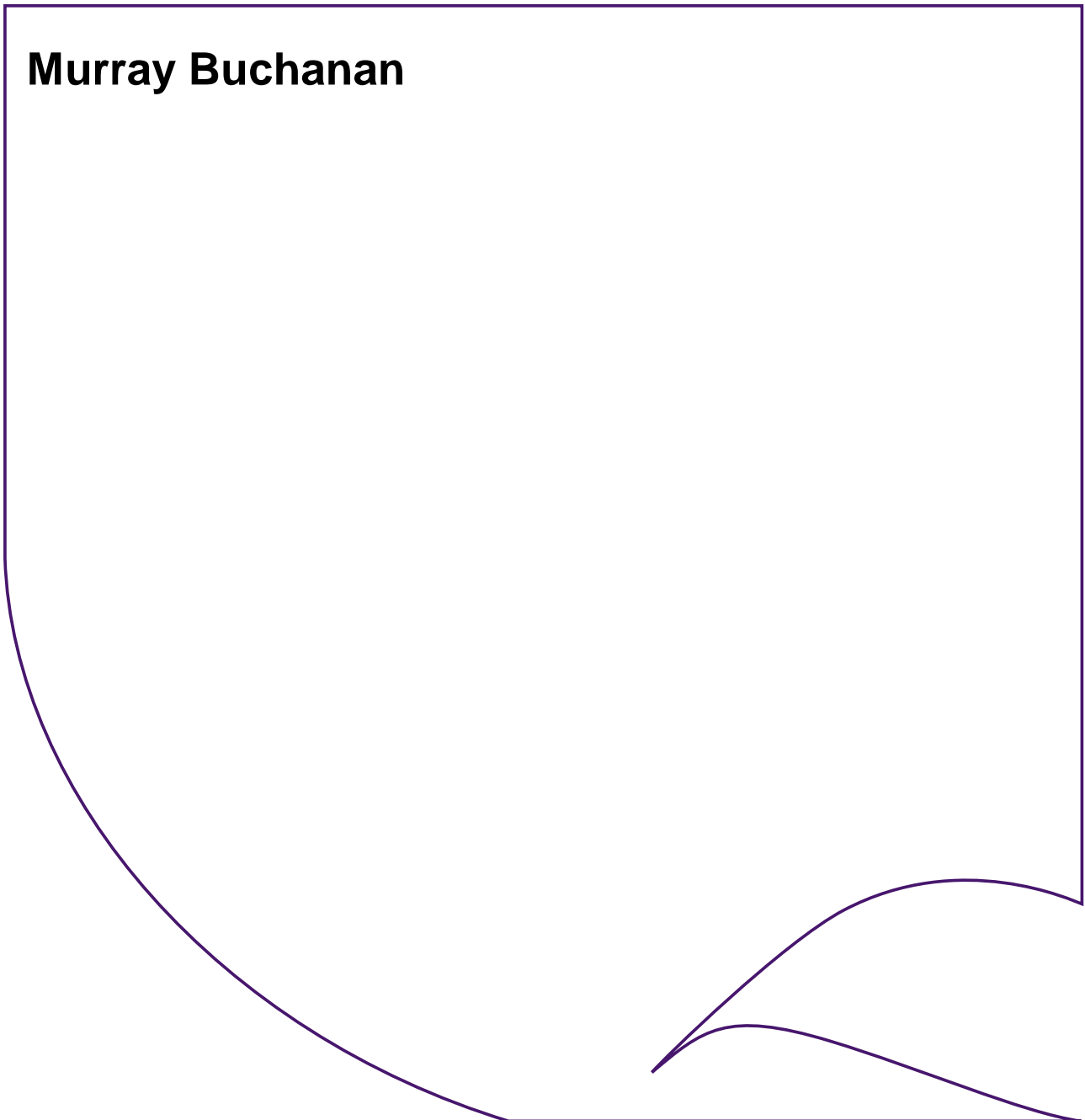


Censorship of Mail in Australian Prisons

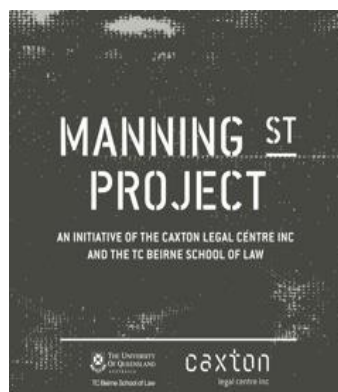
Murray Buchanan



About the Author

This report was researched and authored by UQ law student **Murray Buchanan** for and on behalf of **Civil Liberties Australia**, an independent, non-profit, voluntary member organisation concerned with the protection of individual rights and liberties throughout Australia.

The project was undertaken as part of the Manning St Project, a student pro bono partnership between the UQ Pro Bono Centre and Caxton Legal Centre. The research was conducted from **March to July 2020** in alignment with the first semester of the academic year. Student researchers participate in the Manning St Project on a pro bono basis, without any academic credit or reward, as part of their contribution to service as future members of the legal profession.



This work is licensed under a Creative Commons Attribution - Non-Commercial Licence. This allows others to distribute, remix, tweak and build upon the work for non-commercial purposes with credit to the original creator/s (and any other nominated parties).

Disclaimer

*The paper is intended to give general information about the law. It has been prepared by law students and the content **does not, and cannot, constitute legal advice**. To the maximum extent permitted by law, the University of Queensland and the contributors to this paper are not responsible for, and do not accept any liability for, any loss, damage or injury, financial or otherwise, suffered by any person acting or relying on information contained in or omitted from this paper.*

The University of Queensland make no claims, guarantees or warranties about the accuracy, completeness, timeliness, quality or suitability for a particular use of this information. It is the responsibility of the user to verify the accuracy, completeness, timeliness, quality or suitability for a particular use of this information.

Table of Contents

About the Author	2
Disclaimer.....	2
Introduction.....	4
Summary of Recommendations	5
1. Overview of State and Territory Legislation.....	6
1.1 Australian Capital Territory	6
1.2 New South Wales	7
1.3 Northern Territory	7
1.4 Western Australia.....	8
1.5 Queensland	9
1.6 South Australia	9
1.7 Tasmania	10
1.8 Victoria.....	10
1.9 State and Territory Comparison Table	12
2. Rule of Law as a Normative Criteria.....	15
3. Analysis of Corrections Regimes.....	16
3.1 Limitation of Discretion	16
3.1.1 Inspection of Mail	16
3.1.2 Censorship and Confiscation of Mail	17
3.2 Transparency	17
3.2.1 Accessibility of Public Documents	18
3.2.2 Record Keeping	19
3.2.3 The Right to Reasons	19
3.2.4 Public Access to Data	20
Conclusion	21

Introduction

Freedom of speech has been described as ‘the freedom par excellence; for without it, no other freedom could survive’.¹ In addition to holding intrinsic value, it serves two important instrumental functions: to help realise the dignity and autonomy of individuals and to enable the flow of ideas and information necessary for effective democratic processes.² The ‘Right to Freedom of Expression’, as termed by the *International Covenant on Civil and Political Right* (‘ICCPR’), protects an individual’s right to ‘seek, receive and impart information and ideas of all kinds, regardless of frontiers’.³ The right to freedom of expression is also embodied domestically in state human rights legislation⁴ and, to a limited extent, by Australia’s Constitution itself.⁵ Aside from legal protections, the ideal of free expression perhaps more importantly articulates aspirational normative standards which democratic societies strive to realise.

Given its normative importance, limitations on the right to freedom of expression must be seriously considered. In human rights jurisprudence government enforced restrictions on rights may be permissible but must, at minimum, be genuinely necessary and provided for by law.⁶ Prisons are arguably the most prominent instance of systemic rights limitations in modern liberal democratic societies. As punishment for crimes committed, inmates are deprived of their right to liberty of person. Nevertheless, this specific intended punishment does not legitimise further rights deprivations. Restrictions on other freedoms can only be justified if required for the effective operation of a prison facility.⁷ As such, prisoners retain a prima facie right to freedom of expression.

Mail correspondence is an important means by which inmates can exercise their right to freedom of expression, particularly in light of widespread restrictions to internet and phone services. Despite this, corrections departments across Australia impose vague and arbitrary limitations on prison mail communications. In order to protect against perceived risks, prisons inspect, censor and confiscate incoming and outgoing mail. Whilst perhaps an operational necessity these processes are clearly invasive, and without appropriate safeguards it is easy to envisage instances where censorship of prisoner mail extends beyond what is reasonably required to maintain order.

A recent report by PEN America examined prisoners’ access to literature in the United States. The report found that censorship decisions are being made on indeterminate grounds with little public oversight or scrutiny.⁸ It concluded this censorship regime, in effect, constitutes a hidden nationwide book banning policy.⁹ In Australia too, there is evidence that censorship provisions have been arbitrarily applied. For example, in 2004 a prisoner magazine was banned in New South Wales for ‘publishing [false] information which was likely to cause prisoners to feel anger and resentment’ and for putting the safety of prison staff at risk by identifying them by name.¹⁰ In fact, the Human Rights and Equal Opportunities Commission (‘HREOC’) concluded that the only staff identified by name were the relevant Minister and Departmental Commissioner, and that the magazine truthfully

1 Enid Campbell and Harry Whitmore, *Freedom in Australia* (Sydney University Press, 1966) 113.

2 Australian Law Reform Commission, *Traditional Rights and Freedoms— Encroachments by Commonwealth Laws* (Report, December 2015) 77-8 (‘*Traditional Rights and Freedoms*’)

3 *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19 (‘ICCPR’)

4 *Human Rights Act 2019* (Qld); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

5 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 570.

6 *Traditional Rights and Freedoms* (n 2) 43-50.

7 Corrective Services Administrators’ Council, *Guiding Principles for Corrections in Australia* (Guidelines, 2018) 11.

8 PEN America, *Literature Locked Up: How Prison Book Restriction Policies Constitute the Nation’s Largest Book Ban* (Briefer, September 2019).

9 *Ibid.*, 1-2.

10 Human Rights and Equal Opportunity Commission, *Report of an inquiry into a complaint made on behalf of federal prisoners detained in New South Wales correctional centres that their human rights have been breached by the decision to ban distribution of the magazine ‘Framed’* (Report, No 32, February 2006).

discussed political issues relevant to prisoners.¹¹ It further concluded that whilst individual items of mail or correspondence could be confiscated on inspection, the legislation provided no grounds for the imposition of an ongoing ban of a specific publication.¹² Despite these findings, NSW Department of Corrective Services declined to implement HREOC's recommendations.

Another cause for concern is the relative obscurity and unaccountability of prison administration. Incarcerated persons are entirely dependent on prison officials to provide food, medicine, and other necessities, and are unlikely to have the resources to challenge administrative decisions. Relevant laws and policies are often vague or restricted from public access. Statistics relating to censorship decisions are either not maintained or not published. This report scrutinises the systems of mail censorship across Australia's states and territories. Unfortunately, because of the aforementioned lack of transparency, it is difficult to analyse the de facto implementation of existing law. As such, the report primarily examines the law on the books. The scope of critique encompasses both conventional sources of law, such as legislation and judicial precedent, as well as sources of 'soft law' such as operational manuals and policy guidelines.

As will be explored, the existing written regulatory framework is clearly deficient. Even without evidence as to its implementation, existing laws grant broad and unnecessary discretion to prison officials to interfere with inmate correspondence. Further, the law itself is disturbingly opaque, with little data about prison mail censorship available and key operational policies often withheld from publication. Although it is beyond the scope of this report, future investigation into the implementation of written laws would undoubtedly provide additional valuable insight into Australia's mail monitoring regime.

This paper comprises of three parts. Part 1 provides a brief overview of the prison mail monitoring regimes in each state and territory. Part 2 sets out the criteria for legal analysis, identifying transparency and limitation of discretion as key normative standards implicit in the rule of law. Finally, Part 3 assesses existing mail monitoring regimes against the criteria outlined in Part 2 and provides a number of policy recommendations to rectify identified deficiencies.

Summary of Recommendations

- **Recommendation 1:** *Legislation should set out an objective standard for the inspection of mail.*
- **Recommendation 2:** *Legislation should outline specific criteria for the censorship or confiscation of mail.*
- **Recommendation 3:** *Corrections departments should ensure all relevant policies and guidelines are publicly accessible.*
- **Recommendation 4:** *Prisons should maintain comprehensive records relating to mail inspection, censorship and confiscation decisions.*
- **Recommendation 5:** *Senders and recipients of mail should be notified when prison officials redact or confiscate their mail.*
- **Recommendation 6:** *When prison officials decide to redact or confiscate mail, the sender should be provided reasons for that decision.*
- **Recommendation 7:** *Corrections departments should aggregate and publish anonymised statistics on the inspection, censorship and confiscation of mail in prisons.*

¹¹ Ibid 17.

¹² Ibid, 17-19.

1. Overview of State and Territory Legislation

In Australia, criminal law is primarily the responsibility of its states and territories. As such, prisons are established, managed and regulated pursuant to state and territory law. The following section provides an overview of the prison mail-monitoring regimes in each Australian jurisdiction.

1.1 Australian Capital Territory

In the Australian Capital Territory (ACT) the ACT Corrective Services Director-General must ensure prison conditions meet certain minimum standards. This includes requirements that detainees have 'reasonable access to telephone, mail and other facilities for communicating with people in the community' and that they 'have reasonable access to news and education services and facilities to maintain contact with society'.¹³

The Director-General or their delegate¹⁴ (herein 'prison officer') must ensure that detainees can send and receive as much mail as they wish. However, the sending or receiving of mail can be limited if they reasonably suspect that it might undermine the 'security or good order' of the facility, 're-victimise a victim' or 'circumvent any process for investigating complaints'.¹⁵ A prison officer can open and inspect mail on the same grounds, or by means of random selection.¹⁶ Each time a detainee's mail is searched an electronic record outlining the reason for the search must be maintained.¹⁷

A prison officer may seize mail or items contained within if they suspect on reasonable grounds that seizure is necessary to stop the entry of a prohibited thing, of something that poses a risk to the security or good order of the facility, or of something that is intended to be used for the commission of an offence.¹⁸ Additionally, they can seize outgoing mail if they reasonably suspect it contains threatening or inappropriate correspondence.¹⁹ If an item is seized, a written receipt identifying the item and the grounds for seizure must be passed onto the owner within 7 days.²⁰

The Director-General may declare something to be a prohibited thing by means of a notifiable instrument.²¹ The most recent declaration includes 'restricted publications such as pornography and objectionable material' as prohibited things.²² However, detainees must have reasonable access to newspapers and other mass media for news and information.²³

All ACT Corrective Services policies and procedures are publicly available as notifiable instruments pursuant to the *Legislation Act*.²⁴

¹³ *Corrections Management Act 2007* (ACT) ss 12(e), (i).

¹⁴ *Ibid* s 17.

¹⁵ *Ibid* s 48.

¹⁶ *Ibid* s 104.

¹⁷ Corrective Services Commissioner (ACT), *Corrections Management (Detainee Communications) Policy 2020 (No 2)*, (NI2020-231, 17 April 2020) s7 ('*ACT Detainee Communications Policy*').

¹⁸ *Corrections Management Act 2007* (ACT) s 127.

¹⁹ *Ibid* s 127(b).

²⁰ *Ibid* s 129.

²¹ *Corrections Management Act 2007* (ACT) s 81.

²² Corrective Services Executive Director (ACT), *Corrections Management (Prohibited Things) Declaration 2019 (No 3)* (NI2019-659, 11 October 2019) sch 1.

²³ *Ibid* s 52.

²⁴ *Legislation Act 2001* (ACT) ss 10, 18-19; 'ACT Legislation Register', *ACT Government* (Web Page, 29 June 2020) <<https://www.legislation.act.gov.au/a/2001-14>>.

1.2 New South Wales

Prisoners in New South Wales have the right to send and receive letters or parcels to any person free from censorship.²⁵ However, the governor of a prison facility or their or nominated officer (herein 'prison officer') may open and inspect any mail sent to or by inmates.²⁶ Mail is inspected if the prison has received advice that the correspondence may contain content which is threatening, offensive, indecent, obscene or abusive material; or which might threaten the 'security, discipline, or good order' of the prison.²⁷

A prison officer may confiscate a letter or parcel if it contains prohibited goods but must notify the sending or recipient inmate of the confiscation.²⁸ Prohibited goods include anything likely to prejudice the good order and security a prison; any threatening, offensive, indecent, obscene or abusive written material; or any offensive, indecent or obscene articles.²⁹ If any written material is considered to threaten the 'good order or security' of a prison, the content of that material must be copied and recorded. The material may only be confiscated if an intelligence investigation or legal action pertaining to the material is concurrently commenced.³⁰

Prisoners in NSW may purchase books, newspapers and magazines from the prison store.³¹ However, a prison officer may refuse to permit the purchase of any item if in their opinion the item contains material which is likely to prejudice the good order and security of the prison; or which is threatening, offensive, indecent, obscene or abusive.³²

The NSW Corrective Services Custodial Operations Policy and Procedures (COPP) provide detailed and comprehensive information relating to the administration of NSW corrections facilities. They are publicly available in their entirety, alongside all other Corrective Services NSW policy documents, pursuant to sections 18 and 23 of the *Government Information Act*.³³

1.3 Northern Territory

In the Northern Territory prisoners may send and receive mail in accordance with the Commissioner of Correctional Services' Directions. However, if a General Manager considers it appropriate, they may prohibit a prisoner from sending or receiving mail.³⁴

Mail is taken to be part of a prisoner's personal possessions and may be searched by a correctional officer at their discretion.³⁵ Upon conducting a search, a prison officer may confiscate a thing found which they reasonably believe to be prohibited.³⁶ Prohibited things include items which are offensive, indecent, obscene, threatening or abusive; which might reasonably constitute a threat to the security and good order the prison; or which may have a detrimental influence or effect on a prisoner.³⁷ Items may also be prohibited pursuant to regulations, the Commissioner's Directions or, for a particular prison facility, the declaration of the General Manager provided it is publicised at all entrances to the facility.³⁸

²⁵ Ibid reg 110.

²⁶ Ibid reg 112(1).

²⁷ Corrective Services (NSW), *Custodial Operations Policy and Procedures (Inmate Mail)* (8.1, 16 December 2017) s 1.3 ('NSW Inmate Mail Policy').

²⁸ *Crimes (Administration of Sentences) Regulation 2014* (NSW) reg 112.

²⁹ Ibid reg 3(1) (definition of 'prohibited goods').

³⁰ *NSW Inmate Mail Policy* (n 29) s 5.1.

³¹ *Crimes (Administration of Sentences) Regulation 2014* (NSW), reg 48.

³² Ibid reg 48(2).

³³ *Government Information (Public Access) Act 2009* (NSW).

³⁴ *Correction Services Act 2014* (NT) s 106.

³⁵ Ibid ss 47, 107.

³⁶ Ibid s 47(4).

³⁷ Ibid s 4 (definition of 'prohibited thing').

³⁸ Ibid ss 4 (definition of 'prohibited thing'), 160.

If mail is confiscated, the General Manager or their delegate must either return it to the sender or return it to the prisoner when they leave the facility. Alternatively, they can opt to seize the item for certain legislated purposes, for example, for use as evidence in an investigation or for destruction.³⁹ If mail is seized, the sending or recipient prisoner must be notified of the seizure.⁴⁰

The Northern Territory Correctional Services website lists a number of prohibited items including written or printed material more than five A4 pages in length, photos larger than A4 size and laminated documents.⁴¹ These items are not explicitly listed in the legislation or regulations and are presumably prohibited through the Commissioner's Directions. However, although the 'Commissioner must publish the Directions as the [they consider] appropriate',⁴² any such directions are not currently publicly accessible.

1.4 Western Australia

In Western Australia, prisoners are generally permitted to send and receive mail and have it handled in an 'expeditious manner'.⁴³ The superintendent of a prison or an authorised officer (herein 'prison officer') may open and inspect any parcels or mail which arrive at a prison and are addressed to an inmate. If it appears that the mail or its contents might jeopardise the good order and security of a prison, contain a threat to a person or property, or include coded a expression, the prison officer can choose to return the mail to sender, retain possession of it or destroy the mail.⁴⁴ A register must be kept of all mail received, and in the event that outgoing mail is withheld a security report must be submitted.⁴⁵

Prisoners are not permitted to access prohibited material. The superintendent can prohibit material which, in their opinion, 'is likely to cause a threat to the good order and security of the prison or the safety of other prisoners, staff or the community'.⁴⁶ Prohibited items listed by policy documents include, amongst others, things which depict violence, racial hatred, and sexually oriented material.⁴⁷

The Western Australia Department of Justice Adult Custodial Rules are publicly available, and provide comprehensive guidance on prison standards, operations, policy directives and rules.⁴⁸

³⁹ Ibid ss 157-8.

⁴⁰ *Correction Services Regulations 2014* (NT) reg 22.

⁴¹ 'Send and receive mail in prison', *Northern Territory Government* (Web Page, 13 March 2020) <<https://nt.gov.au/law/prisons/send-and-receive-mail-in-prison>>.

⁴² *Correction Services Act 2014* (NT) s 205(3).

⁴³ Department of Corrective Services Assistant Commissioner Custodial Operations (WA), *Policy Directive 36 Communications* (29 December 2014) s 7.1 ('*WA Prison Communications Policy*').

⁴⁴ *Prisons Act 1981* (WA) s 68, *WA Prison Communications Policy* (n 43) app 1 s 5.5.

⁴⁵ *WA Prison Communications Policy* (n43) app 1 s 5.1.

⁴⁶ Ibid app 1 ss 5.2–5.3.

⁴⁷ Department of Corrective Services Deputy Commissioner Adult Custodial (WA), *Adult Custodial Rule 11: Permitted and Prohibited Material* (17 January 2014) s 5.1.

⁴⁸ 'Adult Custodial Standards and Rules', Department of Justice (WA) (Web Page, 17 October 2016) <<https://www.correctiveservices.wa.gov.au/prisons/adult-custodial-rules/default.aspx>>.

1.5 Queensland

In Queensland a prison officer authorised by the Queensland Corrective Services Chief Executive may open, search and censor letters at their discretion.⁴⁹ They may seize items of mail or their contents if they pose a risk to the security and good order of the prison, are intended for the commission of an offence, if they are prohibited items, or if they contain threatening or otherwise inappropriate material.⁵⁰

Prison officers are also separately empowered to seize items of property which they reasonably consider a threat to the security and good order of the facility or the safety of persons in the facility; or which are prohibited things.⁵¹ If property or mail is seized, the owner must be given a receipt describing the item, date and time of seizure, and estimated value of the item.⁵²

Prohibited goods include publications banned under the *Classification of Publications Act 1991*,⁵³ and anything 'that poses a risk to the security or good order' of the prison including, for example, 'a drawing, plan or photo of the facility'.⁵⁴

Queensland's Custodial Operations Practice Directives require prison officers to give proper consideration to 'each person's right to freedom of expression including the freedom to seek, receive and impart information in print or by way or art'. It further states that 'A person's human rights should only be limited to the extent that is reasonably and demonstrably justified.' However, the two directives potentially relevant to mail monitoring processes, 'Prisoners Communications'⁵⁵ and 'Management of Prisoner Property'⁵⁶, are respectively designated as 'in confidence' and almost entirely redacted.

1.6 South Australia

In South Australia prisoners are entitled to send and receive mail. Letters must be handed to prisoners or forwarded on to their correspondents as soon as reasonably practicable.⁵⁷ Prison officers may inspect letters to determine compliance with the *Correctional Services Act*, but may only withhold or censor them if the letter contravenes specific legislated requirements, such as by including of threats of criminal acts or incitements to violence.⁵⁸ Prisoners must be provided with copies of withheld and uncensored letters upon release from prison.⁵⁹ If a letter contains 'prohibited items' a prison officer may also opt to destroy the letter.⁶⁰ A prisoner can only send or receive goods with prior permission. All parcels may be inspected and withheld if they contain prohibited goods or goods sent without prior permission.⁶¹

Prohibited items include literature which provides instruction on how to carry out activities otherwise prohibited, such as on how to construct a weapon or conduct an escape. Pornographic material is also prohibited, alongside 18+ or equivalent films and computer games.⁶²

⁴⁹ *Corrective Services Act 2006* (Qld) s 45(1).

⁵⁰ *Ibid* s 48.

⁵¹ *Ibid* s 138.

⁵² *Ibid* s 139; *Corrective Services Regulation 2017* (Qld) reg 47.

⁵³ See *Classification of Publications Act 1991* (Qld).

⁵⁴ *Corrective Services Regulation 2017* (Qld) reg 19.

⁵⁵ 'Custodial operations practice directives', Queensland Corrective Services (Web Page, 12 June 2020) <<https://corrections.qld.gov.au/documents/procedures/custodial-operations-practice-directives/>>.

⁵⁶ See Queensland Corrective Services Custodial Operations, Custodial Operations Practice Directive: Management of Prisoner Property (7 November 2019). Approximately 12 of 14 total pages are redacted.

⁵⁷ *Correctional Services Act 1982* (SA) s 33(1).

⁵⁸ *Ibid* s 33(3).

⁵⁹ *Ibid* s 33(10).

⁶⁰ *Ibid* s 33.

⁶¹ *Ibid* s 33A.

⁶² *Correctional Services Regulations 2016* (SA) reg 8(1).

The South Australian Department for Correctional Services (SADCS) website states that ‘newspapers and books are not allowed to be brought to prisoners. They can buy newspapers via the canteen system and borrow books from the prison library’.⁶³ It is not clear on what legislative grounds this prohibition is being enforced, presumably this is a matter of operating procedure. Unfortunately, the SADCS standard operating procedures are not publicly accessible so it cannot be said with certainty.

1.7 Tasmania

In Tasmania prisoners have the right to send and receive letters uncensored by prison staff.⁶⁴ However, if the Director of Corrective Services Tasmania or their delegate (herein ‘prison officer’) reasonably believes that a letter sent or received by a prisoner or detainee is a threat to prison security or may be of a threatening or harassing nature, they may withhold or censor the letter.⁶⁵

A prison officer may at any time search a part of the prison or a prisoner ‘for the security or good order’ of the prison.⁶⁶ The searching officer may seize anything they reasonably believe to constitute a jeopardy to the ‘security or good order of the prison or the safety of persons in the prison’ or otherwise anything that a prisoner is not explicitly authorised to possess.⁶⁷

More guidance on areas such as prisoner mail and access to newspapers is provided in the Director’s Standing Orders. However, these documents are for the most part withheld from public release.⁶⁸

1.8 Victoria

In Victoria, prisoners have a prima facie right to send and receive letters without censorship.⁶⁹ However, the Governor of a prison or their delegate⁷⁰ (herein ‘prison officer’) may open and inspect a parcel to determine if the contents of the letter or parcel may jeopardise the safety and security of the prison, the safe custody and welfare of any prisoner, or the safety of the community.⁷¹ If the parcel is reasonably believed to constitute such a jeopardy, or to contain indecent, abusive, threatening or offensive material, then the prison officer may withhold, censor or return the mail.⁷²

If a prison officer reasonably suspects that a letter or parcel contains an unauthorised article or substance that might pose an immediate danger to any person, they may dispose of in any manner they consider appropriate.⁷³ Unauthorised articles include any audio-visual material or computer games classified above PG, and any written publications classified as ‘Restricted or Refused Classification’.⁷⁴ Additionally, prisoners are not permitted to retain ‘objectionable material’ in their cell. This includes, for example, material that depicts addiction, crime, violence or racial hatred, or

⁶³ ‘Taking property to prisoners’, Department for Correctional Services (SA) (Web Page) <<https://www.corrections.sa.gov.au/family-and-friends/supporting-a-prisoner/visiting-a-prisoner/taking-property-to-prisoners>>.

⁶⁴ *Corrections Act 1997* (Tas) s 29(1).

⁶⁵ *Ibid* s 29(2).

⁶⁶ *Ibid* s 22.

⁶⁷ *Ibid* s 23.

⁶⁸ ‘Policies and Procedures’, Department of Justice Prison Service (Tas) (Web Page, 6 March 2020) <https://www.justice.tas.gov.au/prisonservice/Policies_and_Procedures>.

⁶⁹ *Corrections Act 1986* (Vic) s 47(1)(m).

⁷⁰ *Ibid* s 24.

⁷¹ *Corrections Act 1986* (Vic) s 47C; *Corrections Regulation 2019* (Vic) reg 19(2).

⁷² *Corrections Act 1986* (Vic) s 47D; *Corrections Regulation 2019* (Vic) reg 19(3).

⁷³ *Corrections Act 1986* (Vic) s 47A; *Corrections Regulation 2019* (Vic) reg 17.

⁷⁴ *Corrections Act 1986* (Vic) s 5; Corrections Victoria Commissioner, Commissioner’s Requirements: Prisoner Property (CR 2.1.1, November 2017) s 5.3 (‘*Vic Prisoner Property Policy*’); *Classification (Publications, Films and Computer Games) Act 1995* (Cth) s 7.

which might intimidate prisoners or staff.⁷⁵ The prison must maintain a register of all letters and parcels inspected, the action taken and the reasons for that action.⁷⁶

The Corrections Victoria Commissioner's Requirements sets out operational policies and procedures for prison management and are, for the most part, publicly accessible.⁷⁷

⁷⁵ *Vic Prisoner Property Policy* (n 74) s 5.6.

⁷⁶ *Corrections Act 1986* (Vic) s 47E; *Corrections Regulation 2019* (Vic) reg 21.

⁷⁷ 'Commissioner's Requirements - Part 2', *Corrections, Prisons and Parole* (Web Page, February 2020) <<https://www.corrections.vic.gov.au/commissioners-requirements-part-2>>.

1.9 State and Territory Comparison Table

	ACT	NSW	NT	WA	Qld	SA	Tas	Vic
Right to send and receive letters	Yes – <i>Corrections Management Act 2007</i> (ACT) s 12	Yes – <i>Crimes (Administration of Sentences) Regulation 1999</i> (NSW) reg 110	Yes – <i>Correction Services Act 2014</i> (NT) s 106	Yes – <i>WA Department of Corrective Services Policy Directive 36 (Communications)</i> s 7.1	Not stated	Yes – <i>Correctional Services Act 1982</i> (SA) s 33(1)	Yes – <i>Corrections Act 1997</i> (Tas) s 29(1)	Yes – <i>Corrections Act 1986</i> (Vic) s 47(1)(m)
Grounds for inspection of mail	Reasonable suspicion that mail constitutes a threat to security or good order of prison – <i>Corrections Management Act 2007</i> (ACT) s 104	Advice or other reasons to believe that mail threatens security of prison – <i>Crimes (Administration of Sentences) Regulation 1999</i> (NSW) reg 112(1); <i>Custodial Operations Policy and Procedures 8.1 (Inmate Mail)</i> s 1.3	At prison officer's discretion – <i>Correction Services Act 2014</i> (NT) ss 47, 107	At prison officer's discretion – <i>Prisons Act 1981</i> (WA) s 68; <i>WA Department of Corrective Services Policy Directive 36 (Communications)</i> app 1 s 5.5	At prison officer's discretion – <i>Corrective Services Act 2006</i> (Qld) s 45(1)	To determine compliance with Act – <i>Correctional Services Act 1982</i> (SA) s 33(4)	Reasonable belief that mail contains material which poses a threat to the security and good order of the prison or which may be of a threatening or harassing nature – <i>Corrections Act 1997</i> (Tas) s 29(2)	To determine if mail contains material which jeopardises prison safety and security; or if it contains indecent, abusive, threatening or offensive material – <i>Corrections Act 1986</i> (Vic) s 47C; <i>Corrections Regulation 2019</i> (Vic) reg 19(2)
Record of inspected mail	Yes, including reasons for decision – <i>Corrections Management (Detainee Communications) Policy 2020</i> (No 2) s 7	No	No	No	No	No	No	Yes, but not reasons for inspection – <i>Corrections Act 1986</i> (Vic) s 47E; <i>Corrections Regulation 2019</i> (Vic) reg 21

<p>Grounds for censorship and confiscation of mail</p>	<p>Reasonable suspicion that mail contains something that is prohibited, a risk to security, intended to be used in offence, or which contains threatening correspondence – <i>Corrections Management Act 2007</i> (ACT) s 127</p>	<p>Confiscation of contraband and of threatening, offensive, indecent, obscene or abusive material. Can only occur if investigation or legal action also taken – <i>Crimes (Administration of Sentences) Regulation 1999</i> (NSW) regs 112, 3(1); <i>Custodial Operations Policy and Procedures 8.1 (Inmate Mail)</i> s 5.1</p>	<p>Prison officers can stop entry of mail if considered appropriate and can confiscate mail if reasonably believed to contain prohibited goods – <i>Correction Services Act 2014</i> (NT) s 47(4)</p>	<p>If mail jeopardises prison security and good order of facility, contains threat, or contains coded expression – <i>Prisons Act 1981</i> (WA) s 68</p>	<p>To stop entry of items which pose a risk to the security and good order of the prison; which are threatening or otherwise inappropriate; or of prohibited things – <i>Corrective Services Act 2006</i> (Qld) ss 50, 138</p>	<p>Only on fulfilment of specific legislated criteria set out (e.g. plans to commit crime, incitements to violence etc) – <i>Correctional Services Act 1982</i> (SA) s33(3)</p>	<p>For purposes of maintaining security and good order of prison – <i>Corrections Act 1997</i> (Tas) s 23</p>	<p>If reasonably believed to jeopardise prison safety and security; or if mail contains indecent, abusive, threatening or offensive material – <i>Corrections Act 1986</i> (Vic) s 47A; <i>Corrections Regulation 2019</i> (Vic) reg 17</p>
<p>Record or receipt of confiscated mail</p>	<p>Receipt must be given to owner – <i>Corrections Management Act 2007</i> (ACT) s 129</p>	<p>Content of confiscation must be recorded – <i>Custodial Operations Policy and Procedures 8.1 (Inmate Mail)</i> s 5.1</p>	<p>Notification sent to recipient prisoner – <i>Correction Services Regulations 2014</i> (NT) reg 22</p>	<p>Record kept of mail received and withheld – <i>Prisons Act 1981</i> (WA) s 68; <i>WA Department of Corrective Services Policy Directive 36 (Communications)</i> app 1 s 5.5</p>	<p>Yes a receipt describing the thing, name/address of recipient and date of seizure must be given to property owner – <i>Corrective Services Act 2006</i> (Qld) s 139; <i>Corrective Services Regulation 2017</i> (Qld) reg 47</p>	<p>The recipient and sending prisoner must be notified – <i>Correctional Services Act 1982</i> (SA) ss 33(10)-(11)</p>	<p>No</p>	<p>Interference with mail and reasons for interference must be recorded – <i>Corrections Act 1986</i> (Vic) s 47E; <i>Corrections Regulation 2019</i> (Vic) reg 21</p>

Range of prohibited items	Items are prohibited by declaration. Current prohibitions include 'restricted publications such as pornography and objectionable material' – <i>Corrections Management Act 2007</i> (ACT) s 81; <i>Corrections Management (Prohibited Things) Declaration 2019</i> (No 3)	Money or any item that in the opinion of the nominated officer, is likely to prejudice the good order and security of a correctional centre; any threatening, offensive, indecent, obscene or abusive written or pictorial matter – <i>Crimes (Administration of Sentences) Regulation 1999</i> (NSW) reg 3(1)	Offensive, indecent, obscene, threatening or abusive material; material which might reasonably threaten prison security; and material which may have a detrimental influence or effect on a prisoner – <i>Correction Services Act 2014</i> (NT) s 4	Items can be prohibited by declaration if likely to cause harm to prisoners or threaten the security and good order of a prison – <i>WA Department of Corrective Services Policy Directive 36 (Communications)</i> app 1 s 5.1	Items which pose a risk to the security and good order of a prison and prohibited publications under federal law – <i>Corrective Services Regulation 2017</i> (Qld) reg 19	R18+ content, pornography, and instructions to make other prohibited items – <i>Correctional Services Regulations 2016</i> (SA) reg 8(1)	Anything not explicitly authorised – <i>Corrections Act 1997</i> (Tas) s 23	Items which jeopardise prison safety and security; or which contain indecent, abusive, threatening or offensive content – <i>Corrections Act 1986</i> (Vic) s 5; <i>Corrections Victoria Commissioner's Requirements 2.1.1: Prisoner Property</i> s 5.3; <i>Classification (Publications, Films and Computer Games) Act 1995</i> (Cth) ss 5.6, 7
Publicly available operating procedures	Yes, all policies publicly accessible – <i>Legislation Act 2001</i> (ACT) ss 10, 18-19	Yes, all policies publicly accessible – <i>Government Information (Public Access) Act 2009</i> (NSW) ss 18, 23	No, policies not accessible	Yes, policies mostly accessible	Partial, some policies accessible	No, policies not accessible	No, policies mostly censored	Yes, policies mostly accessible

2. Rule of Law as a Normative Criteria

The 'Rule of Law' is a protean concept that defies straightforward explanation. AV Dicey has famously described it as requiring the supremacy of the law over arbitrary power, and the equality of all citizens before the law regardless of rank or condition.⁷⁸ Dicey's statement of the rule of law has been re-articulated as follows:

'Stripped of all technicalities [the ideal of the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand — rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.'⁷⁹

Lord Bingham provided another well-known account which identified eight principles constituting the broader notion of the rule of law. Whilst Bingham's principles extend to incorporate notions of human rights and international law, the first three substantially overlap with Dicey's original statement. They are as follows:

- The law must be accessible and, so far as possible, intelligible, clear, and predictable'
- 'Questions of legal right and liability should ordinarily be resolved by application of the law, and not the exercise of discretion'
- 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'⁸⁰

These different articulations of the rule of law share common features. First, in order to function as an effective guide to conduct the law must be accessible and understandable – in essence it must be transparent. Second, the law must strive to limit the exercise of discretion in deciding questions of legal right and liability. Third, the law must be consistently applied to all citizens according to the relevant facts.

The High Court has described the rule of law as one of Australia's 'silent constitutional principles'⁸¹ which requires law to comply with certain minimum practical conditions, such as public accessibility.⁸² The various principles embodied within the rule of law also function to establish certain aspirational standards.⁸³ In practice, the fulfilment of these standards is not straightforward; the demands of government administration preclude the possibility of law-making which foresees all possible applications. Thus, the rule of law arguably encompasses a structural tension between the value of predictability on one hand, and the need for flexibility to do justice in individual cases on the other.⁸⁴

Nevertheless, even when conferred with the broadest expression of legislative powers, government decision-makers remain subject to minimum standards of judicial oversight.⁸⁵ Further, it is not controversial to state that legislation should, as much as possible, tend towards the aspirational aspects of the rule of law as articulated by AV Dicey, Lord Bingham and others. In this

⁷⁸ AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan, 10th ed, 1985) 188, 202.

⁷⁹ FA Hayek, *The Road to Serfdom* (University Chicago Press 1944) 54.

⁸⁰ Lord Bingham, 'Government and the Rule of Law in the Modern Age' (Sir David Williams Lecture, Centre for Public Law, 22 February 2006) 11-12
<<https://www.cpl.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cpl.law.cam.ac.uk/legacy/Media/THE%20RULE%20OF%20LAW%202006.pdf>>.

⁸¹ *Sillery v The Queen* (1981) 180 CLR 353, 362.

⁸² *Incorporated Council of Law Reporting (Q) v Federal Commissioner of Taxation* (1971) 125 CLR 659, 672.

⁸³ Chief Justice Murray Gleeson, 'Courts and the Rule of Law' (Speech, University of Melbourne, 7 November 2001).

⁸⁴ HWR Wade and C Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 17.

⁸⁵ *Church of Scientology v Woodward* (1982) 154 CLR 25, 70-71.

sense, these principles act as normative criteria against which the merits of a given legislative instrument can be assessed. This report will adopt this approach in order to critique the prison mail monitoring regimes in each state and territory. Specifically, the report will determine if the current regimes sufficiently limit the exercise of administrative discretion, and if they are adequately transparent. This report will only examine the 'law on the books' and so will not look at the consistency in the application of law. Whilst greater regulation of discretion would arguably limit the risk of unequal enforcement, firm conclusions about disparities in enforcement cannot be drawn without data on prison mail inspection and censorship. Research into the de facto implementation of prison management frameworks remains an important area of future investigation which would help identify with greater specificity the nature and scale of deficiencies in existing law.

3. Analysis of Corrections Regimes

Whilst there is some variation in mail monitoring regimes across jurisdictions, this part of the report identifies a number of trends common to all or most states and territories. In brief, regulatory frameworks for monitoring of prison mail in Australia are overly permissive of administrative discretion and insufficiently transparent. Policy recommendations are provided which, if implemented, would help rectify these deficiencies such that Australian corrections regimes better realise principles immanent in the rule of law as outlined above.

3.1 Limitation of Discretion

Even if prison officials act in good faith, vague or discretionary standards are prone to inconsistent application. Without specificity, officers must rely on varying and potentially extraneous considerations when making censorship decisions. It is easy to envisage significant differences in the application of law depending on the prison, the decision maker and even the date of the decision. In this sense, existing mail monitoring regimes fail to provide an effective guide to conduct for prisoners and their correspondents because the standards of permissible writing are deeply uncertain.

Inappropriate or inconsistent inspection and censorship of letters will also diminish the effectiveness of mail monitoring as a tool for maintaining prison security. Focussing monitoring resources on high risk correspondence would enable prisons to more effectively filter prohibited materials.

Objective criteria can ensure the attention of prison officials is directed to the highest risk mail, rather than being influenced by bias, instinct or other extraneous consideration. In doing so, it would limit the risk of arbitrary decision making and better utilise prison resources.

3.1.1 Inspection of Mail

A number of states and territories provide overly permissive criteria for the inspection of letters. For example, legislation in Queensland, the Northern Territory and Western Australia empowers prison officials read prison correspondence at their discretion. Mail inspections should be restricted to instances in which objective conditions set out in legislation are met. Whilst the monitoring of incoming and outgoing correspondence might arguably be an operational necessity for prisons, there is little convincing case that absolute discretion is a useful basis for the inspection of letters.

Absolute discretion is prone to abuse, as motives that might otherwise be considered improper can stand as legitimate grounds for action. Particular prisoners who are not favoured by officials may have private information exposed or correspondence delayed as a tool for punishment. Further, they may struggle to establish grounds for complaint when excessive inspection of a specific

inmate's mail without explicit justification would not, in itself, constitute evidence of faulty decision making.

An objective test can provide grounds which protect the privacy of inmates without compromising the security of the prison. Indeed, a 'reasonable suspicion' test would arguably provide a more reliable means of maintaining prison security by focussing inspection efforts on higher risk correspondence. If more extensive inspections were required, these could be allocated on a random basis. In the absence of any grounds for reasonable suspicion, random inspections avoid the likelihood of prison officers following unconscious patterns of behaviour which consistently overlook pockets of risk. This combination of a 'reasonable suspicion' test and random sampling largely mimics the ACT's current legislative framework.

Recommendation 1: *Legislation should set out an objective standard for the inspection of mail.*

3.1.2 Censorship and Confiscation of Mail

Most jurisdictions in Australia rely upon some permutation of the 'safety and good order' test to determine when to confiscate or censor mail. Whilst in theory this test provides some constraint, in practice the scope of potential interpretations is so wide as to render the test an insignificant limit on discretion.

South Australia differs from other states by prohibiting the inclusion of specific items in letters such as threats of criminal acts, incitements to violence and plans for activities prohibited in regulations. This provides a far greater level of detail, thus enabling correspondents to adapt their writing accordingly and significantly decreasing the risk of inconsistent or improper exercise of discretion by prison officers. This model should be adopted by other jurisdictions. Whilst arguments may be presented regarding the need for flexibility in mail monitoring processes, the fact that South Australia has successfully implemented this model demonstrates its practicability.

As with inspection decisions, the argument that greater discretion leads to more efficient or effective mail monitoring is dubious at best. Establishing precise criteria enables policy makers to continuously review processes to ensure that resources are being devoted to high-risk mail, and to adapt criteria accordingly. This is exceedingly difficult, if not impossible, when entirely reliant on individual discretion.

Recommendation 2: *Legislation should outline specific criteria for the censorship or confiscation of mail.*

3.2 Transparency

As commented by the House of Lords in *R v Shayler* '...there can be no government by the people if they are ignorant of the issues to be resolved, the arguments for and against different solutions and the facts underlying those arguments.'⁸⁶ Transparency in government decision making is vital to ensuring that administrative powers are being exercised in a manner consistent with community values and expectations.

At a most basic level, transparency requires the laws which define the scope of public power to be publicly accessible. However, transparent governance may also demand proper record keeping procedures, the provision of reasons for administrative decisions, and the publication of government data. To varying extents, Australian prison mail monitoring regimes fail to meet these basic expectations. This, in effect, limits the possibility of individual accountability and systemic

⁸⁶ *R v Shayler* [2003] 1 AC 247, [21].

reform. Thankfully, as outlined below, these failings can be remedied with relatively straightforward legislative and policy change.

3.2.1 Accessibility of Public Documents

In a number of jurisdictions, operating procedures and directives which provide guidance as to the implementation of mail monitoring procedures are not publicly accessible. Generally, this is because large sections of operating procedures are designated as ‘in confidence’ and, thus, restricted from public view. Somewhat paradoxically, whether or not the substance of the particular document merits the assigned confidentiality is impossible to say without access to the document itself. However, without commenting on any particular document, the general inaccessibility of prison policies is still cause for concern.

First, operating procedures and directives are not merely private employee guidelines but are generally drafted and enacted under the provisions of corrections legislation.⁸⁷ In this sense, they are public documents constituting an important source of ‘soft law’ and there is, therefore, a strong presumption that they should be publicly accessible. Second, instructions set out in directives and guidelines are not trivial; they have a significant impact on the substance of the law by providing crucial interpretative detail on otherwise vague legislative provisions. For example, the ACT legislation defines prohibited items only as those things which are declared to be prohibited by a directive of the Director-General. One must refer to the Commissioner’s Directives to gain any worthwhile understanding as to what items are prohibited in prisons.⁸⁸ Further, the risk of publicly inaccessible policy documents substantively impacting the interpretation of corrections legislation is not hypothetical. For example, the South Australia Department for Correctional Services website states that newspapers cannot be sent to prisoners.⁸⁹ This restriction is not set out in any law or regulation – it is perhaps set out in a guideline or manual which is not publicly accessible, but it is impossible to say for certain.

Mail monitoring and censorship standards should be set out in documents which are available to the public. When left unpublished or deemed confidential, prisoners and their correspondents cannot know precisely what types of writing are prohibited, rendering the legislation itself an ineffective guide to conduct. Further, without knowing the actual standards relied upon by prison officials, it is exceedingly difficult to determine the propriety of a decision to censor or confiscate mail. Allowing decisions which bear significantly on the rights of individuals to be grounded on secret criteria stands in stark contrast with the rule of law. Particularly in light of recent concerns regarding erosion of open justice principles and freedom of expression,⁹⁰ deliberate efforts must be made to ensure that documents which define the scope of public powers are stored in the public domain.

Recommendation 3: *Corrections departments should ensure all policies and guidelines pertaining to mail monitoring processes are publicly accessible.*

⁸⁷ See, eg *Corrections Management Act 2007* (ACT) s 14.

⁸⁸ *Ibid* s 81.

⁸⁹ *Taking property to prisoners* (n 63).

⁹⁰ See, eg Christopher Knaus, ‘Witness K and the “outrageous” spy scandal that failed to shame Australia’, *The Guardian* (Online, 20 August 2019) <https://www.theguardian.com/australia-news/2019/aug/10/witness-k-and-the-outrageous-spy-scandal-that-failed-to-shame-australia>; Andrew Probyn, “‘The quiet person you pass on the street’: Secret prisoner Witness J revealed”, *The Australian Broadcasting Corporation* (Online, 5 December 2019) <<https://www.abc.net.au/news/2019-12-05/witness-j-revealed-secret-trial/11764676>>; Rebecca Ananian-Welsh, ‘Why the raids on Australian media present a clear threat to democracy’ *The Conversation* (Online, 5 June 2019) <<https://theconversation.com/why-the-raids-on-australian-media-present-a-clear-threat-to-democracy-118334>>.

3.2.2 Record Keeping

The record-keeping procedures associated with mail inspections and censorship vary greatly across jurisdictions. The Australian Capital Territory and Victoria are the only jurisdictions where prisons must maintain records of mail inspections and subsequent action taken. The Australian Capital Territory also requires prisons to record the reason for every decision to inspect mail. Whilst New South Wales and Western Australia require corrections facilities to maintain some records relating to mail seizures, other jurisdictions don't set out any record-keeping procedures.

Record keeping as it promotes transparency and accountability in the exercise of administrative power.⁹¹ Records serve as evidence of decision-making processes, thus facilitating appeals and auditing procedures. Further, record keeping enables the public to remain informed about administrative processes and ensures that the implementation of law is subject to democratic scrutiny. Undoubtedly there is a substantial public interest in the scale of censorship in the Australian corrections system being monitored and recorded.

Aside from its importance as an accountability mechanism, record keeping helps increase the effectiveness of mail monitoring processes more generally.⁹² A system which fails to maintain records of logistical information cannot ensure a random spread of inspections, identify trends in non-compliant correspondence or monitor consistent application of censorship criteria. Further, the process of recording reasons for decisions need not be particularly labour intensive – a checkbox process as to what legislated grounds are being relied upon during an inspection might suffice. Indeed, this process could be largely automated by integrating it into established administrative workflows.

There is a strong argument that mandatory record keeping would serve to promote transparency and limit the risk of arbitrariness without substantially impeding prison officials' need for flexibility. Prisons should maintain records of all mail sent, received, inspected, censored and confiscated. Mail records should at minimum include the sender name, sender address, recipient name and date received. Additionally, inspection records should include the date of inspection, name of inspecting officer, reason for inspection (e.g. suspicion or random election), action taken, and reason for action taken.

Recommendation 4: *Prisons should maintain comprehensive records of mail inspections, censorship and confiscation decisions.*

3.2.3 The Right to Reasons

Whilst the common law does not impose a general duty for administrative officials to provide reasons for their decisions, courts have identified a 'growing expectation that people affected by administrative conduct will know why it is they have been so affected'.⁹³ Providing reasons can help focus the mind of decision makers and promote trust in administrative processes. Further, reasons are vital to ensuring affected parties can identify errors and pursue avenues of review or appeal.⁹⁴

In a number of Australian jurisdictions, prison officials are free not only to make decisions on mail censorship or confiscation without providing reasons, but even without notifying inmates or their correspondents. This could in theory permit perverse outcomes where correspondents are

⁹¹ Joe Ludwig, 'The Freedom of Information Act - No Longer a Substantial Disappointment' (2010) 59 *Admin Review* 5, 6.

⁹² Roger Wettenhall 'Organisational amnesia: a serious public sector reform issue' (2001) 24(1) *International Journal of Public Sector Management* 80, 84-87.

⁹³ *L & B Linings Pty Ltd v WorkCover Authority of NSW* [2011] NSWSC 474, [108]; *Sherlock v Lloyd* (2010) 27 VR 434, 437.

⁹⁴ Matthew Groves, 'Reviewing Reasons for Administrative Decisions: *Wingfoot Australia Partners Pty Ltd v Kocak*' (2013) 35(3) *Sydney Law Review* 627, 633.

unaware that their mail is being habitually withheld. Although one would hope that officials generally inform affected parties as a matter of course, deferral to conscience is clearly an unsatisfactory means of enforcing expected standards of conduct.

The states and territories should legislate to require that when prison officials confiscate or censor mail, inmates and their correspondents be notified of the intervention and provided reasons for the decision. Doing so would eliminate the risk of secret confiscations outlined above and help to improve mail inspection efforts more generally. Providing reasons for decisions would help ensure that prison officials confined their exercise of power to legislated grounds without relying upon extrinsic considerations. Further, it would improve the capacity for persons to challenge decision-making more generally and, thus, highlight poor censorship practices.

Whilst requiring the provision of notice and reasons would likely increase the administrative cost of mail monitoring, if implemented alongside the earlier-outlined record keeping process these procedures could be largely automated. Upon logging that a particular item of mail was confiscated, senders and intended recipients could be automatically notified. Clearly this would need to be subject to exceptions, such as if mail was confiscated for the purposes of conducting a criminal investigation. These should be explicitly stated alongside the relevant regulatory provision. However, the need for exceptions doesn't provide a case against the prima facie obligation to provide notice of and reasons for a decision to censor mail.

Recommendation 5: *Senders and recipients of mail should be notified when prison officials redact or confiscate their mail.*

Recommendation 6: *When prison officials decide to redact or confiscate mail, the sender should be provided reasons for that decision.*

3.2.4 Public Access to Data

Public access to government data is essential to ensuring that the impact of policy decisions can be understood and scrutinised. In this sense, it serves an important accountability function by enabling the voting public to determine to what extent public powers are being exercised effectively and appropriately. Further, it enables stakeholders to critically examine policy outcomes and propose potential reforms.⁹⁵

Australians have legitimate interest in the administration of the prison system. Aggregated and anonymised data on mail inspection processes should be regularly published. Statistics including mail volume, mail inspections, instances of censorship/confiscation and reasons for censorship/confiscation should be compiled to provide the public with insight into the extent to which access to information is restricted in prisons.

This data would be invaluable in facilitating critical investigation into the effectiveness of Australia's corrections systems. For example, it could be referenced against demographic data to identify potential biases in enforcement, used to compare states and territory policies, or drawn upon to examine trends over time. Additionally, if used in conjunction with data relating to prison disturbances, clear evidence could be gathered as to the effectiveness of different mail monitoring models as tools for maintaining prison order.

⁹⁵ For a detailed analysis of the links between open data, accountability and public service delivery see Michael Christopher Jelenic, 'From Theory to Practice: Open Government Data, Accountability, and Service Delivery' (Policy Research Working Paper No 8873, World Bank Group, June 2019).

Recommendation 7: *Corrections departments should aggregate and publish anonymised statistics on the inspection, censorship and confiscation of mail in prisons.*

Conclusion

The right to freedom of expression is vitally important to the proper functioning of any democratic society which protects the dignity of its citizens. Whilst criminal law intentionally restricts a prisoner's liberty of person, this by no means justifies further limitation of other rights such as freedom of expression. Nevertheless, corrections regimes across Australia impose opaque and arbitrary restrictions on the right of incarcerated persons to correspond via mail – one of the most important modes of communication in light of restrictions on phone and internet usage in prisons. Serious deficiencies exist in mail monitoring regimes across Australian jurisdictions when assessed against basic principles embodied within the rule of law. In many instances, prison officials are granted broad and unnecessary discretion to inspect, censor and confiscate mail. Further, confidential policy guidelines, poor record keeping procedures, and an absence of publicly available data compound to render mail monitoring regimes vague and opaque. More precise inspection criteria and greater transparency would not only better protect the rights of inmates but would also improve the effectiveness of mail inspections as a tool for maintaining prison order. A single breach of normative legal standards harms the integrity of the law everywhere. Rectifying the deficiencies identified in this report would not only directly benefit prisoners but would strengthen the system of rights protections for all Australians.



Contact details

UQ Pro Bono Centre

T +61 7 3365 8824

E probono@uq.edu.au

W uq.edu.au

CRICOS Provider Number 00025B