Impact Summary: Strengthening the Department of Corrections' powers to withhold mail

Section 1: General information

Purpose
The Department of Corrections (Corrections) is solely responsible for the analysis and advice set out in this Regulatory Impact Assessment, except as otherwise explicitly indicated. This analysis and advice is an updated version of a Regulatory Impact Analysis developed between June and 15 August 2019, and reflects additional advice that was sought by Ministers following concerns about the release and publication of prisoner mail that should have been withheld by Corrections.

Key Limitations or Constraints on Analysis
Our analysis on the likely impact of these proposals has been constrained by the absence of empirical information about the total volumes of mail that are currently checked and withheld by Corrections on the grounds set out in the Corrections Act 2004 (the Act). The analysis of additional options identified after 15 August has been limited due to the time constraints involved in getting an updated summary lodged in time for consideration at Social Wellbeing Committee on 28 August.
Responsible Manager (signature and date):
Eamon Coulter Acting General Manager – Policy Department of Corrections 23 August 2019

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

Background

It is important for prisoners to have contact with the outside world, as connection with family and friends can assist in their rehabilitation and eventual reintegration into the community.

Under the Act, every prisoner is allowed as a minimum entitlement:

- at least one outgoing telephone call of up to five minutes duration per week
- to send and receive as much external mail as the prisoner wishes
- to receive at least one private visitor each week for a minimum duration of 30 minutes.

In practice, Corrections generally provides prisoners with greater access to the outside world than the minimum levels required by legislation.

Access to these forms of communication is subject to some limitations under the Act.

Private visits

Anyone wanting to visit a prisoner must apply to Corrections for approval by completing the Private Visitor Application form. The form seeks the applicant's personal details, as well as information regarding any court orders in place that prohibits contact between the prisoner and applicant. Corrections is permitted to decline a visitation application if it does not support the stated purpose of private visits, which is to maintain family and social relationships that promote the prisoner's re-integration into the community on release.

Telephone calls

Before a prisoner is able to make a telephone call, they must nominate the specific telephone number by filling out the appropriate form. Upon receiving the completed application, custodial staff must:

- verify that the name and number of the nominated recipient is correct
- obtain the nominated recipient's consent to receive calls from the prisoner
- enquire whether the prisoner is subjected to a non-contact court order.

Corrections is permitted to monitor all phone calls, except those placed to members of Parliament, lawyers, and other people who have a role in providing independent monitoring and oversight of the corrections system.

External mail

Corrections is permitted to withhold mail sent into and out of a prison, where it is likely to:

- threaten or intimidate the recipient of the mail that is sent by the prisoner
- endanger the safety or welfare of someone
- pose a threat to the security of the prison
- promote or encourage the commission of an offence, or facilitate the possible commission of an offence
- prejudice the maintenance of the law, or
- breach an order or direction of any court or constitute contempt of court.

Due to the substantial amount of mail that is sent to and from prison, only a portion of mail is subjected to detailed checks, which are usually targeted.

Problems

Following the attack on the Christchurch mosques on March 15, attention has moved to consider how to address the activities of individuals who seek to foster and promote hostility against particular groups in society. This is particularly relevant to Corrections because it is responsible for managing people in prison who are known to hold these sorts of views, including the person accused of the attack on the Christchurch mosques. Corrections estimates that it currently manages individuals in prison who have views that might be considered 'extreme'.

While Corrections has a range of powers to withhold mail sent to and from prisoners under section 108 of the Act, recent events have raised questions about whether these are sufficient to address concerns about the distribution of material that seeks to incite or promote hostility against particular groups in society.

Previous work

Shortly after the events of March 15, Corrections undertook some internal work looking at a number of legislative provisions to determine whether these remained fit for purpose, given the need to address specific management issues related to the Christchurch accused, and others who may have some similar characteristics.

As part of that work, Corrections identified an issue related to the scope of its powers to withhold prisoner mail. As noted above, Corrections has a range of powers to withhold mail sent to and from prisoners. These grounds relate to the safety of people, the security of the prison and the need to prevent the promotion or commission of an offence.

However, section 108 is currently silent on Corrections' authority to withhold mail that seeks to incite hostility against particular groups. Experience from overseas has shown that individuals in prison who have hostile views towards particular groups in society may seek to communicate their views in an attempt influence (and potentially radicalise) others, both in prison and in the community. These individuals may also become a focal point for sympathetic individuals and groups in the community, who may seek to draw attention to and amplify their hostile views.

We noted that while at least some of this sort of material may fall within the ambit of the withholding grounds listed in section 108(1)(d), it is also conceivable that material could be produced that would not fall within these grounds. For example, material that does not directly threaten the safety of a person, but which seeks to promote hostility against a particular group.

We noted that if the legislative provisions related to withholding prisoner mail are left as they are, there is a risk that material which seeks to incite hostility against particular groups could be sent from prison into the community or within the prison system, resulting in harm, which could include:

- radicalising people in prison or the community
- the promotion of violence or hostility against groups in society
- the re-victimisation of individuals or groups who have previously been subject to harm.

We also noted a risk that actions to withhold this type of mail could be challenged in court (resulting in additional publicity for these views), and if successful could result in Corrections being required to pay compensation to these individuals.

Recent concerns

On 14 August 2019 senior managers at Corrections became aware that a letter which had been sent by the Christchurch accused had been posted to the 4chan website, and quickly determined that this letter should have been withheld given its content. A check of other mail sent by the Christchurch accused revealed that second letter had been sent that should also

have been withheld.

While Corrections determined that the failure to withhold these letters was the result of human error, rather than a deficiency in legislation, this incident highlighted the importance for Corrections to have clear and explicit provisions related to withholding prisoner mail.

The problems that were identified as a result of this incident were that current provisions for withholding mail:

1) may provide insufficient legal clarity as to what may be withheld
2) do not take account of the potential for mail to be directly or indirectly harmful to third parties, including the potential for mail to be shared and published (including on social media)
3) do not address the fact that people communicating by mail may use coded language to get messages or information through that would otherwise be withheld
4) may not sufficiently address the interests of victims.

2.2 Who is affected and how?

The proposals set out in this Regulatory Impact Assessment will affect:

- prisoners, and those who write to them, including those who seek to communicate views that may incite hostility against groups of people within society
- people within the wider community who are potentially the target of such material (e.g. migrant communities, people with particular religious beliefs), or may be harmed indirectly.

2.3 Are there any constraints on the scope for decision making?

Following the attack on the Christchurch mosques, the Ministry of Justice has been examining whether New Zealand's legislation properly balances the issues of freedom of expression and hate speech. This review may lead to changes to the Human Rights Act, and the Harmful Digital Communications Act.

The desire to address the issues noted above before decisions are made on these areas reflects a concern that the issues noted above will arise in the short term, and have been heightened by the recent incident. Corrections is currently managing correspondence from individuals endorsing the recent attack on the Christchurch mosques, and supporting the ideologies of the individual accused of the attack.

In the event that the Government decides that substantive changes are required to New Zealand's human rights legislation, consideration can be given to whether any consequential changes should be made to the Corrections Act.

The remainder of this document has been completed twice.

- **The first version (below) reflects options that were identified and analysis done prior to 15 August 2019. These address the problem described under the heading "Previous work" in section 2.1.**

- **The second version reflects a suite of additional options that were identified after 15 August 2019. These address the problems described under the heading "Recent concerns" in section 2.1. The analysis of these options has been limited due to time constraints.**

Initial options that were identified following the events of March 15, which seek to address the problem described under the heading "Previous work" in section 2.1.

Section 3: Options identification

3.1 What options have been considered?

The following options have been considered to strengthen Corrections' ability to prevent the dissemination of material that seeks to incite hostility towards a group of people.

The nature of prisoner communications requires consideration of fundamental constitutional principles, including balancing rights related to freedom of association and freedom of expression, with the need to uphold Corrections' legislative responsibility to support public safety, and the rehabilitation and reintegration of offenders.

We have therefore focused our options analysis on how to achieve the best possible balance between these important principles and priorities. To this end, we have developed and tested different options using the following the criteria:

Effective – the extent to which the option clarifies Corrections' authority to withhold mail that seeks to incite hostility towards certain groups of people

Harm prevention – the extent to which the option protects public safety and prevents harm

Supports rehabilitation – the extent to which the option supports (or does not unnecessarily limit) prisoner rehabilitation

NZBORA compliance – the extent to which the option limits the rights affirmed under the New Zealand Bill of Rights

Implementation – the amount of resourcing required to implement the option.

(1) Withholding mail under existing provisions in the Human Rights Act

Under section 108(d)(iv) of the Corrections Act, Corrections has the power to withhold mail that is likely to promote, encourage, involve or facilitate the commission, or possible commission, of an offence. Corrections could therefore rely on existing provisions under the Human Rights Act 1993, specifically section 61, which establishes a civil offence of publishing or distributing written matter that is likely to excite hostility or bring into contempt a group of people, because of their colour, race, ethnic or national origins, or section 131 which establishes a criminal offence of inciting racial disharmony in similar terms to section 61.

However, case law involving these sections of the Human Rights Act has indicated that to satisfy the elements of sections 61 and 131, and justify an incursion on the right to freedom of expression, the material must be at the serious end of the spectrum. As a result, relying on these provision would present a significant risk that Corrections withholds material that is found not to satisfy the high threshold that has been established, and is successfully challenged in court.

Therefore, the legal risk that the status quo presents – i.e. that Corrections withholds mail without the legislative mandate – remains, as it may be difficult for authorised staff who read mail, to determine whether the mail is likely to breach this section of the Human Rights Act.

We also note that sections 61 and 131 of the Human Rights Act specifically relates to racial disharmony, and as a result doesn't protect groups of people that are discriminated against because of their sexuality, religion or gender.

This option will require resourcing to implement, as ongoing training and support will be needed so that authorised staff at prison sites have clear guidance on what mail should and shouldn't be withheld.

(2) Amend legislation so that it explicitly states that mail and telephone calls are for the purpose of supporting rehabilitation and reintegration

While the Corrections Act states that the purpose of private visitors is to maintain the family

and social connections that assist in a prisoner's rehabilitation and eventual reintegration, it is silent on the purpose of prisoner communications via mail and telephone calls.

Unlike private visits, access to mail and telephone calls are not linked to the maintenance of family and social connections in order to promote a prisoner's rehabilitation and reintegration prospects. Instead, mail and telephone calls are treated as a minimum entitlement with specific safeguards to ensure that non-contact Court orders are upheld.

The Corrections Regulations could potentially be amended to state that communications via mail and telephone calls are (like private visits) for the purpose of supporting rehabilitation and reintegration outcomes.

This approach would permit Corrections to withhold and deny communications via mail, telephone calls, and private visits, if the recipient of the communication isn't expected to support the prisoners rehabilitation and reintegration needs.

In theory, this would mean that prisoners only communicate with pro-social people that support their rehabilitation and eventual reintegration. However, the efficacy of this option is limited. By focusing on the *person* that the prisoner is communicating with, it ignores the actual *content* of the material being communicated. This option only limits who prisoners can communicate with, and as a result, its ability to prevent what is communicated is very limited.

As a result, this option would be circumvented with relative ease – for example: an anti-social person can provide material to the prisoner's family member, who can then forward it on to the prisoner.

We also considered the possibility of amending the legislation so that the content of the correspondence must be for the purpose of supporting rehabilitation and reintegration. However, we consider that this would be problematic, because such a provision could be used as a justification to withhold a much wider variety of mail than just mail that seeks to promote or encourage hostility towards certain groups. As a result, this option would not be proportionate to the scale of the issue that we are seeking to address.

(3)(a) Amend section 108(1)(d)(i)-(vi) to broaden the criteria for withholding mail so that it aligns with aspects of sections 61 and 131 of the Human Rights Act

This option would involve amending the Corrections Act to provide Corrections with legislative authority to withhold mail where it is likely to promote or encourage hostility or ill-will towards any group of persons on the ground of the colour, race, or ethnic or national origins of that group of persons. This provision would largely draw from wording used in sections 61 and 131 of the Human Rights Act.

This would provide Corrections with an explicit authority to withhold mail where it encourages or promotes hostility against groups in society, while linking to grounds in the Human Rights Act to determine the groups that are captured.

It is important to note that by closely aligning this option with sections 61 and 131 of the Human Rights Act, there is a risk that this proposed option is not future-proofed. Sections 61 and 131 specifically relate to racial discrimination and as a result doesn't protect groups of people that are discriminated against because of their sexuality, religion or gender.

Corrections believes that its interest in limiting the rights affirmed under the New Zealand Bill of Rights in these specific circumstances is justified, given its legitimate interest in:

- ensuring the safety of people in prison, and in the community
- upholding its legislative responsibility to assist in the rehabilitation of prisoners[1]
- preventing harm and re-victimisation of those affected by offending related to their

[1] Section 5(1)(c) of the Corrections Act states that one of the purposes of the corrections system is to improve public safety and contribute to the maintenance of a just society by assisting in the rehabilitation of offenders.

colour, race, ethnicity or nationality

- ensuring that views which seek to promote hostility towards certain groups are not publicly amplified or glorified which may result in violence (both in prison and in the community).

This option will require resourcing to implement, as ongoing training and support will be needed so that corrections officers have clear guidance on what mail should and shouldn't be withheld.

(3)(b) Amend section 108(1)(d)(i)-(vi) to broaden the criteria for withholding mail so that it cross-references section 21 of the Human Rights Act

This option would amend the Corrections Act to give Corrections explicit powers to withhold mail sent to and from prisoners, where is it likely to encourage or promote hostility towards certain groups of people on the grounds set out in section 21 of the Human Rights Act.

The prohibited grounds of discrimination set out in section 21 include religious belief, ethical belief, colour, race, ethnic or national, and sexual orientation, plus others.

The scope of sections 61 and 131 of the Human Rights Act are narrow and only protects against racial discrimination. Cross-referencing section 21 of the Human Rights Act will ensure that Corrections doesn't unnecessarily limit its ability to prevent harm that is targeted towards marginalised groups within society, given that discrimination in New Zealand extends well-beyond race.

The added benefit of cross-referencing section 21 of the Human Rights Act in this proposed provision is that these prohibited grounds of discrimination are well-settled, long-standing and generally well understood. It also means that should any changes be made to section 21, the proposed provision in the Corrections Act will automatically change as well. It is also likely to align with policy proposals currently under development by the Ministry of Justice, to regulate "hate speech" directed at individuals or groups by reason of their having a characteristic protected by section 21 of the Human Rights Act.

We consider that this option (relying on well-understood terms that already exist in legislation) is likely to be more effective than attempting to generate our own description of the material that we are seeking to withhold – for example, material that promotes violent extremism. This is because terms like 'extremism' and 'violent extremism' can be difficult to define and may be open to signification legal interpretation, which could result in inconsistent decision making and potential legal challenges.

Similar to Option (3)(a), Corrections' interest in limiting the right to freedom of expression in these specific circumstances is justified, given its legitimate interest in:

- ensuring the safety of people in prison, and in the community
- upholding its legislative responsibility to assist in the rehabilitation of prisoners
- preventing harm and re-victimisation of those affected by offending related to their colour, race, ethnicity or nationality
- ensuring that views which seek to promote hostility towards certain groups are not publicly amplified or glorified, which may result in violence (both in prison and in the community).

This option will require resourcing to implement, as ongoing training and support will be needed so that corrections officers have clear guidance on what mail should and shouldn't be withheld.

Impact Analysis: overview of options analysis

	Option 1 – seek to withhold mail under existing provisions in Corrections, and Human Rights Act (status quo)	**Option 2 –** withhold and deny communications via mail if interaction with the sender or recipient wouldn't support a prisoner's rehabilitation and reintegration needs	**Option 3(a)** – broaden section 108 criteria for withholding mail to align with sections 61 and 131 Human Rights Act	**Option 3(b)** – broaden section 108 criteria for withholding material so that it cross-references section 21 Human Rights Act
Effective – the extent to which the option clarifies Corrections' authority to withhold mail that seems to promote or encourage hostility towards certain people(s)	Uncertainty as to what material is likely to reach the threshold established in section 61 and 131 Human Rights Act, as well as the Corrections Act. Recent events indicate that mail that promotes/encourages hostility towards certain people(s) may increase, which will escalate Corrections legal risk. The complexity of the analysis required will increase legal risk.	Corrections cannot withhold mail because of its content, only if the recipient doesn't support the prisoner's rehabilitation. Withholding mail if the content doesn't support the rehabilitation of the prisoner could result in a wider variety of mail than just mail that seeks to promote or encourage hostility towards certain groups being withheld.	Corrections has an explicit ability to withhold mail that is likely to promote or encourage hostility towards certain people because of their colour, race, or ethnic or national origins. However, this ability does not extend to mail that promotes/encourages hostility towards people(s) because of their sexuality, gender and religion.	Corrections has an explicit ability to withhold mail that is likely to promote or encourage hostility towards certain people(s) because of prohibited grounds listed in section 21 of the Human Rights Act.
Harm prevention – the extent to which the options protects public safety and prevents harm	Corrections is working within existing provisions and therefore does not have a greater, or lesser, ability to prevent the dissemination of harmful material.	Corrections does not have an increased ability to promote public safety and/or prevent harm because prisoners will still be able to send mail that is likely to promote/encourage hostility towards certain people(s), but only to people considered to be pro-social. In theory, harm may be prevented because prisoners will be permitted communicate via mail with pro-social people. However, it is likely that this restriction will be circumvented easily.	Corrections has the ability to prevent the dissemination of mail that is likely to promote or encourage hostility towards people(s), which will help to: • ensure the safety of people in prison and in the community • uphold Corrections legislative responsibility to assist in prisoners rehabilitation • prevent harm and re-victimisation of those affected by racially charged offending • ensure that views which seek to promote hostility towards certain grounds aren't amplified or glorified. However, harm caused by mail that promotes/encourages hostility towards people because of other grounds not included in sections 61 and 131, such as sex, sexuality and religion, will not be protected.	Corrections has the ability to prevent the dissemination of mail that is likely to promote or encourage hostility towards people(s), which will help to: • ensure the safety of people in prison and in the community • uphold Corrections legislative responsibility to assist in prisoners rehabilitation • prevent harm and re-victimisation of those affected by offending related to their race, gender, sexuality or religion • ensure that views which seek to promote hostility towards certain groups aren't amplified or glorified..

	Option 1 – seek to withhold mail under existing provisions in Corrections, and Human Rights Act (status quo	**Option 2 –** withhold and deny communications via mail if interaction with the sender or recipient wouldn't support a prisoner's rehabilitation and reintegration needs	**Option 3(a)** – broaden section 108 criteria for withholding mail to align with sections 61 and 131 Human Rights Act	**Option 3(b)** – broaden section 108 criteria for withholding so that it cross-references section 21 Human Rights Act
Supports rehabilitation – the extent to which the option does support (or does not necessarily limit) a prisoners rehabilitation	No greater emphasis has been placed on prisoner's rehabilitation.	In theory, prisoners will only be allowed to communicate with pro-social people. However, in practice it is likely that this restriction will be circumvented easily.	Having an increased ability to stop harmful mail entering prison may have a positive affect on prisoners rehabilitation, however, there is no guarantee that the content of mail will support the prisoners rehabilitation.	Having an increased ability to stop harmful mail entering prison may have a positive affect on prisoners rehabilitation, however, there is no guarantee that the content of mail will support the prisoners rehabilitation.
NZBORA compliance – the extent to which the option limits the rights affirmed under the New Zealand Bill of Rights	No new limitations on a prisoner's ability to communicate via mail – efforts are made to withhold mail under existing conditions.	Placing restrictions on who prisoners can and cannot communicate with via mail and telephone calls is a limitation on their freedom of expression. Whether or not it can be justified in a particular case will need to be considered.	Withholding prisoner mail is a limitation on their freedom of expression. Whether or not it can be justified in a particular case will need to be considered. However, this limitation only applies to mail that promotes or encourages hostility towards people(s) becauyse of their colour, race, ethnic or national origins.	Withholding prisoner mail is a limitation on their freedom of expression. Whether or not it can be justified in a particular case will need to be considered.
Implementation – the amount of resourcing required to implement the option.	There may be some training costs to support corrections officers reviewing mail, however, there is unlikely to be an increase in the amount of mail that is checked.	There is unlikely to be increased checks of mail so the implementation costs will be minimal.	There may be some training costs to support corrections officers reviewing mail, however, there is unlikely to be an increase in the amount of mail that is checked.	There may be some training costs to support corrections officers reviewing mail, however, there is unlikely to be an increase in the amount of mail that is checked.

Key:

Better than doing nothing/the status quo

About the same as doing nothing/status quo

Worse than doing nothing/the status quo

3.2 Which of these options is the proposed approach?

The proposed approach is option (3)(b), which will broaden the criteria for withholding mail so that it cross-references section 21 of the Human Rights Act.

This option will involve amending the legislation so that section 108(1)(d)(i)-(vi) explicitly includes material that is likely to promote or encourage hostility against, or bring into contempt, marginalized and vulnerable people because of the prohibited grounds of discrimination listed in section 21, which includes colour, race, ethnicity, nationality, religious belief, sexuality and sex.

This would give Corrections the ability to withhold material that could have serious consequences if disseminated, but which may not fall within the current statutory criteria.

It will also reduce the legal risk that Corrections may be exposed to, should it withhold material that seeks to incite hostility towards others, without a clear legislative mandate. Reducing this legal risk also reduces the risk of legal action, and prevents re-victimising those harmed by offending related to their colour, race, ethnicity or nationality, religious beliefs, sex, sexuality etc.

There are risks involved in broadening the criteria for mail to be withheld. For example, it could be considered that adding another ground to withhold mail is too restrictive and is in fact a limitation on the right to freedom of expression, contained in the New Zealand Bill of Rights Act 1990. However, the extent of this limitation is arguably minor, and/or justified by Corrections interest in:

- ensuring the safety of people in prison, and in the community
- upholding its legislative responsibility to assist in the rehabilitation of prisoners[2]
- preventing harm and re-victimisation of those affected by offending related to their colour, race, ethnicity or nationality
- ensuring that views which seek to promote hostility towards certain groups are not publicly amplified or glorified which may result in violence (both in prison and in the community).

9(2)(h) [redacted]

Prison managers and those supporting them to make decisions regarding withholding mail may need specialised guidance and training to support them to make individual decisions regarding withholding mail that are consistent with the Bill of Rights Act, and will survive scrutiny on judicial review. 9(2)(h) [redacted]

[2] Section 5(1)(c) of the Corrections Act states that one of the purposes of the corrections system is to improve public safety and contribute to the maintenance of a just society by assisting in the rehabilitation of offenders.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

Affected parties *(identify)*	**Comment**: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	**Impact** *$m present value, for monetised impacts; high, medium or low for non-monetised impacts*
Additional costs of proposed approach, compared to taking no action		
Regulated parties	May result in additional time to get mail through the system	Low/None
Regulators	Ongoing training and support will be needed so that corrections officers have clear guidance on what mail should and shouldn't be withheld.	Low/None
Wider government	None	None
Other parties	None	None
Total Monetised Cost	As above	Low/None
Non-monetised costs	None	None
Expected benefits of proposed approach, compared to taking no action		
Regulated parties	Reduces possibilities that prisoners will send or receive harmful material that promotes or encourages hostility towards certain people(s)	None
Regulators	Provides more explicit grounds to withhold mail, supporting decision making	Low
Wider government	Reduces harm that is targeted towards certain people(s) because of their race, sex, sexuality, religion etc.	Low-Medium
Other parties	Reduces harm that is targeted towards certain people(s) because of their race, sex, sexuality, religion etc.	Potentially high
Total Monetised Benefit	May help to reduce potential future costs to Crown (associated with alleviating harm to victims and avoiding legal costs).	Low
Non-monetised benefits	Benefits relate to preventing harm to individuals, groups and society.	Potentially high

4.2 What other impacts is this approach likely to have?

NA

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Police

Police sought clarity as to whether the proposed threshold for withholding mail would be lower than it currently is in the Corrections Act.

The proposal to introduce a new ground for withholding mail will not lower the threshold for withholding mail under section 108(1)(d)(i)-(vi). Corrections will still only be authorised to withhold mail if the prison manager believes on *reasonable grounds* that the correspondence is *likely to* meet the statutory criteria in the Act.

Crown Law

9(2)(h)

[redacted]

Ministry of Justice

The Ministry of Justice suggested that reference to the terms 'extremism' and 'violent extremism' should be avoided, as whether material is considered to be 'extreme' is often open to interpretation.

The Ministry of Justice also suggested that we consider strengthening the problem definition and the justifications for infringing on the New Zealand Bill of Rights Act.

Following this feedback, the problem definition and the justifications for any NZBORA implications have been strengthened.

Treasury

Treasury did not raise any concerns with the recommendations.

Human Rights Commission

The Human Rights Commission recommended that a Bill of Rights Act assessment of the policy proposal is obtained.

Office of the Ombudsman

The Office of the Ombudsman did not have any comments on the recommendations.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

The proposed approach will be tabled in a Supplementary Order Paper, which will amend the Corrections Amendment Bill.

Corrections will develop guidelines to support staff authorised to check and withhold mail, so that they know what material can and cannot be withheld under the new provision.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

At a national level, Corrections does not currently collect empirical data on the total volume of mail that is currently checked and withheld on the grounds set out in the Corrections Act 2004.

7.2 When and how will the new arrangements be reviewed?

A formal review process of the proposal is not expected. However, the implications of the proposal will be monitored in routine internal service improvement processes and internal audit.

Additional options that were identified following the events described under "Recent concerns" in section 2.1, which seek to address the problems outlined there.

Section 3: Options identification

3.1 What options have been considered?

The options summarised in this section were identified in response to the problems set out at the end of in section 2.1 under "Recent concerns".

In considering the scope of changes to provisions for withholding mail, there is a trade-off to be made between:

- breadth – having grounds that are wide enough to capture all of the types of content that might be of concern, and
- clarity – being sufficiently explicit as to avoid inadvertently capturing other unintended material.

(4) Lowering the threshold for withholding mail

Under section 108(1)(d) of the Act a prison manager can withhold mail where they believe on reasonable grounds that this is likely to:

- threaten or intimidate a person to whom it is being sent by the prisoner, or
- endanger the safety or welfare of any person, or
- pose a threat to the security of the prison, or
- promote or encourage the commission of an offence, or involve, or facilitate the commission or possible commission of, an offence, or
- prejudice the maintenance of the law (including the prevention, detection, investigation, prosecution, and punishment of offences, and the right to a fair trial), or
- breach an order or direction of any court, of the Criminal Procedure Act 2011) or constitute contempt of court.

The threshold for withholding mail on all of these grounds could be lowered, by amending section 108(1)(d) to replace the words "*believes on reasonable grounds is likely to…*" with the words "*believes on reasonable grounds may directly or indirectly…*".

This change would lower the threshold for determining that correspondence could present one of the risks cited in section 108(1)(d), so that Corrections only needs to believe on reasonable grounds that it *may* result in one of these risks arising.

The inclusion of the words 'directly or indirectly' also broadens the grounds for withholding mail by allowing consideration of whether the identified risks may arise as a direct or indirect consequence of correspondence being sent (e.g. publication on social media). This would go some way to addressing the second problem (harm to third parties), and the fourth problem (interests of victims) noted in section 2.1.

9(2)(g)(i) [redacted]

(5) Adding a new ground for withholding mail

This option is the same as option 3(b), which was identified in the previous set of analysis, but with a different threshold – replacing the 'likely' test described in option 3(b) with a 'may

directly or indirectly' test. This would mean mail could be withheld which Corrections:

- believes *on reasonable grounds may directly or indirectly promote or encourage hostility towards any group of persons on the grounds listed in section 21 of the Human Rights Act 1993*

This lower test could be applied specifically to this provision on its own, or applied to all grounds for withholding mail (if option 4 was adopted alongside the inclusion of this new provision).

This option would directly addressing the first and second problems noted in section 2.1 (and going some way to address the fourth problem), by:

- providing an explicit provision to support the withholding of that potentially promotes hostility toward particular groups
- allowing consideration of whether mail may directly or indirectly promote hostility toward particular groups (including through sharing and publication online).

(6) Amending section 108(1)(d)(i) to broaden it

The first ground for withholding mail – section 108(1)(d)(i), allows mail to be withheld where it would "threaten or intimidate a person to whom it is being sent by the prisoner". This could be amended by replacing the words "a person to whom it is being sent by the prisoner" with the words "any person".

This would allow the provision to apply to mail sent both to and from prisoners, and also allow Corrections to consider whether mail might threaten or intimidate someone other than the recipient of the mail.

This change would go some way to addressing the second problem noted in section 2.1 by broadening this one provision to take account of the potential for mail to threaten or intimidate third parties.

(7) Adding additional considerations when deciding whether to withhold mail

Section 104 lists a number of considerations that Corrections must take into account when managing prisoner mail. Currently these considerations cover:

- the need to protect the privacy of prisoners and their correspondents
- the benefits to prisoners of maintaining contact with persons and organisations outside the prison
- the need to maintain the security and order of the prison
- the need to prevent the commission of offences
- the need to ensure the safety of any person
- the need to prevent the entry of unauthorised items into the prison.

Additional provisions could be added to require corrections to consider:

- the interests of victims – this is already included as a guiding principle in section 6, but could be referenced here as well
- potential impacts of written material beyond the receiver, including the potential for the sharing and publication of material
- the potential for messages to be disseminated through coded references as a way to avoid withholding provisions.

Including these as explicit considerations in section 104 would signal the importance of these factors in decision making, and acknowledge wider changes in the environment (e.g. the rise of social media). This change would address the second, third and fourth problems noted in section 2.1.

3.2 Which of these options is the proposed approach?

Time constraints mean that it hasn't been possible to fully evaluate the additional options described above. A proposed approach has not been identified.

It is Corrections' view that any change should include the addition of a provision in section 108(1)(d) that explicitly allows for material to be withheld where it is likely to promote or encourage hostility against the groups described in section 21 of the Human Rights Act 1993.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

Time constraints meant that it was not possible to consult with stakeholders on the additional options described prior to completing this document. 9(2)(h) [redacted]

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

The legislative changes that are chosen by Ministers will be tabled in a Supplementary Order Paper, which will amend the Corrections Amendment Bill.

Corrections will develop guidelines to support staff authorised to check and withhold mail, so that they know what material can and cannot be withheld under the new provision.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

At a national level, Corrections does not currently collect empirical data on the total volume of mail that is checked and withheld on the grounds set out in the Corrections Act 2004.

7.2 When and how will the new arrangements be reviewed?

A formal review process of the proposal is not expected. However, the implications of the proposal will be monitored in routine internal service improvement processes and internal audit.