Ombudsman
Fairness for all

Inside the Office of the Ombudsman

Address by Chief Ombudsman Judge Peter Boshier to the Institute for Public Administration New Zealand, 4 May 2017

Introduction: integrity and good government

It is a privilege to be asked to speak to you today. I detect I have a very interested and discerning audience. There is much occurring within the Office of the Ombudsman at present and some important things I want to convey. We are of course in an election year when historically, interest in the Official Information Act is heightened.

The OIA has been very much on my mind over the past year and a half, as I've made significant changes to the Office of the Ombudsman that have vastly improved our responsiveness and flexibility in dealing with OIA complaints. This has put us in a much stronger position to support government agencies and Ministers to comply in good faith with the OIA, and hold them accountable if they do not.

We're succeeding on all three fronts; in fact, we're even exceeding our own expectations for some of the goals we set ourselves within the Office. And it's fantastic to see the level of interest at events like this, with agency people working at the coal front of the OIA and wanting to know how to make it work better for agencies and for the public.

Just this week I arrived back from Europe, where I attended the board meeting of the International Ombudsmen's Institute in Vienna. Along with my colleagues Ombudsman Connie Lau of Hong Kong and Ombudsman Chris Field from Western Australia, I'm a Director of the Asia-Pacific Ombudsmen's Region, so I was there in that capacity.

The IOI brings together more than 90 Ombudsmen's offices from around the world to strengthen and promote the role of the Ombudsman in each country. The IOI itself states that role as being

> *... to protect the people against violation of rights, abuse of powers, unfair decisions and maladministration... to improve public administration while making the government's actions more open and its administration more accountable to the public.*

I mention the International Institute to you for two reasons. The first is that it is an even more influential and important international body than I had expected. There is the opportunity here to make a real contribution to integrity and good government. And the second reason is that my discussions in Vienna confirmed for me that New Zealand is held in really high regard –

perhaps reflected by the recent number one ranking by Transparency International in our anti corruption status.

The OIA: the first presumption is availability

The Official Information Act is a lynchpin of the openness and accountability that is vital in New Zealand being seen internationally as a world leader.

The Official Information Act starts with the presumption that official information should be released to the public, unless release would cause prejudice to interests such as New Zealand's security, a person's privacy, a company's commercial position, and constitutional conventions that protect free and frank advice by officials.

Section 6 provides absolute grounds for withholding, reflecting the major interests protected, such as security defence, and international relations. Section 9 interests, such as privacy, are of lesser weight and can therefore be outweighed by public interest considerations favouring release of the information.

A strength of New Zealand's OIA is that the type of document requested isn't generally relevant to the decision to release or withhold. The requested information may take the form of a Cabinet paper, an email, or a draft policy document. A decision to release or withhold information starts with the central principle of availability, and involves a balancing of competing interests.

My Office is getting an increasing number of requests from government agencies and from local authorities for training and guidance on best practice in administering the OIA, or in the case of local government, LGOIMA. This is good to see and it's just one part of a whole lot of work going on to significantly boost understanding of and compliance with the OIA.

Building OIA compliance among agencies and Ministers

Let's go back to December 2015, when I took on my role as Chief Ombudsman, and my predecessor Dame Beverley Wakem had just issued a detailed report on central government agencies' compliance with the Official Information Act.

Not a game of hide and seek found that overall, agencies were compliant with the Act, and that government officials genuinely wanted to ensure they were compliant. But that compliance and goodwill were not universal.

Not a game of hide and seek also found that too many agencies were simply not complying with the law, both in terms of the content provided and the time taken to respond. Some were very frank about their practice of 'gaming' the OIA, particularly by interpreting the 20-day time limit as 'put it off to the 20-day deadline'.

This is clearly not acceptable in an open democracy. *Not a game of hide and seek* identified the need for training, adequate staffing and systems, and strong leadership from Ministers and Chief Executives.

It was also clear to me in December 2015 that substantial change was needed within the Office so we could give agencies and complainants a much better and more responsive service, and in so doing restore the OIA to the level of respect it deserves.

Nearly 18 months ago, I joined an Office hamstrung by an avalanche of complaints, a toxic backlog of unresolved complaints that were more than a year old, and processes that were simply not fit for purpose. The Office didn't have the reputation I would have liked and the need for substantial change was apparent.

In April 2016, we had 1,812 complaints on hand. 637 of those were more than a year old – this was our backlog of aged complaints. Lengthy delays were common and the system was creaky.

The first task was to clear the backlog. We set ourselves the goal of no backlog by June 2019, procured targeted funding for the purpose, and brought in a crack team of highly experienced operators.

By the end of June this year, we expect the backlog to have halved. We're on track to clearing it completely by the end of June 2018, a year earlier than planned. It was nice to get recognition for this from the Offices of Parliament Committee in March.

Another goal we set was to resolve 70 percent of complaints within three months of receipt; the rate in 2015/16 was only 58% resolved within three months. Again, we've achieved our target already; the number of complaints on hand is down to 1,400, and by 2020 I want no complaint, no matter how complex the investigation, to take longer than 12 months to resolve.

We've achieved all this by introducing a new business model with a much stronger focus on early resolution and more flexible practices. I learned the value of early, though not hasty, resolution during my time at the Family Court: if we can engage with complainants and agencies in a flexible and responsive way then complaints are resolved more quickly and efficiently, to the benefit of all parties.

The Office of the Ombudsman is now working almost entirely electronically. We have funding for specialised staff to go out to agencies and local government for training and support, and we've produced comprehensive new guides on the OIA legislation to assist both agencies and requesters.

This includes guidance for agencies concerning the legislation itself, such as how to apply the public interest test when deciding whether to release or withhold; and subject guides on matters such as requests about Chief Executive expenses, or local body events funding – the latter, of course, belonging under LGOIMA.

One guide currently under development is a model protocol for agencies in consulting with Ministers on official information requests. You can find all these guides and other resources on our website, and another vision of mine is that before too long you'll find access to e-learning initiatives too.

Our joint work with SSC and DPMC

One long-term initiative I'm particularly excited about is our work with the State Services Commission to improve understanding and compliance about the OIA. In January this year both our offices released comprehensive data about OIA requests and complaints.

This was a first for New Zealand. The information set out, from the SSC, the number of OIA requests received by agencies and the timeliness of response; and from the Office of the Ombudsman, the number and type of OIA complaints received by our Office. Our data includes the name of the agency or Minister complained about, the type and outcome of the complaint, any deficient conduct identified during an investigation, and the remedies achieved.

I'm confident this transparency will provide a boost to compliance, and we intend to repeat the exercise every six months. Our use and presentation of the data will evolve as well, so we'll find it will be valuable in all sorts of areas.

Of course, I must mention that when we compare the SSC and Ombudsman data, we see that of the many thousands of OIA requests made every year, only a very small proportion result in complaints to the Ombudsman. And that's where we step in, as the independent arbiters, not advocates for either side.

The SSC is New Zealand's public sector leader and I see my relationship with the SSC as being crucial to the success of my role.

The same is so with the Department of Prime Minister and Cabinet (DPMC). Late last year I co-led a workshop with DPMC on free and frank expressions of opinion, to assist in achieving a deeper understanding and more certainty in the policy development context. SSC was also a key contributor to this workshop. The results of that workshop will feed into another upcoming guide.

This approach is reaping dividends. And lest we forget, I'm also encouraging complainants to do their part in ensuring that investigations are processed expeditiously, by articulating complaints in a clear and concise manner, with appropriate material provided in support.

I'll keep looking at opportunities to improve workflow practices, to target staff resources, to engage constructively with agencies and to get the maximum benefit from technology, to enhance the operation of the OIA and make the Office of the Ombudsman a centre of excellence.

Looking ahead: a stronger monitoring role

New Zealanders don't only use the Office of the Ombudsman to complain about OIA requests. The Office also deals with complaints about state sector conduct, including conduct within our prisons. We protect people who wish to disclose information about an agency – whistleblowers is the usual term – and we have monitoring roles under the United Nations Optional Protocol to the Convention Against Torture and the Convention on the Rights of Persons with Disabilities.

With our OIA backlog and our response times under control, we can give more attention to our wider mandate: to investigate serious and systemic issues across the state sector, to review and monitor compliance and good practice, and to undertake self-initiated investigations into areas of concern.

Not a game of hide and seek, into agencies' OIA practices, was a self-initiated investigation. Our recently published report *A question of restraint* came out of our inspection of prisons and our resulting inquiry into the use of tie-down beds and other mechanical restraints in At-Risk Units in New Zealand prisons.

The findings of *A question of restraint* came as a shock to many New Zealanders. Inspectors found acts amounting to cruel, inhuman or degrading treatment under the Convention Against Torture, such as a prisoner being secured on a tie-down bed for 37 consecutive nights from 4pm until 8.30am, a prisoner in a waist restraint with his hands tied behind his back for more than 12 weeks, and prisoners designated as being at risk of self-harm being filmed while undertaking ablutions.

These disturbing findings were reinforced in the Human Rights Commission report by international expert Dr Sharon Shalev, released just last month, into the use of seclusion and restraint in a number of New Zealand's detention settings such as prisons, care and protection residences, and health and disability units.

Corrections have, of course, already responded to some of the concerns raised in our report. And I believe that Corrections genuinely wishes to make a difference in the way it treats and handles high risk prisoners with mental health needs. My task is to both hold that agency to account but to also support and encourage good practice when I see there is the wish to develop it.

I think in a modern society, aspects of present practice are clearly unacceptable, with Corrections reliant on mental health services that are not always available at times of crisis or indeed during day-to-day management of prisoners with high mental health needs. I would like to see Corrections having more immediate tools and resources to treat and help mentally ill prisoners as part of a humane, clinically based programme of treatment.

The monitoring role that we undertake in prisons is pursuant to the Optional Protocol on the Crimes Against Torture Convention. The Convention requires State parties to appoint "national preventive mechanisms" to proactively inspect places of detention to strengthen protections of persons against torture or cruel, inhuman or degrading treatment or punishment. Under our Crimes of Torture Act, this includes monitoring the treatment and conditions of detainees. This is a core part of my role as Parliament's independent watchdog.

A society can be judged by the way it treats its most vulnerable citizens. A very high proportion of New Zealand prisoners have significant mental health issues. They cannot speak up for themselves and treatment such as extended isolation or mechanical restraint risks exacerbating their existing problems. Many jurisdictions across the world have banned the use of tie-down beds and mechanical restraints altogether.

As a result of new funding proposed by Parliament, but yet to be formalised, I want to grow the part of our Office that oversees treatment in detention, because I do not think we have been able to comply with our obligations satisfactorily in the past.

But my wish is to not just to monitor the care of the vulnerable in State funded institutions, but more broadly. Let me explain. In addition to prisons we have jurisdiction to monitor mental health patients and dementia patients who are detained in State funded facilities. There are 110 of these all told.

But with our aged population expected to treble in the next 30 years and rates of dementia rise correspondingly, how we treat our vulnerable elderly will become a particularly salient issue.

We are currently considering seeking further funding to inspect private dementia homes under our remit of inspecting health and disability places of detention.

Conclusion: influencing real change

In my address to you today, I have endeavoured to cover three important things.

Firstly, the constitutional importance of the work that we do; secondly, the fact that I want our Office to continue to work in a much smarter and more efficient fashion than it has in the past; and thirdly, that from a reputation point of view I want New Zealand to be seen as a world leader in the way it treats its vulnerable citizens who are detained either because of crime, disability, or a mental health condition.

It is a privilege to undertake this work because in so many respects, we can make a real difference. For a citizen who feels wronged, there is the chance for that person to arrive at a fairer outcome. And thematically, we have the ability to recommend and influence at a level where I believe we are taken seriously and can be responsible for real change.

Thank you.