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Guarding Identity: An Investigation of New Zealand's Accountability Systems for Unrecognised Rights Claimants in Prisons

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Abstract

Humanity's understanding of rights is not static. For many, the recognition of new rights has little impact, but for prisoners, that recognition is of profound importance. Being able to point to a right in legislation enables prisoners to be treated with basic human dignity. For Trans prisoners in New Zealand, policy changes in 2018 means they are now able to do so. Among other things, they can now: access hormone therapy, be put in a facility that aligns with their gender identity, and be free from discrimination. However, for unrecognised rights claimants, there are few protections in place. At its heart, this paper examines how Corrections should reform to ensure prison policy can keep up to date with future rights claimants. To do this, it uses Bovens' public law accountability framework to analyse why it took nearly two decades for Trans prisoners to obtain their rights. It concludes that administrative accountability bodies need to centralise their processes to better hold Corrections to account. It also finds that legal accountability systems should be reformed vis-à-vis: accessibility, readiness to scrutinise decisions, and legislative requirements on administrative bodies. Finally, it notes some ways in which political, professional and public accountability can be improved.

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Subjects and Topics
Prison Policy;
Trans Prisoners;
Public Law Accountability;
Unrecognised Rights Claimants;

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I Introduction

> Dignity is inherent to all human beings. It recognises the innate worth and right of individuals to be treated with respect and humanity.[1]
>
> When a state deprives a person of their liberty, it incurs a duty of care to ensure that the dignity of that person is respected.[2]

It is incontrovertible that the State has a positive obligation to protect prisoners' human dignity. However, humanity's understanding of what would violate someone's dignity is ever-changing.[3] In some cases, that is because new knowledge has come to light about what actions would breach someone's rights; in others, it is because society has come to realise that there exists a previously unrecognised group that should be free from discrimination. Because our understandings continue to evolve, it is essential that those operating prisons can adapt their policies quickly and afford prisoners the fundamental respect they deserve.

In New Zealand, this did not happen in the case of Trans[4] prisoners. Corrections was slow to improve policies regarding Trans prisoners' rights. Trans awareness in Corrections started in 2001 but it took until March 2018 for adequate policies to be brought into force. This was despite numerous reports stating that New Zealand's Trans prisoner policies were inadequate – among others, the Human Rights Commission in 2008,[5] and 2011,[6] the

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1 Association for the Prevention of Torture *Balancing Security and Dignity in Prisons: A Framework for Preventative Monitoring* (2nd ed, Penal Reform International, 2015) at 3.

2 At 2.

3 Doron Shultziner "Human Dignity: Functions and Meanings" in Jeffrey Malpas and Norelle Lickiss (eds) *Perspectives on Human Dignity: A Conversation* (eBook ed, Spring Science & Business Media, 2007).

4 There are a list of useful definitions in Schedule One.

5 Human Rights Commission *To Be Who I Am/ Kia noho au ki tōku anō ao* (January 2008) at [4.64]–[4.93] and [8.35]–[8.38] [Human Rights Commission (2008)].

6 Elizabeth Stanley *Human Rights and Prisons: A Review to the Human Rights Commission* (Human Rights Commission, July 2011).

Ombudsman in 2012,[7] a report at the United Nations in 2013,[8] the Equal Justice Project in 2013[9] and 2016[10], and the International Bar Association in 2014.[11]

For Trans prisoners in New Zealand, this meant being at higher risk of sexual and physical assault by both prisoners and guards. It meant that they could not be housed with their gender, and were instead told by the State that they were their biological sex. It meant that they could not begin hormone treatment or gender affirmation surgery. Even today there still remain problems with Trans policies in New Zealand.

In other countries, not adapting policies to protect Trans prisoners quickly has resulted in unimaginable human rights violations. In 2010 in Australia, a Trans woman was reportedly raped over 2000 times while incarcerated and was denied hormone therapy until her body started reverting to its biological sex.[12] In the United Kingdom, four Trans inmates took their lives in two years due to inadequate treatment.[13] And in the United States, a Trans woman, after being denied gender affirmation surgery, cut open her scrotum and tied a cord around her testes in an attempt to castrate herself to finally have her body match her identity.[14]

In this paper, I do not seek to investigate what specific policies can still be implemented to improve Trans prisoner rights. Instead, at its core, I seek to establish why New Zealand took a long time to improve its Trans prisoner policies. I then use Trans prisoners as a case

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7 Beverley Wakem and David McGee *Investigation of the Department of Corrections in relation to the Provision, Access and Availability of Prisoner Health Services* (Office of the Ombudsman, 2012) at 130.

8 Office of the High Commissioner for Human Rights *Universal Periodic Review: New Zealand* (United Nations Human Rights Council, Geneva, February 2014) at [40].

9 Equal Justice Project *Transgender Prisoners' Rights Ignored: Report on the Treatment of Transgender Prisoners Under the Policies of the Department of Corrections* (Equal Justice Project, 2013) [Equal Justice Project (2013)].

10 Equal Justice Project *The Rights of Transgender People in Prison* (Research Paper, May 2016) [Equal Justice Project (2016)].

11 LGBTI Law Committee *Mr & Ms X: The Rights of Transgender Persons Globally* (International Bar Association, 2014).

12 Olivia Lambert "A Transgender Woman Talks about Life in a Male Prison" *news.com.au* (online ed, 18 April 2016).

13 Andy Gardner "Transgender Woman Found Dead in Her Cell at All Male Prison in Fourth Prison Suicide" *Mirror* (online ed, 30 September 2017).

14 Susan Bendlin "Gender Dysphoria in the Jailhouse: A Constitutional Right to Hormone Therapy" (2013) 61 Clev St L Rev 957 at 971.

study to investigate what needs to be done in order to pre-empt future rights infringements and to ensure that policies are corrected in a smaller time frame.

It is of fundamental importance that potential rights infringements can be pre-empted or quickly corrected. This is not a case where "all's well that ends well". Every day that group's rights are infringed, those individuals suffer, their human dignity is compromised, and irreversible harms are caused. To prevent this from happening in New Zealand, Corrections must have proper accountability measures.

Before moving forwards, I need to outline some key terminology used in this paper. I focus on two different kinds of rights that prisoners may claim in the future. The first are rights to freedom from discrimination claimed by prisoners who do not yet form part of a distinct group recognised by legislation or Corrections' policies – such as, fa'afafine[15] and takatāpui.[16] The second kind of rights are where there is a new understanding of an existing right – for example, if there were compelling international evidence that "cruel and degrading treatment" should extend to every case of solitary confinement.

To refer to both of these situations together, I use the term "unrecognised rights claimants". This will necessarily refer to unrecognised rights claimants in prison. To refer to the first type of rights, I use the term "disenfranchised prisoners". While these terms may be misleading without context, they are a useful way of describing the prisoners for the purposes of this paper.

In this paper, I establish in six sections why it took nearly two decades for Trans prisoners to obtain their rights.

Following this section, I begin in the second section by looking at the importance of protecting unrecognised rights claimants. This involves examining why the State owes a duty of care to prisoners generally, and why disenfranchised prisoners and unrecognised rights claimants in particular should be protected.

In the third section, I lay out the timeline of Trans prisoner rights in New Zealand. I allude to some of the accountability problems, but primarily focus on providing the reader with some context. For those unfamiliar with the evolution of New Zealand's Trans prisoner

15 See Schedule One.

16 See Schedule One.

rights, this section is a useful introduction to understand what actors were at play, and the timeframe we are looking at.

Following the timeline, I briefly outline what public law accountability is in the fourth section. In doing so, I introduce the reader to the framework I use to assess the current accountability for Corrections regarding unrecognised rights claimants.

The fifth section is where I address the five different forums of accountability for unrecognised rights claimants. I evaluate how successful each of those forums is at holding Corrections to account. I use Trans prisoners as a case study to do so.

Finally, I look at what can be learnt from the Trans prisoner experience. I conclude that the "problem of too many eyes" applies to prisoner accountability, and legal accountability needs to be increased. I also mention a number of other lessons.

II Unrecognised Rights Claimants – Why Protect?

In general, the State must be accountable where it makes decisions that affect people's lives: that is the pillar upon which democracy is built.[17] For vulnerable people, the State is under a greater duty of care. In this section, I first discuss the reasons there needs to be high levels of accountability to protect prisoners generally. I then focus on why, in particular, unrecognised rights claimants need additional layers of accountability. Finally, I illustrate that the system needs to be able to respond quickly due to the severity of the human rights abuses: it is not sufficient for accountability to exist or for a system to eventually adapt.

A Prisoners Generally Need to Be Protected

Prisoners are some of the most vulnerable people in society. They are almost entirely reliant on the State to protect them from harm. The State controls every aspect of their life – from who they can associate with to what they eat. Due to the State's relationship with prisoners and its unique ability to prevent them from being harmed, it has a duty to take positive steps to do so.[18] New Zealand already recognises this obligation in legislation: the State's

17 Mark Warren "Accountability and Democracy" in Mark Bovens, Robert Goodin and Thomas Schillemans (eds) *The Oxford Handbook of Accountability* (Oxford University Press, Oxford, 2014).

18 See *Opuz v Turkey* (2010) 50 EHRR 28 (ECHR); *Morgan v Attorney-General* [1965] NZLR 134 (HC) at 137-140.

role regarding prisoner care is described as one of guardianship and ensuring prisoners' "safe custody" and "welfare".[19]

Similarly, when the State imprisons someone, it knowingly puts that person at a high risk of potential abuse. There are extremely high rates of assault and sexual assault in prison. In the year of 2016-2017, there was a prison population of around 10,000 and that population experienced almost 1,500 prisoner-on-prisoner assaults, and 25 serious assaults.[20] In comparable jurisdictions, between 20 per cent and 35 per cent of prisoners report having been assaulted.[21] Given the State is putting its citizens into these dangerous situations, it has a duty to protect them from the harm that could ensue.

Some may argue that because prisoners have broken the social contract, they have given up their rights.[22] Similarly, it could be argued that it is important for offenders to be punished and deterred from committing future crimes, and to do so, prisons should be as unpleasant as possible.[23] However, prisoners do not forgo all their rights simply by offending. To knowingly allow an inmate to be abused by another breaches fundamental human rights. The State should ensure that people are not deprived of any more liberty than is reasonably necessary to fulfil the purposes of punishment.[24] The Supreme Court of the

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19 Corrections Act 2004, s 8(1)(b); Rebecca Kennedy "Much Obliged: An Assessment of Governmental Accountability for Prisoners' Rights in New Zealand's Private Prisons" (2016) 22 AULR 207 at 208.

20 Department of Corrections *Annual Report: 1 July 2016 – 30 July 2017* (2017) at 2 [Department of Corrections AR16/17] at 84.

21 Karen Schneider and others "Psychological Distress and Experience of Sexual and Physical Assault among Australian Prisoners" (2011) 21(5) Crim Behav Ment Health 333; Nancy Wolff and Jing Shi "Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath" (2009) 15(1) J Correct Health Care 58; and Dennis Cooley "Criminal Victimization in Male Federal Prisons" (1993) 35 Can J Criminol 479.

22 (8 December 2010) 669 NZPD 15961; (20 August 1975) 400 NZPD 3785; Shadd Maruna and Anna King "Once a Criminal, Always a Criminal?: 'Redeemability' and the Psychology of Punitive Public Attitudes" (2009) 15 Eur J Crim Pol Res 7; and Mike Hough and Julian Roberts *Understanding Public Attitudes to Criminal Justice* (Open University Press, New York, 2005).

23 Letter from John McGrath (Solicitor-General) to W A Moore (the Secretary for Justice) regarding the "Rights of Prisoners to Vote: Bill of Rights" (17 November 1992) at 20; Mark Leech "Prisoners are Being Left to Rot and the Public Doesn't Care" *The Guardian* (online ed, United Kingdom, 22 January 2018); and Kathleen Maltzahn "We Act as Though People in Prison Deserve Everything They Get. They Don't" *The Guardian* (online ed, United Kingdom, 26 July 2016).

24 Andrew von Hirsch "Proportionate Sentences: A Desert Perspective" in Andrew Von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing* (3rd ed, Hart Publishing, Portland, 2009) at 115–117.

United States has considered whether allowing prisoners to assault each other serves any legitimate purpose of punishment, and found that it did not.[25] There is also no evidence that harsher punishments work to deter offenders from committing future crimes,[26] as was recently held in the High Court of New Zealand.[27] Accordingly, deterrence cannot justify allowing prisons to be harsh places. Moreover, the State must provide the punishment for it to properly communicate a message to offenders.[28]

It is commonly accepted that the State should help offenders rehabilitate. Arguably, prisons give the State a unique opportunity to rehabilitate offenders: prisons allow the State to take someone out of the community for a period of time and help them to put their life back on the correct path.[29] Where prisoners are abused, that will often harm their ability to rehabilitate. Suffering trauma will make it harder for prisoners to trust people, including the State who allowed that abuse to occur. Therefore, the State should prevent abuse from happening.

B Unrecognised Rights Claimants in Prison

Due to the unique vulnerability of unrecognised rights claimants, the State has a distinct obligation to protect them. This is for four reasons.

First, to some extent the State is culpable for disenfranchised persons offending.[30] At worst, the State intentionally oppressed these groups – such as seizing land from the indigenous population or criminalising homosexual behaviour.[31] At best, the State recklessly harmed these groups; for example, by not funding gender affirmation surgery, decreasing access to legal aid, or by enacting laws that apply "equally to all" but in practice are discriminatory,

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25 *Farmer v Brennan* 511 US (1994) at 833.

26 Mojtaba Ghasemi "Visceral Factors, Criminal Behavior and Deterrence: Empirical Evidence And Policy Implications" (2015) 39 Eur J Law Econ 145; and Mirko Bagaric and Theo Alexander "(Marginal) General Deterrence Doesn't Work – and What It Means For Sentencing" (2011) 35 Crim LJ 269.

27 *R v Wellington* [2018] NZHC 2196 at [6]–[9].

28 Von Hirsch, above n 24, at 115–117.

29 Gwen Robinson "Late-Modern Rehabilitation: The Evolution of a Penal Strategy" (2008) 10 Punish Soc 429 at 429–341.

30 See: Action Station *They're Our Whanau: A Community-Powered and Collaborative Research Report on Māori Perspectives of New Zealand's Justice System* (October, 2018) at 4–5 and 8–12; and Chris Cunneen and Juan Tauri *Indigenous Criminology* (Policy Press, Bristol, 2016) at chapter 3.

31 See Action Station, above n 30, at 4–5 and 8–12; and Cunneen and Tauri, above n 30, at chapter 3.

such as the three strikes law. It is well documented that these discriminatory actions directly contributed to these groups' high offending rates.[32] Accordingly, the State has a moral obligation to promote the interests of disenfranchised prisoners and protect them from harm.

Secondly, disenfranchised prisoners require access to unique services, such as medical, cultural, or spiritual services.[33] They rely on the State to provide them with that access. If the State does not, there will often be significant harms to the individuals. For instance, Trans prisoners require special medical assistance, whether that takes the form of hormone therapy, or doctors and psychiatrists who are experts on gender dysphoria.[34] Without access to that medical assistance, Trans inmates will be forced to live in a body that is not their own.[35] This is not only cruel and degrading, but almost 35 per cent of Trans people commit suicide when they do not receive proper medical treatment.[36] Due to the reliance on State provision of services and the potential for significant harm, the State has a particular obligation to protect disenfranchised prisoners.

Similarly, Māori and Pasifika queer prisoners require unique services to combat the imposition of colonial gender identities.[37] For takatāpui and fa'afafine, colonialism erased much of the traditional knowledge and customs regarding pre-colonial gender identity. [38] This erasure and imposition of colonial gender identities prevents them from internally manifesting their true identity: they are unable to fully connect with their spiritual identity.[39] Externally, the erasure results in takatāpui and fa'afafine being discriminated

32 See Action Station, above n 30, at 4–5 and 8–12; and Cunneen and Tauri, above n 30, at chapter 3.

33 United Nations Office on Drugs and Crime *Handbook on Prisoners with Special Needs* (United Nations, New York, 2009).

34 United Nations Office on Drugs and Crime, above n 33, 105–109; Equal Justice Project (2016), above n 9, at [2.5].

35 Rebecca Mann "The Treatment of Transgender Prisoners, Not Just an American Problem - A Comparative Analysis of American, Australian, and Canadian Prison Policies concerning the Treatment of Transgender Prisoners and a Universal Recommendation to Improve Treatment" (2006) 15 Law & Sexuality: Rev Lesbian, Gay, Bisexual & Transgender Legal Issues 91 at 104.

36 Silpa Maruri "Hormone Therapy for Inmates: A Metonym for Transgender Rights" (2011) 20 Cornell JL & Pub Poly 807 at 64.

37 Ti Lamusse "Politics at Pride" (2016) 31 New Zealand Sociology 49 at 64.

38 At 64.

39 Elizabeth Kerekere Takatāpui: Part of the Whānau (eBook ed, Mental Health Foundation of New Zealand, 2015).

against by others in their culture.[40] Accordingly, takatāpui and fa'afafine rely on Corrections providing cultural experts who can help them and other prisoners understand their unique cultural and spiritual identity.

Thirdly, the State has a duty to protect disenfranchised prisoners because they are more likely to be discriminated against, assaulted and sexually assaulted by other prisoners and staff.[41] For example, Trans prisoners are much more likely to face verbal and physical abuse – with 90 per cent of Trans prisoners in other jurisdictions having reported being verbally harassed and 52 per cent being physically assaulted.[42] Another overseas study demonstrated that Trans prisoners are subject to high levels of sexual abuse as they are perceived to be "weak and feminine"[43] – with Trans prisoners being 13 times more likely to be sexually assaulted than other inmates.[44] In New Zealand, there is anecdotal evidence that Trans prisoners are subject to high levels of discrimination,[45] and have been sexually abused.[46] A corollary of this is that Trans prisoners are at high risk of contracting HIV and other sexually transmitted diseases.[47]

Additionally, staff often treat Trans prisoners poorly.[48] This is generally due to a lack of education about Trans issues. Overseas staff have removed Trans inmates medicine as a

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40 For example, Mette Hansen-Reid "Samoan Fa'afafine – Navigating the New Zealand Prison Environment: A Single Case Study" (2011) 3(1) SAANZ 4.

41 Beth Huebner "Administrative Determinants of Inmate Violence: A Multilevel Analysis" (2003) 31 J Crim Justice 107 at 112–114; and Miles Harer and Darrell Steffensmeier "Race and Prison Violence" (1996) 34 Criminology 323.

42 Tonia Poteat, Mannat Malik, and Chris Beyrer "Epidemiology of HIV, Sexually Transmitted Infections, Viral Hepatitis, and Tuberculosis among Incarcerated Transgender People: A Case of Limited Data" (2018) 40 Oxford University Press 27.

43 Valerie Jenness and others *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (University of California, 27 April 2007) at 1–4;

44 Jason Lydon and others *Coming Out of Concrete Closets: A Report on Black & Pink's National LGBTQ Prisoner Survey* (online ed, Black & Pink, 2015).

45 *Miller v New Zealand Parole Board* HC Wellington CRI 2004-485-37, 11 May 2004 at [54]; *Lepper v R* [2016] NZCA 209 at [17]; Beverley Wakem *Annual Report 2012/2013* (Office of the Ombudsman, June 2012) at 32; and Wakem and McGee, above n 7, at 130.

46 Russell Blackstock "Jail Attack Inmate Transgender" *New Zealand Herald* (online ed, 3 October 2015); and Phillip McSweeney "Transgender Woman Alleges Rape in Men's Prison" *Stuff* (online ed, 22 April 2016).

47 Poteat, Malik and Beyrer, above n 42.

48 Chief Custodial Officer's Team *Guidance for Management of Trans Prisoners* (Department of Corrections, paper to Executive Leadership Team, October 2016) at [20] (obtained under Official Information Act 1982 request to the Department of Corrections).

form of punishment, or have specifically misgendered them.[49] Studies demonstrate that staff frequently verbally and sexually harass Trans inmates, with 79 percent of Trans inmates reporting verbal and 44 percent reporting sexual harassment by staff overseas.[50]

Finally, disenfranchised prisoners require Corrections to help them to protect themselves. Disenfranchised prisoners are at high risk of suicide and self-harm. This is due to the aforementioned problems in prison, but also because disenfranchised prisoners often lack traditional support structures and have been subject to high levels of discrimination prior to entering prison.[51] For instance, many Trans inmates enter prison with other mental health problems, often due to being abandoned by family and friends.[52] A 2017 Australian study found that 79 per cent of Trans youth have self-harmed and 48 per cent have attempted suicide.[53] Disenfranchised prisoners require the State to provide specific policies catered to their identity-based needs to prevent them from self-harming – for example, Trans prisoners require counsellors and doctors specialising in Gender-Identity based disorders.[54]

C Conclusion

What all this results in is the need for a high level of accountability and scrutiny over the current protections in place for unrecognised rights claimants. While all prisoners are inherently vulnerable and require oversight of Corrections, unrecognised rights claimants have distinct human rights needs and physical safety concerns.

Importantly, the kinds of abuses – physical abuse, sexual abuse, lack of access to medication or specialised psychiatrists, ignoring moral obligations, staff mistreatment, and failure to protect from self-harm – are ones that require policy responses immediately. Every moment that goes by without the State doing so constitutes a fundamental attack on these prisoners' human dignity. It also risks severe practical harms to unrecognised rights

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49 See Schedule One for definition of "misgendered". *White v Farrier* 849 F 2d 322, 327 (8th Cir 1988) at [22]–[28].

50 Poteat, Malik and Beyrer, above n 42, at 35.

51 Katie Marlow, Belinda Winder and Helen Elliott "Working with Transgendered Sex Offenders: Prison Staff Experiences" (2015) 17(3) Journal of Forensic Practice 241 at 242.

52 Lamusse, above n 37, at 60–61; and Marlow, Winder and Elliott, above n 51, at 242.

53 Penelope Strauss and others *Trans Pathways: The Mental Health Experiences and Care Pathways of Trans Young People* (Telethon Kids Institute, 2017).

54 Max Read and Neil McCrae "Preventing Suicide in Lesbian, Gay, Bisexual, and Transgender Prisoners: A Critique of U.K. Policy" (2016) 12(1) J Forensic Nurs 13.

claimants. As such, Corrections must be able to adapt its policies to new realities within a small time frame.

It may be argued that due to the low numbers of unrecognised rights claimants, there does not need to be high levels of accountability. For example, the latest figures indicate there are only 33 Trans prisoners out of approximately 10,000 prisoners.[55] However, the kind of abuses that Trans prisoners, and most unrecognised rights claimants, are subject to means that the State has a strong obligation to protect them even though they are few in number. They are often considered "among the most vulnerable, with evident risks of suicide and self-harm, as well as facing bullying and harassment".[56] Given these unique and severe harms, there must be comprehensive and proactive accountability systems in place to protect those prisoners.

Even if numbers were a relevant consideration, the official numbers likely grossly underestimate the true population of disenfranchised groups in prison.[57] In the case of Trans inmates: many are yet to be diagnosed with gender dysphoria;[58] the numbers exclude those who are genderqueer or non-binary; and there are a number of reasons, such as fear, why Trans prisoners do not alert Corrections to their gender identity.[59] This can be observed empirically given the number of Trans inmates has drastically increased following the introduction of Trans-friendly policies. There were five Trans inmates in 2012,[60] 17 in 2016,[61] and 33 in 2018.[62] The same would likely happen with other disenfranchised groups.

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55 Letter from Vanessa Koening (Principal Adviser Ministerial Services) to Oscar Battell-Wallace regarding an Official Information Act 1982 Request (22 August 2018) at 1.

56 Prisons and Probation Ombudsman (UK) "Learning Lessons Bulletin" (2017) 3 PPO Investigations at 1.

57 For example: mental illness, Human Rights Commission *Monitoring Places of Detention: Annual Report 2015/2015* (2015); and Trans inmates, Sam Lynch and Lorana Bartels "Transgender Prisoners in Australia: An Examination of the Issues, Law and Policy" (2017) 19 FlinLawJl 185 at 188.

58 Maruri, above n 36, at 810.

59 Lynch and Bartels, above n 57, at 188.

60 (29 Feb 2012) 677 NZPD 667.

61 Letter from Jeremy Lightfoot (National Commissioner) to Ti Lamusse regarding an Official Information Act 1982 Request (30 September 2016).

62 Letter from Vanessa Koening, above n 55, at 1.

III Trans Prisoner Rights Timeline

Investigating the timeline of Trans prisoner rights enables a detailed assessment of the efficacy of accountability mechanisms for unrecognised rights claimants. Doing so highlights the kinds of accountability mechanisms that exist and alludes to their efficacy. Despite there being a number of accountability mechanisms in place, rights changes were slow to occur.

Prior to 2005, statutes and regulation were silent on Trans prisoner rights. To understand the position pre-2005, case law regarding Trans individuals needs to be assessed.

The first case to mention the term "trans"[63] was in 1975.[64] The case concerned a request to change someone's sex on their birth certificate.[65] The High Court, in that case, recognised that someone could be "transsexual" but held that a person's sex or gender remained their biological sex at birth, regardless of whether or not they had undergone surgery.[66]

It was not until 1991 that a Court rejected that approach and stated that biological factors were not determinative.[67] However, to determine whether someone had changed sex, the test still included physiological factors, including whether they had undergone affirmation surgery.[68]

Following this, in 1994 and 1996 the High Court affirmed that chromosomes were not determinative.[69] However, they held that someone could only be considered to have changed sex after having undergone gender affirmation surgery.[70] Both cases suggested that there may be some unique circumstances in which people who had not undergone surgery could be considered to have changed sex.[71]

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63 Note, the case used the term "transsexual". However, this is now considered offensive.

64 *Re T* [1975] 2 NZLR 449 (SC).

65 At 450.

66 At 452–453.

67 *M v M* (1991) 8 FRNZ 208 (FC) at 219.

68 At 219–220.

69 *Attorney General v Family Court at Otahuhu* [1995] 1 NZLR 603 (HC); and *Quilter v Attorney General* (1996) 14 FRNZ 430 (HC).

70 *Attorney General v Family Court at Otahuhu*, above n 69, at 656; *Quilter v Attorney General*, above n 69, at 435.

71 *Attorney General v Family Court at Otahuhu*, above n 69, at 656.

These decisions were reflected in policy documents, legislation, and regulations regarding Trans prisoners. In Corrections' Policy and Procedures Manual 2001, Corrections took a post-operative approach whereby post-operative "transsexuals" could be placed in a prison according to their gender identity.[72] Conversely, pre-operative Trans prisoners were placed in the prison of their biological sex.[73] They were, however, allowed a single cell.[74] In terms of rights, given the approach by the Courts to the definition of "sex" in the aforementioned cases, it is unclear whether the freedom from discrimination provisions, which protect sex, applied to Trans prisoners at this point.

In 2004, the Human Rights (Gender Identity) Amendment Bill was introduced to extend the freedom from discrimination protections to trans prisoners.[75] The Bill was ultimately withdrawn as it was seen as unnecessary. Many were of the opinion that sex would include gender identity.[76]

In 2005, following the passage of the Corrections Act 2004, the Corrections Regulations were brought into force.[77] These codified the post-operative approach to Trans prisoners in the Policy and Procedures Manual 2001.[78] At this point, no Trans prisoners were able to start hormone treatment, have confirmation surgery, or have items that would help them to present in line with their gender identity, such as makeup.[79] They occasionally had to share their room, and were often put into solitary confinement for their general safety.[80] They

72 Department of Corrections *Policy and Procedures Manual* (2001) at D.07 [Department of Corrections (Policy Manual 2001); and Heike Polster "Gender Identity as a New Prohibited Ground of Discrimination" (2003) NZJPIL 173 at 173–174.

73 Department of Corrections (Policy Manual 2001), above n 72, at D.07; and Polster, above n 72, at 173–174.

74 Department of Corrections (Policy Manual 2001), above n 72, at D.07; and Polster, above n 72, at 173–174.

75 Human Rights (Gender Identity) Amendment Bill 2004 (225-1);

76 Crown Law Office *Opinion on the Human Rights (Gender Identity) Bill* (2 August 2006).

77 Corrections Regulations 2005.

78 Corrections Regulations 2005, reg 190; and Wakem and McGee, above n 7, at 128–130.

79 Wakem and McGee, above n 7, at 128-130; and Equal Justice Project (2013), above n 10, at 6.

80 Equal Justice Project (2016), above n 9, at 9; and Kirsty Lawrence "Double-Bunking Arrangements for Trans Prisoners are under Review" *Stuff* (online ed, 24 January 2017).

suffered abuse from guards and other prisoners.[81] Pre-operative Trans prisoners were searched and strip-searched by guards of their biological sex.[82]

Then, in 2006, the Human Rights Commission started investigating Trans issues in New Zealand.[83] The Commission sought public submissions, and in 2007 released a summary paper of the submissions. The public had highlighted problems with the rights of Trans prisoners as a key area for reform.[84] In 2008, the Commission released its report, noting that there were a variety of serious issues with the way Trans prisoners were treated – particularly in relation to insufficient access to medical support, lack of safety within prison, and the inability for Trans prisoners to be recognised by their gender identity.[85]

In 2009, the United Nations Office on Drugs and Crime (UNODC) released a report detailing how Trans prisoners should be treated.[86] While it did not identify which countries were not achieving these standards, New Zealand's practices fell well below UNODC's standards.[87]

In 2012, Chief Ombudsman Beverley Wakem and Ombudsman David McGee investigated and then published a sector-wide report on health issues in prisons.[88] In that report, they dedicated a chapter to issues surrounding Trans prisoners.[89] They found that Corrections' standards were insufficient and recommended Corrections review its policies and practices for the treatment and placement of Trans prisoners.[90] Amongst other things, Corrections was told to review its housing policies and its policies around strip searching pre-operative Trans prisoners.[91]

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81 *Miller v New Zealand Parole Board*, above n 45, at [54]; *Lepper v R*, above n 45, at [17]; Wakem and McGee, above n 7, at 130; Letter from Cameron Oldfield (Principal Adviser Ministerial Services) to Oscar Battell-Wallace regarding an Official Information Act 1982 Request (14 September 2018) at 3–4.

82 Wakem and McGee,above n 7, at 128–130.

83 Human Rights Commission (2008), above n 5, at 1.

84 At 1G.

85 At [4.64]–[4.93] and [8.35]–[8.38].

86 United Nations Office on Drugs and Crime, above n 33.

87 At 109–110.

88 Wakem and McGee, above n 7, at 128–130.

89 At 128–130.

90 At 128–130.

91 At 128–130.

In response to a draft version of the report, Corrections had denied there was a problem, stating that their policies were sufficient and did not need to be reviewed.[92] The Final Report was highly critical, with the ombudsmen stating that Corrections' policies do "not adequately reflect the expectation that transgender prisoners are treated with dignity, nor… accept or acknowledge prisoners' gender identification."[93]

Soon after the report, in 2012, Trans prisoner rights were brought up in Parliament.[94] Jan Logie questioned the Minister of Corrections at the time, Anne Tolley, on whether "she agree[d] with the finding of the Chief Ombudsman that 'transgender prisoners are particularly vulnerable to abuse and/or sexual assault'?"[95] Tolley responded that she did not believe they are more prone to sexual assault.[96] She then stated that "a man who is transgender but pre-surgery is still a man, and to move him to a women's prison would raise a number of safety concerns".[97]

Corrections proceeded to meet with Wakem following the tabling of the report in Parliament. At that meeting, Corrections agreed in principle to change their policies.[98]

In 2013, the Human Rights Council Working Group noted that New Zealand's practices towards Trans prisoners should be updated to reflect international best practice.[99] The Equal Justice Project released a report detailing all the problems with the Corrections Regulations 2005 and argued for reform.[100] Similarly, the Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013 provided extensive submissions to the Human Rights Commission on the need to reform the regulations and treatment of Trans prisoners.[101]

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92 At 128–130.

93 At 128–130.

94 (29 Feb 2012) 677 NZPD 667.

95 (29 Feb 2012) 677 NZPD 667.

96 (29 Feb 2012) 677 NZPD 667.

97 (29 Feb 2012) 677 NZPD 667.

98 Beverley Wakem *Annual Report 2011/2012* (Office of the Ombudsman, June 2012) at 24–25 [Wakem (2011/2012)].

99 Office of the High Commissioner for Human Rights, above n 8, at [40].

100 Equal Justice Project (2013), above n 9.

101 Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013 "Submission from the Aotearoa New Zealand's Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013 to the Human Rights Commission" (2013) at [27]–[35].

Under immense scrutiny, Tolley along with Corrections decided to update the Corrections Regulations 2005 to allow people who have changed their sex on their birth certificate to be housed in line with that sex.[102] The regulations were promptly amended,[103] and by early 2014, Trans prisoners no longer had to have undergone surgery.[104]

In 2014, the United States Department of State released a country report on whether New Zealand was fulfilling its human rights obligations. It noted that the new Trans prisoner regulations did not allow prisoners to begin hormone treatment or access gender affirmation surgery.[105] Additionally, the International Bar Association's LGBTI Law Committee criticised New Zealand's treatment of Trans prisoners due to lack of access to hormone treatment.[106] It also noted that there had been complaints of abuse by Trans prisoners.[107]

That same year, a Trans prisoner brought a case to the Human Rights Review Tribunal seeking access to hormone treatment.[108] The Tribunal dismissed the complaint as it had not yet been through proper processes.[109]

In 2015, there was a significant amount of media attention following the alleged rape of a Trans prisoner.[110] Similarly, substantial media attention followed an attempt by No Pride In Prisons and transgender advocates to prevent Corrections from marching at Auckland Pride Festival.[111] The attempts resulted in arrests as well as harm to Trans activists.[112]

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102 New Zealand Law Society "Policy Changes on Transgender Prisoners: A Step Forward?" *LawTalk* (online ed, 22 November 2013).

103 Corrections Amendment Regulations (No 2) 2013.

104 New Zealand Law Society, above n 102; and Radio New Zealand "Prison Choices for Transgender Inmates" *Radio New Zealand* (online ed, 26 September 2013).

105 United States Department of State *New Zealand 2014 Human Rights Report* (Bureau of Democracy, Human Rights and Labor, 2014).

106 LGBTI Law Committee, above n 10.

107 At [93]–[94].

108 *Forrest v Chief Executive of the Department of Corrections* [2014] NZHRRT 47.

109 At [10]–[12].

110 Natasha Frost "Are Trans Inmates Safe in Prison?" *Radio New Zealand* (online ed, 23 October 2015); and David Fisher "Possible Changes to System after Transgender Inmate's Alleged Rape" *New Zealand Herald* (online ed, 7 October 2015).

111 Michael Field ""Pride Protester 'Had Arm Broken' – Claim" *Stuff* (online ed, 22 February 2015); and Lamusse, above n 37, at 50.

112 Field, above n 111.

That same year, Official Information Act 1982 (OIA) requests by JustSpeak demonstrated that Corrections did not hold centralised records of the number of Trans people or of incidents where they had been harmed.[113] A Community Law publication pointed out that gender affirmation surgery was still not available to prisoners and they could still only continue hormone treatment, not start it.[114]

Following this, in April 2016, a Trans woman alleged having been raped by prison officers.[115] In May of 2016, Equal Justice wrote a research paper comparing New Zealand's policies to other countries. The paper criticised New Zealand's policies and treatment of Trans prisoners.[116]

There were also protests in 2016 due to a Trans woman being subjected to solitary confinement.[117] Corrections had cited an increased risk of abuse.[118]

In response to public pressure, Corrections "approved an action plan to improve the department's response to and management of Trans prisoners".[119] This included surveying other jurisdictions. Later that year, Corrections' executive management team met to discuss their options.[120] They noted many flaws with the current process, including that no staff have received formalised training on how to manage Trans prisoners.[121]

In 2016, the United Kingdom's Prisoner and Probation Ombudsman released a report following three Trans prisoners committing suicide. The report emphasised the need to improve Trans prisoner policies.[122] Within a year, new regulations and policies were adopted.

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113 Letter from Jeremy Lightfoot (National Commissioner) to Sophie Buchanan regarding an Official Information Act 1982 Request (18 June 2015) [Letter from Jeremy Lightfoot (Lamusse)].

114 LAG Law *Your Rights Inside Prison and on Release* (Community Law Wellington and Hutt Valley, Wellington, 2015) at 117.

115 McSweeney, above n 46.

116 Equal Justice Project (2016), above n 9, at 12.

117 Belinda Feek "Group Opposed to Transgender Lockdown Arrested in Hamilton" *New Zealand Herald* (online ed, 22 November 2016).

118 Feek, above n 117.

119 Chief Custodial Officer's Team, above n 48, at [4].

120 At [6].

121 At [7]–[8].

122 National Offender Management Service *The Care and Management of Transgender Offenders* (9 November 2016); and Prisons and Probation Ombudsman *Annual Report* 2016/2017 (July 2017).

In 2017, confusion still remained about which prison Trans people were going to be placed in.[123] There was also concern about the continued use of double-bunking arrangements for Trans prisoners.[124] Due to that uncertainty, and the potential harm of a woman being placed in a male prison, Whata J decided to take a person's Trans identity into account when deciding whether to give someone electronic monitoring instead of incarcerating them.[125] His Honour held that due to the potential abuse of Trans prisoners, Trans identity should favour not sending a Trans offender to prison.[126] Another Court in the same year for the first time directed that an offender's rehabilitation plan be tailored to their Trans identity.[127]

In 2018, following consultation, Corrections brought into force a new progressive policy in its Prison Operations Manual that is based around self-identification.[128] Among other things, it made it much easier for Trans prisoners to be housed in the prison of their gender identity.[129] It also increased the range of clothes and tools Trans prisoners have access to in order to maintain their identity,[130] as well as prevented Trans people from being forced to bunk.[131]

Since these changes, Parliament has introduced a bill that makes it easier for Trans people, including inmates, to change their gender on their birth certificate.[132] Corrections has an individualised plan for every Trans person; 1,100 members of its staff have undergone diversity training; work is underway to deliver training to all frontline staff; and they have increased the support services for Trans people.[133] Additionally, "the Office of the Inspectorate ran a focus group with Trans prisoners at Tongariro Prison earlier this year following implementation of new Trans policy".[134] It found that the changes were generally

123 Lawrence, above n 80; Georgina Blackmore "Implications of changes to Births Act for female inmates" *Scoop* (online ed, 20 April 2018).

124 Lawrence, above n 80.

125 *Chief Executive of the Department of Corrections v Parsons* [2017] NZHC 229 at [23]–[24].

126 At [23]–[24].

127 *Rudolph v R [2017]* NZHC 2263 at [21]–[23].

128 Department of Corrections *Prison Service Operation Manual* (2018) [Department of Corrections (PSOM 18)]; Chief Custodial Officer's Team, above n 48; and Department of Corrections *Briefing to the Incoming Minister 2017* (2017) at 36.

129 Department of Corrections (PSOM 18), above n 128, at I.10.

130 Chief Custodial Officer's Team, above n 48, at [7].

131 Department of Corrections (PSOM 18), above n 128, at I.10.

132 Births, Deaths, Marriages, and Relationships Registration Bill 2018 (296-1).

133 Letter from Koening, above n 55, at 2.

134 Letter from Oldfield, above n 81, at 4.

well-received.[135] There were still some concerns about "access to female products" and questions "about hormone treatment and the introduction of individual support plans".[136]

However, problems still remain. On 29 August 2018, the Office of the Inspectorate went to Whanganui Prison and found:[137]

- "No centralised record detailing the location or specific needs of transgender prisoners";
- "Staff did not appear to be familiar with the protocol around transgender prisoners";
- "Staff were unaware that Corrections was developing a policy around the Management of Transgender Prisoners";
- "[trans] prisoners spoken to reported a high level of verbal harassment from prisoners";
- "one Trans prisoner expressed concern about the conduct of a staff member";
- a Corrections Officer told an Inspector that trans prisoners were "homos that should be referred to somewhere else where they will be better accepted";
- "transgender prisoners stated that they had not been provided with any access to, or resources from, local LGBTI services"; and
- "transgender prisoners felt that Prison staff would benefit from training around LGBTI matters. Inspectors shared this view."

Accordingly, despite Corrections' positive steps and progressive policy platform, issues still remain around the above. There are also issues about: the housing of Trans prisoners who have committed sexual offences;[138]the inability to access surgery; and deciding what items constitute too much of a security risk to allow Trans inmates to wear them.[139]

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135 At 4.

136 At 4.

137 Peter Boshier *OPCAT Report: Report on an Unannounced Inspection of Whanganui Prison Under the Crimes of Torture Act 1989* (Office of the Ombudsman, OPCAT Report, August 2018) at 43 and 71 [Boshier (Whanganui)].

138 Corrections Regulations 2005, reg 65B(2).

139 See *R (on the Application of Green) v Secretary of State for Justice* [2013] EWHC 3491 (Admin).

IV Theoretical Underpinnings of Accountability

There are many different ways to assess the extent to which unrecognised rights claimants will be protected. The timeline outlined a number of different factors that contributed to changing prison policies for Trans prisoners. A useful lens through which to group, and assess the efficacy of, the current mechanisms to protect unrecognised rights claimants is "public law accountability". Namely, what are the pro-active protections in place to protect unrecognised rights claimants, and what are the avenues through which those prisoners can seek recourse when things go wrong?

In this section, I outline what public law accountability is. It is important to have a theoretical understanding of the concept before applying that understanding to the scenario of unrecognised rights claimants in prison.

Initially, accountability referred to the ability to call forth an agent and require them to render an account of their actions.[140] Today, in common usage, the term can be both descriptive and normative.[141] In the sphere of public law governance, the meaning of "accountability" has been the subject of significant academic debate – with no definition being universally accepted.

For some, the meaning of accountability is extremely wide – where any ability or power to find out information or hold someone liable for their actions, whether that be formally or informally, would constitute accountability.[142] For others, accountability is a narrow term requiring an ability to legally hold someone to account.[143] Numerous definitions between these extremes exist.

A useful definition of public law accountability was proposed by Mark Bovens.[144] Bovens acknowledged the diverse range of opinions about what constitutes accountability.[145] He

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140 Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" (2007) 13(4) ELJ 447 at 447–448 [Bovens (2007)].

141 Mark Bovens "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism" (2010) 33(5) West Eur Politics 946 at 947-948 [Bovens (2010)].

142 Richard Mulgan "'Accountability': An Ever-Expanding Concept?" (2000) 78(3) Public Administration 555.

143 Andreas Schedler, Larry Diamond and Marc Plattner *The Self-restraining State: Power and Accountability in New Democracies* (Lynne Rienner Publishers, Colorado, 1999) at 15–18.

144 Bovens (2007), above n 140.

145 At 447–448.

sought to distil the concept's central principles and justify why certain powers or actions were excluded from his definition.[146] Bovens adopts a descriptive version of accountability.[147] He argued:[148]

> [accountability] is a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences.

Bovens then investigated the four elements of accountability: the nature of the forum, the nature of the actor, the nature of the conduct, and the nature of the obligation.[149]

The nature of the forum refers to the person to whom the account is rendered.[150] Bovens suggested there were at least five different forums: political, legal, administrative, professional and social.[151] Political accountability refers to political mechanisms that make an actor feel obliged to explain their conduct, and that actor potentially faces consequences.[152] Legal accountability refers to the legal mechanisms, such as courts, through which a decision-maker can be held to account.[153] Administrative accountability refers to the powers of quasi-judicial bodies, such as ombudsmen.[154] Professional accountability looks at bodies or processes within a profession or organisation that can hold someone to account.[155] Finally, social accountability covers the power of the public in being able to hold a person to account.[156]

The nature of the actor looks at who is accountable.[157] Is it the organisation as a whole, the CEO, all the staff members together, or each staff member individually?[158]

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146 At 448.
147 At 450.
148 At 450.
149 At 455.
150 At 455.
151 At 456.
152 At 456.
153 At 456.
154 At 456.
155 At 456–457.
156 At 457.
157 At 457–459.
158 At 457–459.

The nature of the conduct refers to the aspect of conduct being held to account – is it financial, procedural or product?[159]

Finally, the nature of the obligation investigates whether it is vertical, horizontal or diagonal accountability.[160] Vertical accountability is when the person holding the actor accountable wields power over the agent.[161] Horizontal is when they do not. Diagonal is when they hold semi-legal power, such as ombudsmen, but can only make recommendations.[162]

This framework can be used to identify the extent to which an actor can be held to account. In the context of the treatment of unrecognised rights claimants, the first and last element can be assessed to identify what level of accountability exists. From there, I can evaluate whether sufficient accountability exists, and where and in what form accountability is lacking. To some extent, this is a subjective task. However, the evaluation should be done in light of the three purposes of accountability – democratic, constitutional and learning.[163]

The democratic purpose is achieved when citizens can ensure public officials are making decisions in line with the will of the people.[164] The constitutional purpose aims to prevent corruption and absolute power.[165] Finally, the learning purpose states that accountability is to enhance government efficiency through learning from mistakes.[166]

While all three purposes are relevant for unrecognised rights claimants, the learning purpose is the most important. The democratic purpose and constitutional purposes ensure inmates' rights are respected and abuses of power do not occur. However, if Corrections can quickly and effectively adapt its policies and practices, unrecognised rights claimants will not have to retroactively vindicate their rights in the first place. Moreover, formal institutions will be slow to intervene as it takes time for legal understandings of rights to adapt.

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159 At 459.
160 At 460.
161 At 460
162 At 460.
163 At 462–464.
164 At 463.
165 At 463.
166 At 463–464.

V Protecting Unrecognised Rights Claimants: What Accountability Currently Exists and Is It Sufficient?

As discussed above, accountability is multi-faceted. This paper uses Bovens' structure of accountability to determine what level currently exists. To do this, it investigates the five different forums – legal, political, administrative, professional and social. It also explains the nature of the accountability vis-à-vis that forum.

The reason for focusing on the "nature of the forum" is that it makes it easier for the reader to conceptualise how the different forums interact. Additionally, to date, there has not been a comprehensive account of the mechanisms in place to protect unrecognised rights claimants. By focusing on the forum element of the inquiry, this paper hopes to enable future scholars to more easily identify the framework through which unrecognised rights claimants can vindicate their rights.

A Legal Accountability

There are two mains kinds of legal accountability – claims under the New Zealand Bill of Rights Act 1990 (NZBORA) and the Human Rights Act 1993, and judicial review. I will first examine these before assessing the limitations of legal accountability.

1 NZBORA/Human Rights Act cases

In New Zealand, where the executive infringes on human rights, the courts can challenge their decision, review certain policies, and in certain cases award damages to the claimant.[167]

As aforementioned, there are two different kinds of unrecognised rights. First, where a prisoner is trying to enforce a new understanding of an existing right – such as the right to be free from cruel and degrading treatment and whether that extends to being misgendered.[168] Secondly, prisoners may try to claim that the group they belong to should be legally protected by the freedom from discrimination provision – for example, obese persons.

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167 New Zealand Bill of Rights Act 1990, s 3(a). For damages see *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) [*Baigent's Case*].

168 Bendlin, above n 14.

Since the concept of rights is not fixed, in order to assess how effective the current framework is at providing legal accountability for rights abuses, the framework must be assessed against its ability to adapt current rights and incorporate new ones.

The legislature seems unwilling to create new rights or establish new prohibited grounds of discrimination. The two key pieces of legislation governing human rights in New Zealand have not been updated for over 25 years.[169] The Human Rights Act 1993 has added no new substantive grounds to s 21, freedom from discrimination, despite calls for gender identity, among other things, to be added.[170] Similarly, the NZBORA has only had one minor amendment since enacted.[171]

Due to the legislature's unwillingness, the courts have been relied on to interpret rights in light of new social realities. Without a court doing so, there would be no legal accountability for infringements of "new rights". In general, courts seem prepared to take a progressive view of rights.[172] Courts have avoided "a niggardly approach to the content and meaning of BORA rights and freedoms".[173] Instead they have adopted "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism'."[174]

For unrecognised rights claimants, generous interpretations of rights will result in courts finding that existing rights cover the unrecognised rights claimants' rights, even if that is not the existing right's natural meaning.[175] Courts will likely do so to "give individuals the full measure of the fundamental rights and freedoms referred to".[176] For example, courts could interpret the right to "receive medical treatment that is reasonably necessary" as requiring gender affirmation surgery for Trans prisoners.[177]

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169 New Zealand Bill of Rights Act 1990; Human Rights Act 1993.

170 For example, Human Rights (Gender Identity) Amendment Bill 2004 (225-1); and Theresa Upperton "Time For Reform: Protecting Gender Identity Under The Human Rights Act 1993" (LLB (Hons) Dissertation, Victoria University of Wellington, 2016).

171 New Zealand Bill of Rights Amendment Act 2011.

172 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [4.2.5].

173 At [4.2.4].

174 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

175 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [13].

176 *Minister of Home Affairs v Fisher*, above n 174, at 328.

177 See Bendlin, above n 13.

Additionally, while international law is not directly enforceable, courts will interpret legislation in line with it, where possible.[178] In the context of prisoners, a number of international instruments apply to New Zealand.[179] These are often more progressive than New Zealand rights. There are also a number of international organisations that offer guidance on how these principles apply to a wide range of disenfranchised prisoners.[180] In light of the international documents and commentary, courts will have the scope to interpret existing rights in a way that respects unrecognised rights claimants' rights.

Prisoners' rights claims operate in a slightly different context to others due to the Prisoner and Victims' Claims Act 2005 (PVCA).[181] However, this is discussed later.[182] The core idea remains that decisions or policy can, in theory, be challenged under the NZBORA.

The NZBORA claims provide a legal, vertical power to challenge decisions. They enable prisoners to stop rights abuses happening and directly hold decision-makers to account. Courts can overturn executive actions. Moreover, when a court declares that certain legislation or a branch of the executive is breaching rights, the court sends a powerful message to the legislature that the current processes are unacceptable. [183] This kind of message can lead to significant political, public and international pressure to reform policies. Additionally, courts can, in rare circumstances, award *Baigent's* damages to prisoners,[184] which act as a monetary incentive on Corrections to change policies.

For example, in *Taunoa v Attorney General*, the Supreme Court declared that an Auckland prison's behaviour management regime was unlawful.[185] The regime put prisoners in a

178 *Zaoui v Attorney-General* [2005] 1 NZLR 577 (SC) at [34].

179 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976); *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)* GA Res 70/175 (2015); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* GA Res 43/173 (1988); Convention on the Rights of Persons with Disabilities UNTS 2515 (opened for signature 30 March 2007, entered into force 3 May 2008); Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment UNTS 2375 (opened for signature 18 December 2002, entered into force 22 June 2006).

180 United Nations Office on Drugs and Crime, above n 33, at 109–110.

181 Prisoner and Victims' Claims Act 2005.

182 See Part V(A)(3) of this paper.

183 Olga Ostrovsky "Declarations of Inconsistency under the New Zealand Bill of Rights Act" [2015] NZLJ 283 at 285–288.

184 *Baigent's Case*, above n 167.

185 *Taunoa v Attorney General* [2007] NZSC 70, [2008] 1 NZLR 429.

form of solitary confinement for most hours of the day for a period of a few weeks.[186] Among other things, they were denied association with other prisoners and could not exercise in the yard.[187] All this was done without a fair hearing.[188] The Court held that this was cruel and degrading treatment,[189] awarding a relatively significant sum of compensation, and declaring the regime unlawful.[190] Following this, the prison stopped using the regime.

By holding decision-makers legally accountable, prisoners can achieve both democratic and constitutional perspectives of accountability. Inmates can directly prevent abuses of power and also have their rights respected. Additionally, NZBORA cases fulfil the learning perspective of accountability. They render an account of what was done wrong and identify the kinds of processes that need to be put in place to prevent future rights abuses.

2 Judicial review

Judicial review is where a Court exercises its supervisory jurisdiction to ensure that bodies make public decisions according to the law.[191] The decision must be in substance public or have important public consequences.[192] While judicial review is a flexible doctrine, there are set grounds and not all decisions will be reviewable, nor will all result in a remedy. In general, judicial review looks at how a decision was made, and not whether the substantive outcome was correct.

Decisions regarding unrecognised rights claimants may be amenable to judicial review. There will almost always be jurisdiction to review the decision because the decision-maker will be exercising a statutory power under the Corrections Act 2004.[193] However, whether the decision will be justiciable will depend on a range of factors.[194] In general, the more policy-heavy the decision, the less justiciable it will be.[195] Conversely, the more

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186 At [16]–[18].

187 At [16]–[18].

188 At [17].

189 At [2]–[11].

190 At [10].

191 Graham Taylor *Judicial Review: A New Zealand Perspective* (2nd ed, LexisNexis, Wellington, 2010) at [1.01].

192 *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC).

193 Judicial Review Procedure Act 2016, s 5.

194 For a detailed discussion see Taylor, above n 191, at [3.04]–[3.06].

195 *Wellington City Council v Woolworths NZ Ltd (no 2)* [1996] 2 NZLR 537 (CA) at 546.

adjudicative the decision, the more likely it will be amenable to judicial review.[196] For example, the entirety of the plan on how to treat Trans prisoners adopted in 2018 would likely be non-justiciable, but determining whether an individual Trans prisoner could be housed with a certain gender would be justiciable.

If the decision is amenable to judicial review, whether or not an unrecognised rights claimant would be successful in having a decision reviewed is heavily fact-dependent. In this paper, I cannot provide a detailed account of the situations in which a court would overturn Corrections' decision. It suffices to note that there are a range of circumstances in which courts could overturn Corrections' policies and decisions about unrecognised rights claimants.

Judicial review provides a legal avenue for accountability. It enables unrecognised rights claimants to seek review of decisions made about them and potentially have those decisions overturned. For policy decisions, judicial review may force Corrections to consult unrecognised rights claimants due to natural justice concerns.[197] Consultation can influence policy and will allow unrecognised rights claimants to have their voices heard.

For example, in the United Kingdom Trans prisoners have brought cases to review decisions on: which gender to house them with;[198] preventing an inmate from participating in relevant rehabilitation programmes linked to her gender identity;[199] and preventing prisoners from wearing certain clothes.[200] Some were successful. Even where unsuccessful, the cases highlighted issues Trans inmates faced.

In New Zealand, judicial review has already proved a powerful mechanism through which prisoners can protect their rights. Courts have reviewed a wide range of Corrections' decisions, from security classifications,[201] to banning smoking,[202] to the use of behaviour management regimes.[203]

196 At 546.

197 Taylor, above n 191, at [13.74]–[13.77].

198 *R (on the Application of AB) v Secretary of State for Justice* [2009] EWHC 2220 (Admin);

199 *R (on the Application of H) v Secretary of State for Justice* [2015] EWHC 1550 (Admin)

200 *R (on the Application of Green) v Secretary of State for Justice*, above n 139.

201 *Smith v Attorney-General* [2016] NZHC 136, [2017] NZAR 331.

202 *Taylor v Manager of Auckland Prison* [2012] NZHC 3591.

203 *Taunoa v Attorney-General*, above n 185.

In *Smith v Attorney General*, the High Court overturned an Auckland Prison Director's decision to revoke Smith's right to wear a wig.[204] While this was reversed on appeal, Corrections nonetheless continued to allow Smith to wear a wig.[205] Similarly in *Watson v Chief Executive of the Department of Corrections*, the Court ruled that the Chief Executive's decision not to allow Watson to conduct interviews about alleged miscarriages of justice in his trial was unlawful.[206]

These cases demonstrate the power of judicial review, as well as show the kinds of decisions that can be challenged. Both these cases would also likely be useful for Trans prisoners. Judicial review thus fulfils two purposes of accountability. First, it prevents the overreach of executive power by enabling prisoners to highlight where decisions have been made unlawfully. Secondly, it fulfils a learning function, whereby Corrections can learn from what they have done wrong in the past and from the consultation required in policy-based decisions.

3 Problems with legal accountability

In theory, both NZBORA cases and judicial review would appear to solve all problems and prevent future rights abuses. However, in reality this is not the case. There are five common problems with judicial review and NZBORA, and one unique problem for each.

First, wherever statutes exist, New Zealand courts do not have the power to strike down the law as inconsistent with the NZBORA or review the law itself. Therefore, any rights, processes, or proscribed actions contained in any piece of legislation cannot be challenged by the courts. For example, subpart four of the Corrections Act 2004 explains what powers Corrections has to use coercive force. The courts can still make declarations of inconsistency and interpret ambiguous words in line with rights However, this does limit courts' ability to prevent rights abuses.

Secondly, courts are necessarily reactive. They require someone to bring a claim for a right that has already been infringed or is likely to be infringed. Accordingly, courts struggle to prevent rights abuses except to the extent that Corrections learns from previous cases. In

204 *Smith v Attorney General* [2017] NZHC 463, [2017] 2 NZLR 704.

205 *Attorney General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899.

206 *Watson v Chief Executive of the Department of Corrections* [2016] NZHC 1996, [2016] NZAR 1264.

contrast, other forms of accountability, like investigations that identify risk, can pre-empt rights abuses.

Thirdly, court processes are lengthy. The average civil trial takes 309 days to resolve.[207] Often by the time a court hears a case, an unrecognised rights claimant will have lived for a long period of time with that new policy. Many rights abuses are time sensitive.[208] For Trans prisoners, "delay of treatment… not only exposes them to a longer duration of pain, suffering, and decreased social functionality, but also unnecessarily places their lives at risk."[209]

Fourthly, common law systems in general, and particularly the New Zealand legal framework for prisoners' rights, are difficult to navigate. To mount a successful case, litigants need to read and understand large amounts of case law. However, 71 per cent of prisoners have literacy levels "below the level at which a person is able to cope with the demands of everyday life and work in a complex, advanced society",[210] and up to 90 percent have low literacy skills.[211] Many will be unable to navigate the legal system or fill in the requisite forms. As such, even accessing legal aid or filing the appropriate forms to review the decisions may be difficult. This reduces the courts' ability to hold Corrections accountable.

Finally, New Zealand courts may be reluctant to actively uphold disenfranchised prisoner rights or review Corrections' actions. Since Parliament delegated its "legislative role" to Corrections under the Corrections Act 2004,[212] courts will likely be reluctant to interfere with policies regarding unrecognised rights claimants.[213] Where courts do not interfere, legal accountability is reduced. The Trans prisoner experience suggests this. There have

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207 Mark Henaghan "A preliminary study on civil case progression times in NZ" (May 2011) Law Foundation <https://www.lawfoundation.org.nz/?p=1119>.

208 Tammi Etheridge "Safety v. Surgery: Sex Reassignment Surgery and the Housing of Transgender Inmates" (2014) 15 Geo J Gender & L 585 at 608–609.

209 The Sylvia Rivera Law "*It's War In Here": A Report on The Treatment of Transgender and Intersex People in New York State Men's Prisons* (New York, 2007) at 28.

210 Jill Bowman "Assessing the Literacy and Numeracy of Prisoners" (2014) 2(1) Practice: the New Zealand Corrections Journal 39 at 39.

211 Controller and Auditor General *Department of Corrections: Managing Offenders to Reduce Reoffending* (Office of the Auditor General, December 2013) at [4.5].

212 Corrections Act 2004, s 200.

213 See reasoning for the high threshold of unreasonableness in *Wellington City Council v Woolworths NZ Ltd (no 2)*, above n 195.

been four cases in which Trans prisoner rights abuses, while not the subject-matter of the case, have been mentioned.[214] The Court only mentioned these abuses in passing or dismissed them as proper processes were not followed. Given Trans prisoner rights were a prominent issue, it is surprising the courts did not take the opportunity to highlight the abuses in their judgments. If courts refuse to actively engage in these topics, it leaves room for doubt about how willing they will be to judicially review Corrections' actions for unrecognised rights claimants.

Regarding NZBORA claims, there is one unique fetter on the ability to hold Corrections to account: the PVCA.[215] This was enacted to restrict and guide the ability for prisoners to bring NZBORA claims forward.[216] Compensation cannot be awarded and courts will often decline to hear cases "unless the Court is satisfied that the plaintiff made reasonable use of reasonably available complaints mechanisms".[217] There are three relevant processes, and prisoners must use at least one of them. [218] The PVCA's procedural requirements limit the ability for prisoners to use legal accountability mechanisms. Prisoners have to go through lengthy processes first. Prisoners may also become disheartened and not go to court if the first complaints resolution service decides against them. This harms the ability for NZBORA claims to effectively hold Corrections to account.

Additionally, even if they make use of the complaints mechanisms, the PVCA requires exceptional circumstances to award compensation, and has guiding principles to restrict the quantum awarded.[219] These restrictions decrease the monetary incentive for Corrections to change behaviour. Moreover, there is a Victims Special Claims Tribunal where the offender's victims can claim compensation received by a prisoner in court while the prisoner is incarcerated.[220] This reduces the monetary incentive for prisoners to bring a claim in court. Accordingly, legal accountability is reduced.

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214 *Miller v New Zealand Parole Board*, above n 45, [54]; *Lepper v R*, above n 45, at [17]; *Forrest v Chief Executive of the Department of Corrections*, above n 108; and *Field v Chief Executive Department of Corrections* [2011] NZERA 26 at [12] and [57].

215 Prisoner and Victims' Claims Act 2005.

216 *Chief Executive of the Department of Corrections v Gardiner* [2017] NZCA 608, [2018] 2 NZLR 712 at [26]–[27].

217 At [28].

218 At [33].

219 Ministry of Justice *Compensation for Wrongful Conviction and Imprisonment* (May 2015).

220 Ministry of Justice "Victims & Justice" <https://www.justice.govt.nz/tribunals/victims-and-justice/special-claims/>.

Judicial review's unique problem is that it addresses procedure, not substance. Courts rarely provide substantive remedies. Instead, they refer decisions back to decision-makers. In practice, this means that where prisoners' rights have been breached, they may not be properly vindicated. For instance, if a Trans prisoner is put in the prison of their sex, the court may just order the decision-maker to hear the prisoner before making the decision again. This could lead to the same outcome.

B Political Accountability

1 Inter-party

In New Zealand, the parties not in Government (the Opposition) are the primary means through which a Government is held politically accountable.

The Opposition has the power to ask the Government questions each day and require them to answer.[221] This is the main way the Opposition holds the Government to account. Asking questions forces the Government to render an account of why their current policy is acceptable. An aforementioned example of this was the questioning in 2012 by Jan Logie.[222] Her questions forced Tolley to engage with Trans prisoners' rights and explain whether the policy needed to be changed.

Parliamentary questioning primarily relies on informal, horizontal accountability. By highlighting issues in policy, the Government may have to change those policies to appease the public. New Zealand's Mixed-Member-Proportional voting system has resulted in increased political accountability. The main party in Government generally does not have a majority and instead requires other parties' support to govern. If the main party allows human rights abuses to happen, they may lose that support.

However, in relation to unrecognised rights claimants, relying on informal political accountability is ineffective. At a base level, since prisoners cannot vote, political parties see little benefit from enacting rights-friendly policies for prisoners. More importantly, the public does not perceive prisoners as a sympathetic group of people. New Zealand has a strong penal populist culture and subscribes to "tough on crime" rhetoric.[223] Citizens are unlikely to ever properly rally around rights abuses in prison. This is particularly true for

221 Standing Orders of the House of Representatives 2017.

222 (29 Feb 2012) 677 NZPD 667.

223 John Pratt *A Punitive Society: Falling Crime and Rising Imprisonment New Zealand* (Bridget Williams Books, Wellington, 2013).

unrecognised rights claimants whose plight is often not understood by the public. For example, many voters do not understand the intricacies of Trans rights and how harmful it is not to be able to access items, such as a wig, that allow someone to present in line with their gender. Moreover, since Parliament delegated away large amounts of responsibility for the care of prisoners, the Government itself may not be criticised for Corrections' actions.

Accordingly, due to being unable to vote, a tough on crime narrative, a lack of understanding of unrecognised rights claimants' issues, and the delegation of those issues, there is little political accountability for rights abuses of unrecognised rights claimants.

A clear example of this was Tolley's response to Logie's question.[224] She denied the existence of problems with Trans prisoners' care; stated Trans prisoners did not suffer from widespread sexual assault, despite the Ombudsman's report; and made transphobic comments about a pre-operative Trans person remaining as their biological sex.[225] Despite these statements, there was no public backlash and parties quickly dropped the issue.

2 International

A range of international bodies monitor prisoners' welfare. To ascertain whether New Zealand is protecting rights, those bodies rely on reports from New Zealand. However, the United Nations also inspects prisons from time to time to ensure compliance with human rights obligations.[226] International organisations often mention disenfranchised prisoners in their reports.[227] That is why, for instance, the Office of the High Commissioner's report included a critique of New Zealand's treatment of Trans prisoners.[228] There are many examples of international bodies critiquing New Zealand's treatment of prisoners.[229]

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224 (29 Feb 2012) 677 NZPD 667

225 (29 Feb 2012) 677 NZPD 667.

226 For example: Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to New Zealand* (United Nations, 28 July 2014).

227 For example: Office of the High Commissioner for Human Rights, above n 7.

228 At [40].

229 Every year by the Office of the High Commissioner for Human Rights in its periodic review. For example: Office of the High Commissioner for Human Rights, above n 8, at [40]. Also see: United States Department of State New Zealand, above n 105; LGBTI Law Committee, above n 10; and Annaliese Johnston *Beyond the Prison Gate* (Salvation Army, December 2016).

International accountability is informal. It operates through three mechanisms: leveraging relationships at an international level; highlighting issues for domestic pressure to be put on governments; and educating governments about rights breaches they were not aware of. It can be a powerful form of accountability in certain circumstances, particularly for New Zealand, which tries to maintain a strong rights-friendly reputation internationally.

However, the rights abuses have to be particularly severe for the international agencies' reports to carry any weight. Minor infringements are often ignored by the public or the Government. Moreover, for disenfranchised groups of prisoners, such as Trans prisoners, the population size is so small that they often only occupy small parts of a report. Because of their small size, it is hard for domestic and international pressure to be properly exerted.

On a practical level, there is some evidence that New Zealand takes international reports on human rights abuses seriously.[230] However, the Government's response is slow and there seems to be an "implementation gap".[231] New Zealand has ignored international criticism about prisoner rights on a number of occasions.[232] This suggests some level of ambivalence from New Zealand governments towards international pressure, at least in relation to unrecognised rights claimants. Moreover, as Dame Silvia Cartwright stated, "New Zealand has succumbed to a kind of world-weary acceptance that full enjoyment of universal human rights remains a distant dream".[233]

C Administrative Accountability

1 Ombudsman

The Ombudsman is a parliamentary officer. Amongst other things, the Ombudsman is "responsible for inspecting and monitoring the conditions and treatment of detainees, and for recommending improvements where needed" under the 2007 amendment to the Crimes of Torture Act 1989, which incorporated a 2002 United Nations Protocol: the Optional

230 Judy McGregor, Sylvia Bell and Margaret Wilson *Fault Lines: Human Rights in New Zealand* (Bridget Williams Books, Wellington, 2016).

231 At 31 and 203.

232 At 145, 149, 151, 154, 156 and 158.

233 At 7.

Protocol to the Convention against Torture (OPCAT).[234] OPCAT "aims to strengthen the protection of people who are deprived of their liberty" and focuses on preventing rights violations, as opposed to dealing with them once they have happened.[235]

The Ombudsman relies on diagonal accountability. It holds Corrections accountable in various ways. By writing specific investigation reports and issue-based reports, the Ombudsman directly highlights problems to Corrections. It helps Corrections learn from its previous mistakes and improve its management of unrecognised rights claimants. Additionally, as the reports are public, other mechanisms of accountability can use them to hold Corrections to account. In 2012, the Ombudsman released a report on the health needs of prisoners.[236] Chapter 19 focused on Trans prisoners and highlighted the ways in which Corrections policies for Trans prisoner management needed to be improved. This report forced Corrections to reply and justify why its conduct was acceptable.[237]

Additionally, since 2017 the Ombudsman has delegated its power to the "OPCAT team" to carry "out unannounced full and follow-up inspections so it can observe the prison in its usual, every-day operations" and to write public reports.[238] As part of this role, the Ombudsman or the OPCAT team conducts focus groups with prisoners about policies and their implementation.[239] This helps to identify what is working and what needs to be changed. The Ombudsman has done two of these so far in 2018.[240] The OPCAT team has done six reports since 2017.[241] The Ombudsman also writes an annual OPCAT report.[242]

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234 Justice Committee *Briefing from the Office of the Ombudsman on its prison inspections role under the Optional Protocol to the Convention against Torture, and Reports of the Ombudsman on inspections under the Crimes of Torture Act 1989*: *Unannounced Inspection of Spring Hill Corrections Facility, of Christchurch Men's Prison, and of Hawke's Bay Regional Prison; and Unannounced Follow-up Inspection of Rolleston Prison, of Manawatu Prison, and of Arohata Prison* (February 2018) at 3.

235 At 3.

236 Wakem and McGee, above n 6.

237 Wakem and McGee, above n 7, at 129.

238 Justice Committee, above n 234, at 3.

239 Peter Boshier (Whanganui), above n 137, at 11

240 Peter Boshier *OPCAT Report: Report on an Unannounced Inspection of Upper Prison (Aroata) Under the Crimes of Torture Act 1989* (Office of the Ombudsman, March 2018); Peter Boshier *OPCAT Report: Report on an Unannounced Inspection of Christchurch Women's Prison under the Crimes of Torture Act 1989* (Office of the Ombudsman, April 2018); and Peter Boshier (Whanganui), above n 137.

241 Justice Committee, above n 234.

242 Obliged to do so under the Public Finance Act 1989, s 39.

Finally, the Ombudsman is empowered to resolve disputes between prisoners and Corrections. This enables prisoners to complain to the Ombudsman when rights abuses happen and be heard by an independent party.

The Ombudsman is a key part of the accountability framework for prisoners. While the Office of the Ombudsman technically relies on informal accountability, it is well-respected and rarely ignored.[243] In general, Corrections attempts to work with the Ombudsman and will take its advice on board, as evidenced by the Agreement between the Chief Executive of the Department of Corrections and the Chief Ombudsman in 2017.[244] That agreement guaranteed the two bodies would work together and respect each other.[245] Consequently, when the Ombudsman writes a report, Corrections will either follow it or at the very least respond to why they are not adopting the Ombudsman's recommendations. The Ombudsman also has the power to influence Corrections' operational policies.

Moreover, the Ombudsman presents reports to Parliament.[246] This ensures the Government is aware of rights breaches, and puts pressure on Corrections to change their practices. An example of this was with Trans prisoner rights in 2012 where "after [the Ombudsman's] report was tabled in Parliament, a meeting was held between the Chief Executive of Corrections and the Ombudsmen".[247] Following this, "Corrections agreed to review its policy regarding transgender prisoners".[248]

All of these powers go towards achieving the learning function – the Ombudsman is able to identify what practices Corrections needs to improve and explain how to do so. The Ombudsman also helps to prevent abuses of power, thus fulfilling the constitutional purpose of accountability.

However, the Ombudsman as a form of accountability comes with a range of limitations. The largest criticism of relying on the Office of the Ombudsman for accountability is that its ability to hold the Government to account depends on who the Chief Ombudsman is. As

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243 Warren Young *Prison Policy, Prison Regime and Prisoners' Rights in New Zealand* (Department of Corrections, June 2008) at 508.

244 Ray Smith and Peter Boshier *Agreement between the Chief Executive of the Department of Corrections and the Chief Ombudsman* (2017).

245 At 1.

246 Ombudsman Act 1975, s 22(4).

247 Wakem (2011/2012), above n 98, at 24–25.

248 At 24-25.

with many companies, the person in charge heavily influences the scope and power of the whole organisation. [249] This is particularly true for Ombudsmen who are required to consistently "step on the toes" of high-ranking public officials.[250] As such, some Ombudsmen are less willing to interfere with executive actions than others. Because the Ombudsman's willingness to hold the Government to account changes, unrecognised rights claimants cannot guarantee they will have their rights upheld by using the Ombudsman.

Another criticism is that in New Zealand inspecting prisons and resolving disputes is only one the Ombudsman's many roles. While the OPCAT team resolves disputes relatively quickly,[251] it is reactive and focuses on solving that particular dispute. Accordingly, the team can fail to proactively investigate or issue meaningful reports on policy regarding unrecognised rights claimants. Additionally, different Ombudsmen will prioritise different aspects of their job to different extents. If there is an Ombudsman who knows little about prisoners' rights and/or deems them less important than other issues, they will be a less effective form of accountability. In contrast, the United Kingdom has a specific Prison and Probation Officer who is an expert in that policy area.

Finally, for disenfranchised prisoners, it is often hard to get recognised by the Ombudsman. The Ombudsman has to investigate and report on the whole prison and sometimes struggles to identify new ideas of rights abuses, particularly if those people represent a small portion of the prison population. An example of this is that prior to 2012, and after 2014, tTans prisoners were not been mentioned in the Annual Reports. This was despite unsatisfactory policies still existing and abuse allegations.

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249 See: Dean Gottehrer "Fundamental Elements of an Effective Ombudsman Institution" (Paper presented to Plenary Session II: Developing the Working Methods and Tools of the Ombudsman, 2009); Linda Reif *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff Publishers, Leiden, 2004) at 393–411.

250 At 393–411.

251 Michael Frahm "New Zealand: Ombudsman" in International Ombudsman Institute (ed*) Australasia and Pacific Ombudsman Institutions* (Springer, Berlin, 2013).

2 Office of the Inspectorate

The Office of the Inspectorate dates back to 1880.[252] It is governed by the Corrections Act 2004 and the Corrections Regulations 2005. It reports directly to the Chief Executive of the Department of Corrections.[253] In 2017, the Office of the Inspectorate's powers were "expanded to allow a programme of ongoing reviews in the form of prison inspections".[254] In these inspections, the Office goes into prisons and evaluates whether there are any concerns with the prison processes regarding: prisoners' safety; the respect afforded to prisoners; prisoners' rehabilitation opportunities; and the reintegration preparation of prisoners.[255]

The Office also investigates individual incidents and reports. In doing so it attempts to resolve disputes between prisoners and Corrections. Following an inspection, the Office releases a report and Corrections replies to the findings. As at 7 October 2018, there have been four prison investigations and three specific incident investigations.[256]

As with the Ombudsman, the Office of the Inspectorate could be a useful form of informal horizontal accountability as the Office: (a) sits inside Corrections; (b) identifies where a policy has gone wrong; (c) identifies where rights abuses are happening; and (d) explains how to prevent future problems with administration of inmates. It fulfils a learning function. As the reports are public, they alert the Minister and the general public to rights abuses or the need for a policy to change. Moreover, these inspections have the potential to be a very effective form of accountability due to their regularity – this enables them to track policy and treatment over time and ensure that policies are put in place in more than just tokenistic ways.

However, it is hard to know how powerful the Office will be. There have only been seven reports so far and the Office has only had the power to investigate and write reports for a few months. None of the reports focused on unrecognised rights claimants. None even mentioned LGBT prisoners. Given the Office is an internal complaints mechanism within

252 Office of the Inspectorate "Who We Are" Department of Corrections <https://www.Corrections.govt.nz/about_us/who_we_are/office_of_the_inspectorate.html>.

253 See Corrections Act 2004, s 28; Corrections Regulations 2005, reg 96–97.

254 Office of the Inspectorate "What We Do" <https://inspectorate.Corrections.govt.nz/about_us/what_we_do.html>.

255 Office of the Inspectorate, above n 254.

256 Office of the Inspectorate *Invercargill Prison Inspection* (May 2018); Office of the Inspectorate *Auckland Prison Inspection* (February 2018); Office of the Inspectorate *Waikera Prison Inspection* (March 2018); and Office of the Inspectorate *Manawatu Prison Inspection* (September 2017).

Corrections, it may be more capable of effecting change. It does not create an antagonistic relationship with Corrections. Alternatively, it may be less likely than a truly independent organisation to highlight where Corrections is failing.

3 Human Rights Commission

The Human Rights Commission does not have the same legal standing to investigate prisons. However, it coordinates all the OPCAT reports from the four agencies: the Independent Police Conduct Authority; the Children's Commissioner; the Inspector of Service Penal Establishments: Defence Force; and the Ombudsman, including the Ombudsman's reports regarding Health and Disability places of detention.[257]

Because of the Commission's expertise, it actively comments and makes recommendations on policy. It is often perceived as one of the key actors to liaise with when implementing policies for disenfranchised prisoners.[258] For Trans prisons, the Human Rights Commission played a role in helping to guide the new Prison Operations Manual.[259] The Commissioner can also resolve disputes and declare that practices are inconsistent with the Human Rights Act.[260]

For accountability, the Human Rights Commission can help fulfil the learning purpose of accountability as it promotes cross-agency learning. It is also invaluable at alerting people to the kinds of abuses that happen.[261] Moreover, the Human Rights Commission has a lot of informal accountability as it reports on OPCAT to international organisations. Those organisations can then put pressure on Corrections to update policy.

The main limit to the Commission's powers is that it does not have the same power to investigate as the Ombudsman or Office of the Inspectorate. If a report fails to include human rights abuses, those abuses could, to some extent, go under the radar. This is likely to happen with new conceptions of rights, which organisations do not understand.

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257 Nathalie Pierce "Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience" (2014) 31 Law in Context 154 at 180; Human Rights Commission "Monitoring Places of Detention/OPCAT" <https://www.hrc.co.nz/your-rights/human-rights/our-work/opcat/>.

258 Pierce, above n 257, at 180–181.

259 Chief Custodial Officer's Team, above n 48, at at [11] and [70].

260 Human Rights Act 1993, part 3.

261 For example, Human Rights Commission (2008), above n 5, at 1.

Moreover, for Trans prisoners, the Human Rights Commission did not seem to be particularly influential in bringing about change despite releasing several reports. It also neglected to include Trans prisoners in all its annual reports since 2007, except for one tokenistic mention in 2015. This is potentially due to the informal nature of the accountability and relying on other actors to use the reports to bring about change.

D Professional Accountability

As society becomes more accepting, Corrections is likely to become more diverse. Corrections staff also receive diversity training programmes to help them understand what disenfranchised prisoners are going through and how they can treat those prisoners better.[262]

For example, Corrections staff are now being educated about unconscious bias as well as how to deal with Trans prisoners.[263] Corrections staff are taught about the unique struggles and the needs of Trans people inside and outside of prison.[264]

Through these education programmes, Corrections has fostered a sense of professional accountability. As staff know more about Trans issues, they will be more likely to hold each other to account for abuses.[265] Most countries have cited the necessity of training staff when implementing Trans policies.[266] Where staff have not been trained, this can result in abusive behaviour towards Trans prisoners.[267] Training also creates accountability: if the prison is failing at a certain kind of policy, other staff members are more easily able to identify why that is, and what they can do about it. Staff can also talk to Trans prisoners more freely and obtain their views on policies.[268] The same would likely happen with other disenfranchised prisoners if there was diversity training.

However, this kind of accountability relies on fundamentally changing the way people think. Many people are socially conservative when it comes to disenfranchised prisoners,

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262 Letter from Cameron Oldfield, above n 81, at 3–4.

263 At 3–4.

264 At 3–4.

265 Prisons and Probation Ombudsman (UK), above n 56.

266 For example: Marlow, Winder and Elliott, above n 51, at 248 and 251; and Sydney Tarzwell, "The Gender Liens are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners" (2006) 38 Colum Hum Rts LR 167 at 213.

267 Marlow, Winder and Elliott, above n 51, at 248.

268 At 248.

such as gender diverse prisoners. They are unlikely to suddenly understand the needs of those prisoners simply because they have had some training, as evidenced by the way Trans prisoners continued to report being treated post-training.[269] Additionally, the training is not proactive but retroactive. It does not teach about unexplored minorities – such as takatāpui and fa'afafine – and therefore does not increase accountability for those unexplored minorities.

E Social Accountability

In New Zealand, the LGBT community has been active in trying to hold Corrections to account regarding its treatment of Trans prisoners. For instance, New Zealand saw public campaigns by "No Pride in Prisons" which resulted in police officers clashing with Trans rights activists at pride parades.[270]

Public accountability can be a powerful form of accountability. It puts pressure on the legislature, and on individual Ministers whose jobs rely on their popularity, to change policy. Moreover, where the public is engaged, it can help Corrections to determine the correct policy. The public has a wide variety of expert skills and is the most invaluable resource for learning from mistakes and developing better processes. However, for disenfranchised prisoner rights, there are two problems when relying on social accountability.

First, there have been problems with the ability of academics and protestors to access information about Trans prisoners. A lack of information hinders the ability to successfully mount protests. Corrections has not proactively released information about disenfranchised prisoners. Occasionally, they refuse to answer OIA requests, citing privacy concerns.[271] For Trans prisoners, protestors had to rely on anecdotal evidence and have not been able to conduct comprehensive studies, or monitor whether the situation is getting better. This severely inhibits protestors' ability to get strong public support. If the Minister does not see wide scale outrage, public accountability is unlikely to work.

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269 Letter from Cameron Oldfield, above n 81, at 3–4.

270 Frost, above n 110; Fisher, above n 110; Field, above n 111; Lamusse, above n 37.

271 Letter from Jeremy Lightfoot (Lamusse), above n 61.; Hannah Gabriel "Corrections Needs Trans Transparency" (2015) Justspeak <http://www.justspeak.org.nz/Corrections_needs_trans_transparency>; Sexual Orientation, Gender Identity and Intersex (SOGII) UPR Coalition 2013, above n 101; Equal Justice Project (2013), above n 10, at [1.1]; and Human Rights Commission (2008), above n 4, at 92.

Second, even if the information becomes available, as aforementioned, the New Zealand public tends to abide by a tough on crime rhetoric – as evidenced by New Zealand having one of the highest incarceration rates in the OECD.[272] This has implications not just for how many people are incarcerated, but also how we treat those in prison. For example, New Zealand recently repealed prisoners' right to vote.[273] It has passed legislation that risked double jeopardy.[274] It has removed the right to trial by jury in many cases.[275] The general public tends not to be sympathetic towards prisoners and is unlikely to demand legislative change due to rights abuses in prison.[276]

Moreover, in terms of minorities, this is even less effective. The average person does not understand their plight, nor the problems they face. For example, a large section of the public do not believe that Trans prisoners should be able to go into the prison of their gender due to the risk to female inmates.[277] They believe that Trans people remain their birth sex and that they just want to get an "easy ride" by going to a women's prison.[278] There is also likely to be a lack of understanding in the future with new minorities.

Public accountability therefore relies on a small number of citizens putting pressure on the government to change policies. For Trans prisoners, this was not particularly effective given the small size of the LGBT community and its ability to act as a voting bloc. There was little incentive on Government to protect prisoners where they suffered no repercussions. However, Corrections itself has demonstrated it is willing to listen and adapt policies. The leadership team at Corrections likely recognises the importance of community support in rehabilitating prisoners. Many rehabilitative programmes are run by the community. For unrecognised rights claimants, they often need support groups from the community they identify with. It is well documented Trans people often feel isolated or

272 (31 May 2016) 714 NZPD 11481; (23 May 2017) 722 NZPD at Rino Tirikatene MP's speech.

273 Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010.

274 Returning Offenders (Management and Information) Act 2015.

275 New Zealand Bill of Rights Amendment Act 2011.

276 Pratt, above n 223.

277 For example: Daniel Sanderson "Male Transgender Prisoners 'Pose Threat to Women'" *The Times* (online ed, 12 September 2018); and Alexandra Topping "Sexual Assaults in Women's Prison Reignite Debate over Transgender Inmates" *The Guardian* (online ed, 9 September 2018).

278 House of Commons Women and Equalities Committee *Transgender Equality* (First Report, December 2015) at 66–68.

may engage in self-loathing behaviour before they come to terms with who they are.[279] In New Zealand, Trans prisoners have sought to be connected with community groups.[280] Therefore, Corrections attempted to reconnect them with those groups.[281] Corrections cares about rehabilitating prisoners and has demonstrated that it wants to form a good relationship with the public.

VI What Can We Learn From This Analysis?

For Trans prisoners the current accountability mechanisms were insufficient – it took nearly two decades with multiple accountability mechanisms working together to effect change. There will be new rights understandings and new groups of disenfranchised prisoners in the future who will claim the right to be free from discrimination. It is essential to learn from the mistakes with Trans prisoners and ensure unrecognised rights claimants' rights are not abused. In this section, I examine the previous section's accountability analysis to explain why it took so long to improve Trans prisoner rights. I do not have the scope in this paper to propose detailed reforms or offer a comprehensive set of solutions to the problems. Instead, I will highlight what Corrections can learn from the Trans rights experience, and suggest some things that should be done to improve accountability metrics.

It is not particularly relevant which accountability mechanism was the most successful at holding Corrections to account. This is because all of the different forums are essential to any functioning system. The best system would be one where there are high levels of accountability in each forum. Instead, the purpose of detailing how the different mechanisms interact is to outline which ones have unrealised potential.

For Trans prisoners the two key areas to improve are administrative and legal accountability. While social, political and professional accountability are important, fully realising their potentials would require substantial shifts in public attitudes towards crime. This seems the least practical of all the solutions due to New Zealand's deeply embedded

279 Elizabeth McDermott, Katrina Roen and Jonathan Scourfield "Avoiding Shame: Young LGBT People, Homophobia and Self-Destructive Behaviours" (2008) 10(8) Culture, Health & Sexuality 815; or Genny Beemyn and Susan Rankin *The Lives of Transgender People* (Columbia University Press, New York, 2011) at 39, 50, 53, 57, 114–115, 122, 130–134, and 156.

280 Jill Bowman "Evaluation of the Counsellors and Social Workers Services" (2018) 6(1) Practice: The New Zealand Corrections Journal 23 at 23–24.

281 Letter from Cameron Oldfield, above n 81, at 3–4.

penal populist culture. Instead, there should be some key changes to how the administrative bodies function, and to the legal accountability systems.

A Administrative Accountability: The Problem of "Too Many Eyes"

Despite the existence of a number of different actors, overall there appears to have been a low level of accountability regarding Trans prisoner rights abuses. This phenomenon – where there are a large number of actors, yet low levels of accountability – has been referred to as "the problem of too many eyes".[282] In the following subsection, I briefly theorise three reasons for the occurrence of this problem, apply that to the context of Trans inmates, and finally investigate what should be done to fix the problem.

1 Theorising the problem

The first possible reason for the problem of too many eyes is that none of the actors are sure which parts of an entity's conduct they are responsible for monitoring. This uncertainty is compounded when actors rely on the same means of accountability and those actors do not readily information share.[283] Where actors are unsure of what they are meant to be monitoring, they often neglect central aspects accidentally.

The second possible reason concerns the failings that have been associated with collective action.[284] Each actor may expect the other to investigate certain kinds of conduct. This can result in some conduct being overlooked entirely. In particular, this happens when each actor is tasked with many other jobs and has limited resources. The actor prioritises the other jobs because they believe the other actor will fulfil their mutual job.

The third possible reason arises in circumstances where the actors come to different conclusions about what is important and what needs to be done. In doing so, the actors send mixed messages to the entity, which reduces an entity's ability to implement each actor's suggested changes. It makes it hard for the entity to know what to do, and also hard for an

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282 Jan Biela "Effective Accountability in New Forms of Governance: Political Institutions and Regulatory Agencies" (paper prepared for the ECPR General Conference, Bordeaux, September 2013) at 5; Sean Gailmard "Multiple Principals and Oversight of Bureaucratic Policy-Making" (2009) 21(2) J Theoretical Politics 161 at 182; Yannis Papadopoulos "Problems of Democratic Accountability in Multilevel Governance" (2007) 13(4) European LJ 469 at 481-483; Mark Bovens (2007), above n 140, at 455.

283 Biela, above n 282, at 5; Papadopoulos, above n 282, at 481–483.

284 Gailmard, above n 282, at 182.

actor to hold that entity to account. So long as the entity fulfils one of the goals it has been set, it is hard to criticise the entity's conduct.

The effects of these possible contributing factors, alone or in combination, can also be theorised. The existence of too many actors doing similar jobs results in less breadth and depth of scrutiny. Many of the reports will cover similar topics and each actor will expend its resources on achieving a surface level analysis. Conversely, where resources are pooled, the actor can investigate more broadly, more deeply, and have a greater ability to follow up and make sure that the entity changes its behaviour.

2 Application

The problem of too many eyes has occurred in the context of Trans inmates' rights. Corrections were subjected to a range of actors all trying to hold them to account: the Human Rights Commission; the Ombudsman; International Organisations, such as the UNODC and the United States Department of State; Members of Parliament; the Human Rights Review Tribunal; public lobby groups, such as JustSpeak and Equal Justice; and the general public. However, none of these bodies were able to get meaningful change from Corrections, apart from the Ombudsman on one occasion.[285]

Currently, in the New Zealand prison context, all of the administrative actors – the Human Rights Commission, the Office of the Inspectorate and the Ombudsman – perform the same role and have the same means of accountability – they rely on informal horizontal/diagonal accountability. They also do not information share. In line with the first reason for the problem of too many eyes suggested above – uncertainty about who is doing what – they often cover similar issues and neglect others. The neglected issues are generally disenfranchised prisoners. This is likely to be the reason why, in the case of Trans prisoners, the majority of the reports said very similar things. They did not go into detail, and instead continuously repeated the same issues. It also explains why Trans prisoners became excluded from Human Rights Commission and Ombudsman reports. None of the bodies were sure which one was meant to follow up with Trans inmates and ensure policies were properly working.

A further possible explanation for each actor failing to report on Trans inmates is that there was a collective action problem. The Ombudsman and the Human Rights Commission may have prioritised their other jobs over investigating disenfranchised prisoners. Both bodies

285 Wakem (2011/2012), above n 98, at 24–25.

have a large number of tasks they need to complete and have resources constraints. They may have thought the other body would do a satisfactory job.

Corrections recently expanded the role of the Office of the Inspectorate to enable it to report on prison failures too. This was to improve accountability within prisons. However, it has only increased the number of eyes. It is unclear how the Office of the Inspectorate's role is different to the Ombudsman's role. By expanding the Office's role, Corrections has likely only made it harder for the Ombudsman to know what they should do. It has also worsened the collective action problem – as evidenced by the absence of reference to Trans prisoners in any reports.

Regarding the third reason suggested above – the drawing of contradictory conclusions by the different parties – there were no explicit contradictions in relation to Trans rights. However, there were implicit contradictions that made it harder for Corrections to know what to do. The Ombudsman and Human Rights Commission stopped commenting on Trans policies following the 2014 reforms. In doing so, the bodies implied to Corrections that their policies did not need any further reform. However, at the same time, other organisations continued to criticise Corrections. Due to these mixed messages, it would have been unclear to Corrections how urgent the problem was and what exactly needed to be reformed.

So the outcomes in the actual practice of administrative accountability, as detailed in the previous paragraphs, mirror the effects predicted in the theoretical discussion of the too many eyes problem. Each administrative accountability actor tended to produce very similar findings, and not make in-depth reports about Trans inmates. They did not do follow up studies, or conduct large amounts of empirical research. They needed to do more empirical research on the extent to which New Zealand Trans prisoners felt they were being discriminated against. This information would have been vital to increasing transparency and mounting a more effective campaign for reform.

3 What to do?

It is my contention that there should be a centralised body that is responsible for overseeing prisoners' rights. Similar to the Prisons and Probation Officer in the United Kingdom, this body should be an expert on what happens in prisons and it should focus almost exclusively

on prisons.[286] A centralised body would not require the Office of the Inspectorate, Human Rights Commission and the Ombudsman's roles to merge, but it would require that the reporting and critiquing of Corrections' practices happen from one body, not all three.

Centralising the functions would also remove any collective action problems or worries about coming to different conclusions. Instead, the body would have one powerful message to send to Corrections. The message would be consistent and relentless. Corrections would be more likely to listen to a persistent body that does not stop fighting for disenfranchised prisoners. The body would also have increased legitimacy and ensure Corrections knew exactly what it needed to do. The body could better co-ordinate the other bodies to ensure that all aspects of the prison system are being investigated, including disenfranchised prisoners.

Additionally, a centralised body could more readily do in-depth scrutiny of Corrections' policies due to the pooling of resources and information coordination. It could, for example, have monitored the improvement to Trans prisoners' wellbeing following the 2004 or 2014 policies. This would have produced reliable empirical evidence about whether the life for Trans inmates was improving. None of the previous accountability metrics have done well at following up with Trans prisoner rights and have published reports on an ad-hoc basis. A centralised body would be able to do so and would better fulfil the learning purpose of accountability.

It will be important for the centralised body to ensure it does not result in "enclave deliberation": where the body becomes unable to conceptualise problems and/or solutions that have not yet been suggested due to a "group think" mentality.[287] However, this is unlikely to happen due to the existence of international accountability mechanisms. The international institutions will continue to push rights forward and challenge existing understandings.

For new understandings of rights, a centralised body would: identify problems earlier; ensure that Corrections followed through on policies; have more resources to investigate and support claimants; and become an expert on those rights claimants due to extra resources. This would proactively protect those rights and make sure policy advances much faster.

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286 Anne Owers "The Protection of Prisoners' Rights in England and Wales" (2006) 12 Eur J Crim Policy Res 85 at 86.

287 Papadopoulos, above n 282, at 481.

If the bodies are not centralised, they should at the very least co-ordinate and construct demarcated roles. They should work together to ensure that they are investigating all parts of the way that prisoners are treated without excessive use of resources. There should be a single designated body that collates the reports. Those reports should have a section that specifically focuses on unrecognised rights claimants and disenfranchised prisoners.

B More Legal Accountability Is Required: Braver Courts, Accessible Courts and Legislative Reform

1 New Zealand courts should be more willing to review decisions

Legal accountability by reviewing decisions is essential. It can be a quick way to vindicate rights and send a strong message to Corrections that they need to change their policy. It makes public the reasons why Corrections fails, and the kinds of processes that need to be implemented in order to rectify the problem. Court cases also endure. They do not change with every time a new Government is elected. Where a Court rules that a certain policy must be implemented, the executive cannot ignore that. Additionally, for unrecognised rights claimants, courts are generally more willing to vindicate rights even if it imposes an additional burden on the State.

For example, in Ontario, Police officers were often strip-searching Trans inmates of the same sex as them, regardless of whether trans inmates had asked to be searched by someone of the same gender.[288] The Ontario Human Rights Tribunal held that this was clear case of sex discrimination.[289] It ordered the Police Services Board to "revise its Directive concerning the strip-searches of transsexual detainees".[290] It then set out a detailed procedure by which the Police should conduct strip searches in the future.[291] Additionally, it ordered that the Board conduct trainings on the needs of Trans prisoners every six months.[292]

Similarly, in another case in British Columbia, the Human Rights Tribunal ordered that the Police change a range of policies regarding Trans people, including that they put in place

288 *Forrester v Peel (Regional Municipality) Police Services Board* 2006 HRTO 13.

289 At [475].

290 At [476].

291 At [476].

292 At [476].

proactive policies to ensure that the Police do not misgender people, and that Police provide correct post-operative medication to trans detainees.[293]

While Canada has a different constitutional framework to New Zealand, the above cases demonstrate that if given adequate power courts can quickly change policies and vindicate rights. New Zealand courts are reticent to review the actions of the executive in the policy sphere.[294] However, they should be less hesitant when reviewing decisions and enforcing the NZBORA. In this paper, I do not have the scope to argue for stronger judicial review powers, or for an entrenched Bill of Rights, nor would I necessarily want to. Instead, it suffices to say that courts should be willing to strike down policy documents or delegated legislation in relation to prisoners' rights where it is clearly inconsistent with the NZBORA. Prisoners are uniquely vulnerable in society and rely on the courts as their last refuge. I have already explained the reasons why this is. It is important to remember, however, that prisoners are not similar to other people bringing claims for judicial review or rights breaches. Prisoners cannot leave the situation they are in. Without the courts' intervention they will continue to have their rights abused. Accordingly, courts should be move willing to intervene.

It is not my contention that legal accountability will fix everything. It often relies on other forms of accountability to act following it – for example, following a judgment declaring a policy breaches rights, there needs to be an Ombudsman investigation about what policy Corrections should implement instead. However, the public nature and power of the decision helps other actors to learn from their past mistakes. It also helps to improve the constitutional function of accountability by preventing the executive from exceeding their powers.

2 Improving accessibility to courts

As identified earlier, there are significant problems with accessing routes of legal accountability. There are: funding concerns; time concerns due to the inordinate Human Rights Review Tribunal backlogs; and literacy concerns that prevent prisoners from

293 *Dawson v Vancouver Police Board (No 2)* 2015 BCHRT 54 at [268]–[271].

294 *Wellington City Council v Woolworths NZ* Ltd, above n 195, at 546; *New Zealand Association for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC) at [159]; *Comptroller of Customs v Terminals (NZ) Ltd* [2012] NZCA 598, [2014] 2 NZLR 137 at [155]; and Chris Finn "The Concept of Justiciability in Administrative Law" in Matthew Groves (ed) *Australian Administrative Law* (Cambridge University Press, Melbourne, 2007) at 146.

navigating legal documents and procedures.[295] New Zealand's small population means that there are few disenfranchised prisoners. Where processes are hard to access, the small population results in a low likelihood of a case being brought forward. For Trans prisoners this is likely why there was only one court case.[296] The lack of cases is despite clear evidence of abuse and that policies were discriminatory and insufficient.

To reap the full benefits of legal accountability, prisoners need to be encouraged to use formal accountability mechanisms. They also need to be assisted with their applications and receive adequate legal aid.

Having access to accountability not only improves prisoner rights retroactively, but also makes Corrections proactive. Corrections is unlikely to want to be sued for rights abuses. Similarly, since Corrections relies on community support, it is unlikely to want a court to highlight that it is not respecting prisoners' rights. Accordingly, Corrections will likely invest in pre-empting rights abuses. There will be a monetary incentive to change practices as soon as possible. Repealing the PVCA would help to increase the effectiveness of this accountability by decreasing barriers to bringing a claim in court.

Corrections taking a proactive approach would mean, for example, that Corrections would attempt to understand the unique needs of fa'afafine as distinct from Trans women.[297] Corrections would then bring policy into force as soon as possible to avoid litigation, having to pay damages, and public denunciation. By doing so, all the harms of a decade without rights progression could be avoided.

3 New legislative requirements

The Government has nearly entirely delegated responsibility for prison operations policy to Corrections. While the Corrections Regulations 2005 and Corrections Act 2004 contain some procedures, the vast majority of regulations concerning how unrecognised rights claimants should be cared for is found in the Prison Operations Manual and the Custodial Practice Manual.[298]

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295 See Part II(B) of this paper.

296 *Forrest v Chief Executive of the Department of Corrections*, above n 45.

297 Hansen-Reid, above n 40.

298 Department of Corrections (PSOM 18), above n 128; Department of Corrections *Custodial Practice Manual* (2017).

These Manuals are not enforceable to the same extent as statutes. They also have not been through the same level of scrutiny as legislation. While I do not contend that the Manuals should be codified in statute, it is important to contain catch-all provisions and fundamental protections in the Corrections Act 2004.

In practice, the Corrections Act 2004 should have a minimum standards of justice section for unrecognised rights claimants. It would detail the kinds of prisoners who are included and what justice requires. It should also have a "catch-all" provision that details when a currently unrecognised disenfranchised group claiming rights should be recognised as a distinct group with unique needs. The catch-all provision should state that all delegated legislation and Corrections' manuals must comply with the Act's requirements except where there is a justifiable reason for departing from it.

By having these provisions, the courts would be empowered to review policies around unrecognised rights claimants and ensure that they are treated correctly. For example, takatāpui prisoners could bring claims for Corrections failure to rehabilitate them in line with traditional Māori views of sexuality. Courts could also look to overseas jurisdictions and make sure that New Zealand is in line with international understandings of rights. A catch-all provision would fulfil the purposes of accountability. It would more easily prevent abuses of power, and also allow for courts to help Corrections learn about what kinds of characteristics need to be protected much earlier.

The legislation should also include an investigatory reporting requirement. While this currently exists to some degree, it should ensure the investigatory body identifies as soon as possible new potential rights claimants, or new understandings of rights overseas. Once these people are identified, the statute should compel Corrections to create policy as soon as possible that pays due respect to their dignity. This would satisfy the learning perspective of accountability. Corrections would have to learn what it is doing wrong and change its policies as quickly as possible, otherwise face legal sanction. Unrecognised rights claimants would not have to wait for years, like Trans prisoners did, to have their rights respected.

C Public Accountability: Increasing Transparency and Community Engagement

Public and community support is essential for the rehabilitation of prisoners. I have demonstrated that it is hard for unrecognised rights claimants in prison to obtain public support for repealing discriminatory policies. Given the public is the largest repository of knowledge vis-à-vis improving practices, Corrections should continue to try and engage

with the public. For Trans prisoners this has worked, and for future prisoners, it will be important to consult with the relevant community.

Another way to improve public accountability is to increase transparency. It is clear that there is a lack of transparency currently. Corrections needs to be as open as possible with the actions it is taking. For example, the documents released to me under the OIA demonstrate that by 2016 Corrections had become engaged with Trans prisoners' rights and by early 2018 had adopted good practices.[299] However, few people realised Corrections was doing so.[300] This meant prisoners and the public were uncertain about what Corrections was doing and what rights to expect. Moreover, by not making these reviews public, Corrections likely missed out on relevant views, even though it consulted some groups.[301]

D Political Accountability: A Lost Cause?

Some of the suggested solutions, such as reducing delegation, will help to increase political engagement and ownership of the problems. However, similar to public accountability, political accountability for disenfranchised prisoners is unlikely to ever be fully effective. Political accountability relies on public buy in. Due to New Zealand's penal populist culture and a lack of understanding about disenfranchised issues, voters will not change their behaviour. For unrecognised rights claimants, political accountability is not the most useful form of accountability. It is unclear how unrecognised rights claimants can best utilise political accountability.

E Professional Accountability: Diversity is Key

Corrections has introduced great initiatives with its trainings and diversity groups. Corrections should continue to improve its front-line understanding of rights by hiring a more diverse range of people. Those who have lived experience[302] of what it means to be Trans, for example, will be best placed to hold other Corrections employees professionally accountable. Actual members of the disenfranchised group, as opposed to staff members who have been trained, will always better understand the unique issues those prisoners face in relation to their identity. They will also likely be more willing to criticise discriminatory

299 Chief Custodial Officer's Team, above n 48, at [20].

300 For example: Lawrence, above n 80; Stuff "Transgender prisoner Alex Aleti Seu's prison sentence unclear" (online ed, 26 March 2017); and Damien Rowse "Still No Transgender Action Plan From Corrections" *GayExpress* (online ed, 2017).

301 See Chief Custodial Officer's Team, above n 48, at [20].

302 See Schedule One.

policy towards members of their group. More importantly, Corrections should hire internal diversity monitoring staff, who work within prison units and make sure that people respect unrecognised rights claimants' rights.[303] All this would fulfil the learning purpose of accountability by helping Corrections staff learn how to treat disenfranchised groups.

VII Conclusion

For Trans inmates the battle is largely over. As of March 2018, Corrections has put in place policies that properly protect their human dignity. They no longer have to worry about being forced to stay at the prison of their biological sex, or that guards will refuse to allow them to start hormone treatment. That is not to say all problems have been resolved, but Corrections has made good progress. However, there will be new concepts of rights and new groups claiming the right to be free from discrimination in the near future. Corrections must be capable of adapting their policies much faster than they did for Trans inmates.

So what should we do? How are unrecognised rights claimants best protected? These questions are not easy to answer. The very nature of unrecognised rights claimants is such that it is hard to conceive of the rights they will claim. Accordingly, it is a near-impossible feat to design a perfect system that will adapt to all groups. In this paper, I have not attempted to lay out a road map for what ought to be done. Instead, by examining Trans prisoners, I have identified some key features of the current accountability framework that are hindering the ability for the system to adapt. These two areas are administrative and legal accountability.

Administrative accountability suffers from the problem of too many eyes. It lacks an ability to pool resources, make co-ordinated decisions, conduct in-depth investigations, and follow up on policies to ensure they have been effective. The recent addition of the Office of the Inspectorate has likely only made this worse. I have explained that agencies need to be unified in their approach and have clearly demarcated roles. They must centralise or co-ordinate to achieve this.

While other countries have demonstrated the promises of legal accountability, it is yet to be realised in New Zealand. Partly, this is due to the reluctance by courts to review policy decisions. In other situations, it is because of the hurdles that have been created for

303 For example: Ministry of Justice (UK) *Promoting Equality in Prisons and Probation: The National Offender Management Service Single Equality Scheme 2009–2012* (March 2009).

unrecognised rights claimants to access the services. In order to increase the system's adaptability, legislative requirements should be brought into place. These should ensure that administrative bodies and Corrections actively identify where unrecognised rights claimants may exist.

In addition to these two areas, I have detailed the importance of political, public and professional accountability. Political accountability is likely to be the hardest to change of them all. However, public accountability can be increased through community engagement and more transparency. Similarly, professional accountability can be improved by hiring more diverse staff bringing in diversity boards.

None of these changes alone will suffice to ensure that unrecognised rights claimants are protected. The system needs to continue to be aware of who it is dealing with and what potential rights are at play. Humanity's understanding of rights will continue to evolve and so with it must the prison system. Just as our understanding of what constitutes cruel and degrading treatment has drastically changed over time, it is certain other understandings of rights will change in the future too. Trans prisoners were not the first and will not be the last rights claimants. As we continue to explore the human condition, we will discover other groups with inalienable characteristics that require the State's protection. For those groups, the journey needs to be easier. People should not have to live for nearly two decades before there is meaningful policy change. The State needs to do better.

VIII Schedule One:

Term	Meaning
Disenfranchised Prisoners	The term "disenfranchised prisoners" refers to the first of the two situations in the "Meaning" column of "Unrecognised Rights Claimants" in this table below.
Fa'afafine[304]	Literally translated Fa'afafine means "like a woman". There is no universally accepted definition. I shall attempt to draw out some key characteristics. Fa'afafine are considered a third gender in Samoa. They are born biologically male. They refer to themselves by masculine, feminine and gender neutral pronouns. They play an incredibly important part in traditional Samoan society. They display many traditionally feminine characteristics. They identify as being born the way they are. Many reject terms such as "transgender" or "gay".
LGBT	LGBT is an acronym for "lesbian, gay, bi, trans". It is generally accepted as the acronym for the movement representing those with diverse sexual identities and gender identities. It also is often written "LGBTI" where the "I" stands for "intersex". There are many other variations – recognising the diverse and complex nature of the movement. This essay uses LGBT to refer to all those who are of a different gender identity to cisgender and those of a different sexual identity to heterosexual.
Lived experience[305]	"The notion of lived experience centres on attempts to develop a more contextualized and rich appreciation of how a person or group feel and react in relation to everyday life circumstances. An individual or group make continual and ongoing sense of life and the events, structures and relationships that constitute their experiences… Language, stories and narratives are often important means of pointing at and illustrating lived experience in action".
Misgender[306]	This refers to the situation where a person refers to someone as the wrong gender. For example, where someone calls a woman "he" or a "man". It may be accidental or intentional. For Trans people it is deeply offensive and can have psychological impacts.
Unrecognised Rights Claimants	This paper focuses on two different kinds of rights that prisoners may claim in the future. The first, is rights of freedom of discrimination claimed by prisoners who do not yet form part of a distinct group recognised by Corrections' policy – for example, fa'afafine and

304 The definition provided is found in Poiva Junior Ashleigh Feu'u "Ia e Ola Malamalama I lou Fa'asinomaga: A comparative study of the fa'afafine of Samoa and the whakawahine of Aotearoa/New Zealand" (MA Dissertation, Victoria University of Wellington, 2013).

305 Peter Stokes *Palgrave Key concepts: Key concepts in business and management research methods* (Macmillan Publishers Ltd, Basingstoke, 2011).

306 Kevin McLemore "Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals" (2015) 14(1) Self and Identity 51.

	Takatāpui. The second kind of rights is where there is a new understanding of that right – for example, if there was compelling international evidence that "cruel and degrading treatment" should extend to every case of solitary confinement. To refer to both of these situations together, I use the term "unrecognised rights claimants". This will necessarily refer to unrecognised rights claimants in prison.
Takatāpui[307]	"Takatāpui is an umbrella term that embraces all Māori with diverse gender identities, sexualities and sex characteristics including whakawāhine, tangata ira tāne, lesbian, gay, bisexual, trans, intersex and queer. Takatāpui identity is related to whakapapa, mana and inclusion. It emphasises Māori cultural and spiritual identity as equal to - or more important than – gender identity, sexuality or having diverse sex characteristics. Being takatāpui offers membership of a culturally-based national movement that honours our ancestors, respects our elders, works closely with our peers and looks after our young people"
Trans[308]	In this paper "trans" is used as an umbrella term to refer to anyone whose gender identity does not align with their birth sex. This is intended to be an inclusive definition. It includes, but is not limited to, anyone who identifies as: transgender, genderqueer, non-binary, fa'afafine, gender non-conforming, or agender. "Transgender" may be used from time to time to replace "trans". The term "transsexual" is only used to copy the language of the time or quote a text. It is widely accepted now that the term "transsexual" is inappropriate.[309]

307 The definition for this is from Elizabeth Kerekere "Part of The Whānau: The Emergence of Takatāpui Identity He Whāriki Takatāpui" (PhD Dissertation, Victoria University of Wellington, April 2017) at 25.

308 The definition for Trans comes from Charlotte Knight and Kath Wilson *Lesbian, Gay, Bisexual and Trans People (LGBT) and the Criminal Justice System* (Palgrave Macmillan, London, 2016) at 29.

309 Theresa Upperton, above n 170, at 7.

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