes restrict prisoner communication to protect the public.

Outside individuals and organisations such as the Chief Victims Advisor, the Howard League and RAW told us they had never been invited to speak to recruits about prison matters from the perspective of prisoners or victims. Although obviously a matter for Corrections, we see great benefit in inviting outside speakers to address recruits. As an aside, several external parties we spoke to said prisons were run in a way that was "all about prisoners but without them". In other words, prisoners' views are not, they consider, taken into account by Corrections in designing and implementing decision-making processes. This view may or may not have any basis, but some treatment of prisoners' and victims' perspective in the training of new recruits receive would go some way towards demonstrating that their views do matter. Moreover, this step would be consistent with Corrections' newly adopted values framework and Hōkai Rangi strategy. These values are Rangatira (leadership), Wairua (spirituality), Whānau (relationships), Kaitiaki (guardianship) and Manaaki (respect).

There is no regular formal training for recruits (including anything related to prisoner communications) after they graduate, apart from online training, which many custodial staff told us was "not a very good tool". They also said opportunities to do online training were infrequent: "When we do get a break and are at the computer, we are more likely to be checking emails and doing administrative work than e-learning." Any improvement in skills came from colleagues in the course of day-to-day work.

Staff said each prison used to have a learning and development unit offering good refresher training, including in decision-making, but these had not been available for some time. They contrasted their limited training with what was available at Corrections' other arm, Community Corrections (that is, probation). There, officers were well supported with a wide range of training tools and processes. They pointed to the fact the probation arm has one practice leader (whose task is to support staff in their day-to-day duties) for every 20 probation officers.

This contrasts with the prisons' arm where there are only four regional directors and one practice manager who are responsible for what Corrections calls "practice delivery", but who have only a limited role in helping staff with practice improvements. Many experienced staff

told us how much better training used to be when each prison had its own learning and development personnel, who could offer staff good refresher training and support. As one said: “There are no trainers in prisons now – it’s a massive gap.”

## Audit and assurance

Corrections has a variety of risk, quality assurance and audit processes. In general, it identifies potential risks to its operations or strategic objectives, assesses their impact, puts controls in place, and monitors the performance of the controls. Corrections has an “integrated quality improvement framework” that aims to continuously improve the standard of its operations. It also has a team that conducts quality assurance reviews and runs workshops on Corrections’ values and how staff should put them into effect. In addition, it has a 16-question checklist called CheckPoint that managers and the chief custodial officer complete about risks in their area.[30] Some administration and business services staff, who administer the Trust Account Manual for prison money and phone cards, have completed ad hoc audits of trust account processes only. The system is multi-layered and complex.

Prisoners’ mail does not figure anywhere in this system. It is not on Corrections’ risk register, it is not in the CheckPoint checklist, and it does not feature, with one exception, in its risk, assurance and audit programme. The exception is an internal audit team review of prisoners’ mail and email which was carried out in 2017, which rated mail processes as inadequate[31] and made nine recommendations to improve processes, two of which have yet to be implemented.[32] One recommendation from the audit took more than two years to put into effect. We were told the delays were caused by insufficient staff to make the changes and the substitution of higher priorities partway through the work.

Regional performance teams do not appear to have reviewed the quality of mail processes at prisons in their area, at least in the past five years, and mail processes do not feature in any of their work plans. Prison managers rarely, if ever, visit areas where mail is processed to hear first-hand about any problems or concerns. Few prison managers or senior managers accord much importance to mail processes. One prison manager summed up the general feeling: “Mail is not my priority – the safety of my staff and the safety of the people in my care are. Mail doesn’t even feature in the scheme of things. “To be fair, prison managers and senior staff face a myriad of competing priorities and work with limited resources in a pressured and complex environment. And there has been a visible improvement in some prisons post-August in their mail monitoring processes.

## External checks

The Office of the Ombudsman surveys prisoners about mail. Visits by this independent oversight body are unannounced. The Howard League’s Wellington branch analysed eight of its reports prepared in 2017 and 2018 and found prisoner satisfaction with mail process

[30] A recent review of CheckPoint found it was not working as intended. Corrections is considering what a replacement tool might consist of.
[31] Inadequate means there is a reliance on “soft controls” such as ethics, competence and integrity rather than “hard controls” such as policies, processes, authorisations and monitoring to manage risks.
[32] These relate to reminding staff about the limitations of copying mail, and the rules regarding use of prisoner email systems.

varied significantly prison by prison.[33] At Arohata Prison, for example, 81 per cent of prisoners[34] were dissatisfied with the mail processes, 68 per cent at Springhill Corrections Facility, 49 per cent at Whanganui Prison and 30 per cent at Tongariro Prison.[35]

The Office of the Inspectorate, a team of independent inspectors at Corrections' national office, also conducts unannounced visits. It checks prisoners' treatment and conditions against a performance framework and has visited all 18 prisons in the past 20 months. It told us it had not reviewed prisoners' mail, focusing instead on visits and telephone calls, but would begin doing so in response to the August incidents.

We consider inspections by both bodies to provide a good check on prisons' compliance with their various obligations and welcome the inspectorate's intended focus on mail.

## Complaints

A final form of assurance is a good complaint process. Prisoners can complain about mail processes through Corrections' complaints system. If not satisfied, the complainant can contact Corrections' complaints response desk. If still not satisfied, the complainant can go to the Office of the Inspectorate and then to the Office of the Ombudsman. One interviewee said complaints to both bodies "can remain invisible for some time".

Complaints data extracted from Corrections' COBRA system shows 297 complaints were received since 1 January this year, which appear to relate to prisoner mail. The Office of the Inspectorate told us that since 1 January it had received 37 complaints relating to mail. It could not give us any insights into themes running through these complaints. We suspect delays getting mail may be a common one.

Complaints data is, of course, critical to identifying problems and their root causes. We were told Corrections began a programme last year to improve its complaint processes, including ensuring prisoners had easy access to the complaint form and had their complaint resolved quickly. We trust this work will include complaints about mail (and other communications) so Corrections can analyse the data for underlying problems.

[33] The Office of the Ombudsman, as part of its investigation, asks prisoners to complete a survey that asks, among other things, if they have had problems with mail processes.
[34] Of the prisoners who responded to the survey.
[35] See the Ombudsman OPCAT reports: Arohata Prison (March 2018) p58, Springhill Corrections Facility (August 2017) p63, Whanganui Prison (August 2018) p82, and Tongariro Prison (September 2019), p55. The Office of the Ombudsman's in their recent review of Tongariro's mail processes said mail arrangements were efficient, with mail normally distributed each working day.

# IMPROVEMENTS

We have identified five broad areas where practical improvements can be made to restore the Chief Executive's confidence in the way prisoner mail is processed. These relate to law reform, establishing dedicated mail-monitoring teams, clear and concise guidelines to help staff, training for staff, and regular monitoring.

## Law reform

In section one, we identified deficiencies in the Act and regulations. Some, in our view, require urgent attention, while others will clearly need more time for careful policy deliberation, including discussion and debate with stakeholders, such as prisoners' and victims' groups and other agencies before considering legislative change. Our recommendations respond to these various deficiencies and challenges.

## Withholding grounds

The grounds for withholding mail should be widened. The obvious example – triggered by recent events – is to prohibit mail containing hate speech from coming into or out of prisons. This is already receiving urgent attention. Corrections has proposed that it be able to withhold mail if it promotes or encourages hostility towards any group of people on the grounds set out in section 21 of the Human Rights Act 1993,[36] and also if it threatens or intimidates any person, not just its recipient. The withholding threshold would be lowered to take account of the risk that mail may directly or indirectly intimidate or threaten any person. And finally, the principles to be taken into account when dealing with mail would include the interests of victims, the potential for mail to be posted online, and the potential for messages to be disseminated through code. We commend these proposed changes.

A question, however, is whether, in the longer term, the withholding grounds should be expanded further still. As noted earlier New South Wales and Victorian legislation allows mail to be withheld, among other grounds, if it is "offensive" or "indecent".[37] The United Kingdom simply prohibits "objectionable" mail (with its equivalent to Corrections' manual providing a long list of mail caught by that description, including offensive or indecent mail).[38] Thus, unlike New Zealand legislation, the prohibition on what can be broadly described as objectionable *property* (because it is offensive or indecent) applies to the *mail* as well to its enclosures such as pictures and photos. Closer to home, the Oranga Tamariki Act 1989 says the manager of a residential care facility may "inspect" mail if he or she believes on reasonable grounds it contains material that "would be likely to be offensive and harmful to the person for whom the mail was intended".[39]

Plainly, there is a need to protect prisoners' rights to preserve loving relationships and, more widely, their privacy and freedom of expression. At the same time, many members of the public would, in all likelihood, think prisoners should not send or receive mail that on its face is indecent or offensive , as in some Australia states, especially if such mail were then to be posted online.

Perhaps more importantly, Corrections requires certainty, one way or the other, whether offensive or indecent mail is prohibited either because the mail is an item of property or it is considered likely to (or may directly or indirectly) endanger recipients' welfare or pose a threat to prison security. These last two grounds are the only ones, we think, that could

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[36] Those grounds include religious and ethical beliefs, colour, race and ethnic and national origins.
[37] Victoria Corrections Act 1986, New South Wales Correctional Centres Act 1952.
[38] Prison Rules 1999, rule 34; see also footnote 23.
[39] Section 384B of the Oranga Tamariki Act 1989.

apply to withholding such mail on a case-by-case basis. (This is unless the mail were clearly threatening or intimidating – especially if the recipient is a victim.) But these are both high thresholds, especially endangering a recipient's welfare or safety, which requires that the mail puts someone at risk or in danger. And it is hard to see how Corrections staff would necessarily have the information about the recipient to assess whether indecent or offensive mail might have that effect.

One other withholding ground that may also warrant attention is abusive mail. With the increasing focus on New Zealand's deplorable record of family violence, and the need for greater recognition of victims' rights,[40] there may be a case for prohibiting abusive mail. Some abusive mail can be withheld now if it is intimidating or endangers the welfare of the abused person.

Sometimes, however, the abuse is subtle and we have already noted the severe damage abusive mail can cause for victims of family violence (section three). We were told of one letter referred to the Chief Victims Advisor from a victim of domestic abuse who received a letter from a prisoner – not the abuser – that included words to the effect: "I will come and look after you when I get out of prison." For her, this was code that her partner would see to it she was dealt to. We acknowledge that, even with an abuse test, such a letter may still get to its intended recipient (though as we note later, more can be done to let recipients know how they can stop prison mail being sent to them in the first place). Our point is that abusive mail can fall well short of intimidation or endangering welfare, so it may be timely that policy and law makers consider whether New Zealand should follow the examples of New South Wales and Victoria legislation and explicitly prohibit abusive mail.

For completeness, we should add we are aware that one view expressed during parliamentary debates on section 108 of the Act was that the withholding grounds were a "fairly broad net and it [was] pretty hard to see what one would want to catch, in fairness, that that provision cannot catch".[41] Time has not permitted an examination of all the policy and related papers underpinning the introduction of the 2004 Act (or the 2008 amendments). This may well have been the intention, but practice has shown it is far from clear precisely what some of these grounds are – grounds that one interviewee described as "ephemeral". Was it intended this welfare-related provision catch indecent, offensive and abusive mail or not? New South Wales and Victorian legislation has the advantage of making this explicit.

Another option is to retain the "broad net", but, as many modern-day statutes now do, provide examples of the sort of mail considered to endanger welfare or pose a threat to prison security.This would assist both Corrections and prisoners. And in fairness to some prisoners, they are unlikely to know themselves what they can and can't write about.

### Other changes

We consider the Act needs a range of changes, some of which require reasonably urgent attention. Some, we know, are under consideration by Corrections right now.

*Copying mail*: The regulations should be amended to allow the copying of mail beyond the three existing limited situations (correspondence between Corrections and the prisoner, passing mail to an enforcement officer or seeking legal advice about whether there are grounds to withhold the mail). We have noted above the range of reasons why we consider the prohibition on copying mail is, to put it bluntly, absurd. Legislation in New South Wales, Sweden and Finland permits copying of mail in certain circumstances or subject to

[40] See, for example, Strengthening the Criminal Justice System for Victims, Chief Victims Adviser, 2019.
[41] Hansard, Corrections Amendment Bill (no 2) First Reading, 21 February 2008.

appropriate restrictions.[42] The legislation in many other countries is simply silent on copying (and indeed storing) mail, making it arguable that copying mail is not prohibited per se (as in, for example, Norway, Canada and Victoria).

*Intelligence gathering*: The Act should be amended to give Corrections explicit powers to allow prisons' security and intelligence units to receive, read, copy and store mail for the purposes of gathering intelligence. Mail must be able to be examined for code and patterns signalling possible criminal intent. The current provisions of the Act fetter Corrections' ability to maintain safety and welfare within prisons and protect public safety and security.

Appropriate safeguards can be put in place to protect prisoners' privacy, such as redacting and destroying those parts of a letter that are personal in nature.[43] Time has not enabled us, or Corrections, to identify overseas legislation that permits mail to be read, copied and stored for intelligence gathering. We were told by New South Wales' equivalent to Corrections, however, that it has this power. No doubt if it is decided this area needs attention, appropriate research into the law and practices in other countries can be undertaken.

*Email correspondence:* The Act should be extended to include email correspondence. We note the Oranga Tamariki Act 1989 includes emails within the definition of "mail". Whether the definition of mail should simply be widened to include email, or whether email requires its own set of rules will need careful consideration. Suffice to say there is a legislative gap when the Act and regulations are completely silent on the management of email and, indeed, the use of other newer technologies, such as video calls and the internet. We are not alone with outdated legislation. New South Wales is about to look at this very issue. As one person we spoke to put it: "We need to bring the legislation into the 20th century, let alone the 21st."

*Prisoner-to prisoner mail:* Policy and law makers should consider whether prisoner-to-prisoner mail should require the prior approval of the prison manager. In United Kingdom prisons, correspondence between convicted prisoners requires approval except where prisoners are "close relatives" or co-defendants and the mail relates to their conviction or sentence.[44] Approval for prisoner-to-prisoner mail is not new: it applied in New Zealand before the 2004 Act. We have already examined in section three why expanding the Act in this way may well be appropriate, particularly with the huge increase in gang mail.

Legislation could set out the range of circumstances for approving such correspondence. This may include when prisoners are close family members, when correspondence will help support a prisoner's rehabilitation and eventual reintegration into society, or when such mail will generally benefit a prisoner's welfare and wellbeing. As one external party emphasised, and we acknowledge, friendships are often formed in jail, and when prisoners are transferred to other prisons, mail is the only way they can continue with their friendships. Clearly, that should be permitted. But, as we heard from so many interviewees, it is highly questionable whether, in some instances, prisoner-to-prisoner mail (particularly gang mail) achieves these rehabilitation or wellbeing-related objectives. We emphasise, again, that gang membership itself is not the issue, rather the content of gang mail.

*Consistency with contact provisions:* There should be greater consistency, and overall coherency, in both the policies behind, and regulation of, mail, telephone calls and visits,

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[42] New South Wales Correctional Centres Act 1952; Prison Treatment Act 1974 (Sweden); Imprisonment Act 2005 (Finland).

[43] For example, as required by section 103 of the Intelligence and Security Act 2017 Note: It may be that section 103A of the Act will need amendment to make clear that a Corrections staff member authorised to read correspondence includes regional and national office staff because some intelligence-gathering units are also located in regional and national offices.

[44] The legislation should have a coherent set of rules relating to all.

which are all but different forms of communication between prisoners and the outside world. We have pointed out the many inconsistencies in the rules for mail and telephone calls (section one). As one interviewee said, each form of communication should ultimately be about "supporting rehabilitation, reintegration and whānau connections". It is only sensible that mail, telephone calls and visit provisions are therefore broadly similar in both their purpose and application. New South Wales prison officials told us their legislation suffered from the same problem and they were about to review all contact provisions to achieve a much lacking "coherency".

It may be timely, too, to consider whether the Act should be updated to regulate the emergence of modern digital technologies in prisons. This is a topic well beyond the scope of our review. All we note is that prisons worldwide have been slow to date to embrace modern technology, although some countries are beginning to adopt digital technologies to improve communication processes.[45] Video conferencing has been developed to nurture family contact in Ireland and the Netherlands. Belgium has introduced "PrisonCloud", which enables prisoners to access details about the prison regime, have their own personalised timetable, and access their own legal files and so on. Some United Kingdom private prisons are using digital kiosks and in-cell telephones, as are a limited number of New Zealand prisons. As the Council of Europe's European Prison Rules note: "Prison authorities should be alert to the fact that modern technology offers new ways of communicating electronically … and it may be possible to use them in ways that do not threaten safety or security."[46]

### Dedicated mail-monitoring teams

Each prison should set up a dedicated mail-monitoring team that opens, reads and withholds mail in one seamless process. In some parts of New Zealand, regional mail hubs may be more efficient and also achieve economies of scale. Regional hubs could work well in Canterbury (where three prisons are close to one another) and in Auckland where there are four prisons.[47]

Features of this new process would be:

*Dedicated staff:* Each mailroom would have dedicated staff for incoming and outgoing mail. Those prisons with a full-time person assigned solely to reading all incoming mail said having such a person "helped considerably to streamline the process". This simply reinforces our view that dedicated mail teams for both incoming and outgoing mail are the solution. They would be multi-disciplinary and have administrative staff, who, on the whole, do an efficient and effective job opening and processing incoming mail; custodial staff with the experience to read and decide whether mail should be withheld; and one person with the delegation from the prison manager to make decisions to withhold mail there and then and to record it appropriately. As one interviewee put it: "You want the brains and jail craft of our custodial staff, but the resource and availability of our administrative people." It would also answer the plea of prison managers who said their custodial staff were "better left to get on with their jobs on the landings to keep the units safe and secure and attend to the myriad of other things they must do day in and day out than be spending time monitoring mail". As one manager observed: "Mail is a tangled web and our staff can't win, whatever we do." We agree with all these points.

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[45] See *Some Observations on the Digital Landscape of Prisons Today*, Prisons Service Journal, issue 220 p3.

[46] Council of Europe, European Prison Rules (2006); see commentary, p52.

[47] Christchurch Men's Prison already processes incoming mail for Christchurch Women's Prison (and previously was also doing the same for Rolleston Prison). Rolleston recently decided to process mail itself, although it still sends money, included with incoming mail, to its counterpart to receipt and bank.

Such a team could include part-time staff, such as retired Corrections or NZ Police officers, who could bring to the task many years' experience of the prison system and offenders. They would be able to make well-informed decisions that struck the right balance between prisoners' rights and public safety. All of these staff would be authorised to read mail for the purposes of determining whether it should be withheld.

*Email:* The same team should deal with all incoming emails and, at least for the time being, apply broadly the same rules as those relating to mail.

*Dedicated mailroom:* All mail should be processed in a permanent mailroom, which, combined with the dedicated staff above, would facilitate the smooth processing of mail from start to finish. This would avoid the many hands that at present handle mail, and all the attendant risks of such an arrangement. As to facilities, these need to be adequate for teams' needs. We saw many staff processing incoming mail in office areas designated for general office duties, and this left little space to spread out mail. Some prisons at least had a dedicated mail table, but others lacked even that. One prison had a temporary mailroom, but it was cramped and had no shelves or cubicles to file processed mail. Staff were using cardboard boxes to designate mail that required withholding decisions, depending on which of the statutory grounds might be met. One prison did have a spacious, well-equipped mailroom, which drove home to us how essential it is to have a good-sized room with all necessary furniture and equipment for orderly processing.

*Consistent processes:* Each mailroom would, by and large, follow clear and consistent processes for opening, reading and withholding mail. Local processes would be confined to matters of administrative detail, such as when mail was delivered by New Zealand Post, when it was collected, and when it was bagged up and delivered to the units within the prison. Consistent processes mean staff must have clear guidelines to follow, or, as one interviewee put it, "a common source of truth": see further below.

*Formal documents:* Templates, forms and the like should take the place of email exchanges. That way they are distinguished from the welter of everyday email correspondence when staff are notified of changes to the manual or processes more generally. None of this is to suggest these documents need to be complex. Indeed, they should be simple and user-friendly.

*Trained staff:* All staff would be appropriately trained: see further below.

*Health and safety:* It goes without saying the health and safety of these staff would need careful monitoring. While pleased that few staff assigned to such work raised health and safety issues with us, we could envisage a different outcome among a particularly dedicated team. Custodial staff currently on light duties who do nothing but mail processing eight hours a day at one of the larger prisons described the work as "tedious as well as disturbing". They said they saw "some pretty sick, real nasty and some poorly written Fifty Shades of Grey letters". Corrections must give appropriate support to these staff.

*Clearer notice to recipients:* Corrections should do more to ensure recipients understand they can tell the department they don't want to receive prisoner mail. The mail team should apply a stamp on the back of each outgoing envelope advising the recipient to phone or email Corrections if he or she does not wish to receive mail from this prisoner or any other prisoner. The stamp would include relevant phone and email details. (These details are on Corrections' website, including its new 0800 number for this purpose, but not all recipients will have access to the internet.)

*Reporting:* The team would provide regular reports to the prison manager, copied to the Regional Commissioner, and would cover matters such as the volume of mail, the

percentage withheld, broadly the grounds for withholding mail, areas of concern (including emerging risks), and complaint data. With a dedicated mailroom, it should be possible to count the number of mail items coming in and going out, enabling Corrections to get a better estimate of volumes – information that can affect the allocation of resources and also identify trends, such as whether prisoner-to-prisoner mail has increased in volume.[48]

*Auditing and assurance*: Processes would be regularly audited: see further below.

We think such a dedicated and seamless mail process will overcome many of the current inadequacies and inconsistencies in how mail is checked and why it is withheld. It will also achieve consistency in manual processes and compliance with statutory requirements, especially those relating to withholding mail. It should also result in faster processing times and earlier receival of mail by prisoners – a particularly important point for prisoners for whom mail is virtually their only form of contact with the outside world. A dedicated mailroom also has the advantage of keeping this process out of sight of prisoners. Custodial staff told us one of the risks of skim-reading mail on the day shift is that prisoners can see staff reading their letters. That leads to prisoners abusing staff about reading – if only in the most cursory way – their letters.

There is one final important point. What would the checking of mail look like for these dedicated teams, particularly given the volume of mail involved? This really goes to the heart of the problem: how much checking is practicably possible and needed? A sensible approach would be to adjust the degree of checking to the levels of risk, including matters such as the identity of the prisoner and his or her correspondent, the nature of the prisoner's offending and his or her security risk. We envisage three broad approaches:

*Word-for-word reading:* There are clearly some prisoners whose mail should be very closely monitored, much as already happens at the centralised process in Wellington. Many overseas prisons – those in New South Wales being but one example – monitor very carefully the mail of high-risk or security-risk prisons. Plainly, the mail of such prisoners should be subject to careful scrutiny. If it is in a foreign language, it should be translated. If it appears to be in code, it should be passed to the intelligence unit. In short, this mail would in all likelihood require in-depth reading.

*Light reading:* The second category is mail that needs something more than the current scanning but certainly far less than word-for-word reading. A well-trained custodial staff member with a careful eye will be able to look for particular words, phrases, code or content that alerts him or her to the need to read such mail more carefully. Depending on the length of the letter, it is probably no more than a two or three-minute job.

*Quick glance*: The third category is mail that, given the identity of the prisoner, warrants only the briefest examination to satisfy the staff member that the content is completely innocuous and can be forwarded without delay to the prisoner or sent for mailing. Much of the mail, in fact, falls into this category. It is important to avoid over-checking mail of this type so as to protect a prisoner's privacy to the fullest extent possible. It is the scan Corrections staff currently give mail.

With all mail, however, it is essential dedicated teams check Correct IOMS alert system to ensure mail is not going to anyone the prisoner is not permitted to contact. This checking should include the mail address as well as the addressee's name. Several prisons told us they always checked the address on the letter because prisoners often used the name of someone else at the address, or even a fictitious name, to circumvent the system and get

[48] It may even be possible for Corrections, as New Zealand Post's biggest customer, to ask for a daily count of each delivery to each prison.

mail to a protected person or victim. And as already noted, the dedicated mail team must guard against prisoners sending such mail via other prisoners. One task that warrants a high degree of vigilance is ensuring prisoner mail does not get to any protected person, victim or anyone who does not want to receive prisoner mail. The distress, including potential physical and mental harm, that could result from a failure of this kind is obvious.

### Guidelines

All staff in these teams must have guidelines that are clear and concise and take them step by step through the processes they must adhere to and the decisions they are required to make. We recommend Corrections examines the United Kingdom's (England and Wales) equivalent of the manual. Note their guidelines give staff a very clear list of items prohibited under that country's equally "broad net" regulatory regime. For example, the list of items includes mail that is obscene or indecent, contains threats or plans for the commissioning of an offence (whether or not readily intelligible or decipherable), descriptions of how to make weapons or dangerous items, and material that may place a child's welfare at risk. And this is only a portion of the list.[49]

We found the guidelines well-structured and very clear in their instructions on all the various aspects of mail processes, such as postage, correspondence with children and young persons, prisoner-to prisoner mail, victim and public protection issues, and penfriends, to name but some. The guidelines are in plain English, making them easy to read, and start with a good explanation of why prisoners are actively encouraged to maintain contact with the outside world, including by mail. We think it especially important new guidelines do likewise and explain why victims' interests are so important, but equally why prisoners should have good social contact, so staff are always conscious of the need to balance these competing objectives.

The benefit of guidelines that all staff follow will be more consistency in processes among prisons. This is not to ignore the need for each team to understand local prison conditions and prisoner make-up and behaviour. We accept staff will take all these factors into account in deciding when to withhold mail, especially outgoing mail. Custodial staff working in the units will need to make sure their team is regularly informed of issues that may affect decisions on mail.

In the long term, the manual will need rewriting to achieve this objective of clear and concise guidelines on mail, and indeed in our view other forms of prisoner communications. In the short term, we recommend Corrections gives staff – pending even the set-up of dedicated mail teams – some clear interim guidelines on particular problem areas, such as scanning, withholding, gang mail and sex talk, so current inconsistencies in processing among prisons are significantly reduced.

Prisoners, just like staff, also need some clear guidance about what the law means in practice. An induction booklet we sighted (and which we suspect is widely distributed among prisons) merely repeats the statutory tests for what is allowed in or out. Yet we know how difficult staff often find interpreting the Act. How much harder must it be for prisoners? And if amendments to the Act take effect and prohibit discriminatory mail, the need to provide some level of education for prisoners will be even greater. When, for example, will a letter be considered to be hate speech? Prisoners are entitled to some guidelines, written in plain English, that spell out what they can and cannot write about. Examples would be helpful. A focus on education and prevention would be a common-sense way to lessen the need for staff to make decisions about withholding mail in the first place. While redrafting the

[49] Ministry of Justice Prisoner Communications Services Guidelines (November 2018) at www.justice.gov.uk.

guidelines for prisoners, Corrections could take the opportunity to look at clamping down on certain abuses, such as the prisoner who writes strings of one-page letters, and even introducing some of the United Kingdom's practices for curbing excess mail. We leave it for Corrections to explore whether it can do this in practical ways, or whether it will need legislative or regulatory change to achieve this objective.

We suggest, too, that Corrections gives prisoners' family members, friends and whānau guidance about when it will withhold incoming mail. Corrections' website offers no guidance in this respect except to note that it checks all letters for contraband. It does not say that it checks the contents of letters to establish whether there are statutory grounds to withhold the correspondence. This needs attention.

### Training

Training is needed on two fronts. First, mail teams should receive their own dedicated training so they can carry out this important task efficiently and effectively. Training should not merely be e-based learning. Rather, it should include face-to-face workshops conducted from time to time in each region. In that way, staff can learn from each other by sharing issues or concerns, discussing different approaches to particularly difficult withholding cases and supporting each other in what are challenging roles. It should be possible to share examples of letters (suitably anonymised) to educate and coach staff in making the right withholding decisions. People undoubtedly learn best by discussing tangible examples. This will mean, though, that copies of letters will be necessary for training purposes – yet another reason why the copying provision of the Act needs amending.

The benefit of such training will be obvious. It will help achieve much greater consistency in mail processes at all prisons. Whether a prisoner's mail is withheld will not depend – as now – on individual prison's practices. Secondly, training in mail processes (and monitoring other forms of communication) should extend beyond these dedicated teams. We consider it important the 12-month training programme for recruits contains a module on prisoners' communication, including mail. As we have already noted, if there is no training on prisoner mail, telephone calls or visits, then staff are unlikely to understand why this communication helps maintain family bonds and assists with eventual reintegration – and equally, why it is sometimes necessary to restrict prisoner communication to protect the public. As we suggested in section three, and time and resources permitting, there may be great benefit in inviting outside speakers to address recruits to understand the necessary "why", not just for mail processes but also other processes that form an integral part of the correctional system.

More generally, custodial staff would undoubtedly benefit from the re-establishment of learning and development units within prisons offering good refresher training and support.

### Auditing and assurance

These mail processes, if adopted, must be subject to regular auditing. This is not just for statutory compliance but more importantly to ensure sound decision-making. Given the complexity of Corrections' risk and assurance systems, it is not possible for us to express a view about who precisely should conduct these audits, or how often. Auditing by national or regional offices would certainly achieve consistency against common standards. If the task is left to each prison to audit its mail processes, guidance would clearly be necessary on how such auditing best takes place and how often.

Prison managers should show leadership, too, in visiting these mailrooms from time to time to hear first-hand about particular issues, concerns or emerging risks and generally support their staff in these difficult roles.

Complaint processes should be easy to access and use. Complaints should be shared with mail processing teams. An important feature of any good process is that lessons are identified and disseminated for educational and prevention purposes.

## Implementation

Our recommendations will clearly require some time to implement. Some, however, can be acted on immediately, while others are for the near term or longer term. Some, of course, require legislative change or policy discussion. Our own view is that the best way to make improvements relating to process would be to adopt a project approach. This would entail a project lead, good project management tools and clear accountability. We stress, however, that good project management is not just about tools or templates: the greater part of it is about culture, people and work practices, which feature strongly in the Hōkai Rangi strategy.

We are confident our recommendations, if adopted, will restore the Chief Executive's confidence in Corrections' mail processes.

Miriam Dean CNZM QC
Lead reviewer

Grant O'Fee MNZM
Reviewer

# APPENDIX: TERMS OF REFERENCE

## Scope of Independent Review into the Adequacy of Processes relating to the Opening, Reading and Withholding of Mail

### Background

1. Following the publication of a number of letters by prisoners, including from the Christchurch accused, the Chief Executive of the Department of Corrections has determined that she does not have confidence in existing processes for reviewing and assessing prisoners' mail.

2. The Chief Executive therefore wishes a high-level internal review to be undertaken into whether the prisoner mail system is fit for purpose

### Review Objectives

3. The review's objectives are to:

    I. Examine how the current mail processes operate and their adequacy in achieving the intent of the Corrections Act, Regulations and Prison Operations Manual. This should have a particular focus on - Corrections Act 2004 103A to 110C; Corrections Regulations 2005 82 to 84; and Prison Operations Manual C.01 Prisoner external communication and mail correspondence.
    II. Make recommendations for improvements or enhancements to the current processes.
    III. Work with the Chief Executive on any other related matters as agreed.

### Deliverable

4. A report to the Chief Executive which will contain:

    I. A broad assessment of how current processes operate and the level of consistency across the prison network of New Zealand
    II. Clear recommendations to enhance the existing processes to ensure instances of inappropriate treatment of prisoners' mail are mitigated
    III. Advice on additional strategies or responses that would maximise the impact and effectiveness of all aspects of the current legislative settings.

5. The reviewers will report on progress on the review to the Project Manager.

### Personnel

6. The review will be undertaken by independent experts.

7. Independent Reviewers: Miriam Dean CNZM QC and Grant O'Fee MNZM, (the reviewers)

8. Project Sponsor: The Chief Executive of the Department of Corrections

9. Project Manager: Jeremy Lightfoot

## Scope

10. The Review may consider, without limitation, the following:
    - What are the priority issues to address
    - How could the end to end processes be strengthened
    - How can staff working with prisoner mail be better supported
    - Identification of training needs.

## Out of Scope

11. Employment matters.

12. The mail process for the Christchurch accused.

## Approach

13. The reviewers will consult with Departmental staff and other relevant agency staff as appropriate, as well as any external professionals with specialist knowledge, or any other party whom they consider may be able to assist in the review.

14. The reviewers will anonymise interviewee's comments in the final report (unless permission is provided by the Project Manager and interviewee).

15. All information and documentation generated by this review will remain the property of the Department of Corrections and cannot be discussed or disclosed externally without express permission.

16. The reviewers will keep interview notes confidential to any other person to the fullest extent permitted by the law (provided this does not prevent the reviewers including the interviewee's comments in the final report in accordance with paragraph 14).

17. If legally privileged information is disclosed to the reviewers in the course of the review, they will:

    I. maintain the legal privilege in that information and keep that information confidential; and

    II. use their best endeavours to ensure there is nothing in the final report that could result in the imputed waiver of that privilege.

18. A draft report will be provided to the Project Manager and Project Sponsor for comment to ensure it contains no material errors or misunderstandings.

19. The reviewers may be required to attend a meeting with the Project Manager and Project Sponsor to discuss their report.

20. The outcome of the review may be released publicly by the Department of Corrections, in whole or in part.

## Timing

21. The review will be completed by 7 October 2019.