Ombudsman
Fairness for all

Guide

OPCAT – Expectations for conditions and treatment of residents

in health and disability places of detention – aged care

Draft #1 – June 2021

Contents

Introduction

Monitoring the treatment and conditions of people in places of detention helps to ensure that those who are deprived of their liberty, and cannot leave at will, are treated humanely and their rights are respected and protected.

This approach is preventive, aiming to ensure that safeguards against ill treatment are in place and that risks, poor practices, or systemic problems, are identified and addressed promptly. It also helps to ensure Aotearoa New Zealand adheres to international human rights standards, to which all people are entitled.

The Chief Ombudsman is designated by the Minister of Justice to monitor aged care facilities where people are unable to leave at will. His role is broad, and includes examining the treatment and conditions of people living in those facilities (residents). The Chief Ombudsman makes recommendations to improve the conditions and treatment of residents. He may also identify good practice.

Central to the Chief Ombudsman's monitoring function is conducting visits and inspections of aged care facilities. These visits and inspections are required under the United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).

Further detail about the legal framework under which the Chief Ombudsman operates is located in **Appendix 1**.

The Chief Ombudsman's expectations

This document sets out the Chief Ombudsman's expectations for the conditions and treatment of residents in aged care facilities who cannot leave at will.

This 'Expectations' document is intended to provide residents, their whānau[1], facility management and staff, Parliament, and the public with an understanding of some of the matters the Chief Ombudsman considers when monitoring aged care facilities.

These Expectations will also guide the Chief Ombudsman's staff when conducting inspections. However, his inspections are not a 'check list' exercise and these Expectations are indicative only; they are not exhaustive.

Appendix 2 to this document includes examples of evidence sources that the Chief Ombudsman may consider when examining residents' conditions and treatment.

The expectations and areas of interest are based on international and domestic human rights law and guidance, some of which is listed in **Appendix 3** to this document. The expectations

[1] This documents refers to whānau rather than family. In Te Ao Māori whānau encompasses family in the fullest meaning. Whānau may include immediate and extended family through whakapapa (genealogy), as well as all persons connected by emotional or spiritual bonds. Any person who has been involved in the care or welfare of a resident may also be considered whānau (kaupapa whānau).

also draw from applicable domestic legislation, regulations and policies that inform, but do not determine, the Chief Ombudsman's observations.

The expectations are informed by te Tiriti o Waitangi / the Treaty of Waitangi[2] and its principles, including those articulated in the Waitangi Tribunal's kaupapa inquiry into health services and outcomes (Wai 2575).

This is a living document

This is the first draft of the Chief Ombudsman's Expectations for conditions and treatment of residents in aged care facilities. The Expectations will be updated over time. The Chief Ombudsman welcomes feedback on this document[3], recognising that best practice is continually evolving, and there will always be further or new areas relevant to his monitoring in aged care facilities.

A note about the resident group

The Chief Ombudsman monitors aged care facilities where people are not free to leave at will - primarily dementia level care and/or psychogeriatric level care.

Residents in these facilities mostly have a diagnosis of dementia, along with varied other health or disability related needs. Dementia is an umbrella term, used to describe symptoms of memory loss and/or changes in thinking or behaviour that interfere with daily life.

These expectations refer to 'residents', and 'dementia'. However the Chief Ombudsman acknowledges the importance of language and that some people will have a preference for using kupu Māori such as kaumatua (elder) and mate wareware (mate referring to being unwell, and wareware to forgetting or forgetfulness). The Chief Ombudsman encourages, and may adopt, the use of kupu Māori when appropriate.

[2] The Chief Ombudsman recognises there are two texts with different meanings.

[3] Please visit the website at https://www.ombudsman.parliament.nz/what-ombudsman-can-help/aged-care-monitoring for more information about the Chief Ombudsman's monitoring role in aged care, including information on how to provide feedback on these Expectations.

1. Leadership and culture

Expectation: Residents' rights are a focus at all levels of the facility.

The facility's culture and leadership promote residents' rights. Strong, rights-promoting leadership and governance is evident. Governance arrangements give effect to Te Tiriti o Waitangi / the Treaty of Waitangi and its principles. Organisational culture reflects a person-centred approach to care with emphasis on improving residents' health and enjoyment of their life.

Examples of areas of interest

Organisational culture

All staff uphold the dignity and respect of residents at all times. There is strong leadership to support this.

2. Safety and independence

Expectation: Residents are safe and their independence is promoted.

No person is arbitrarily deprived of their liberty. Thorough assessment and legal processes are followed. The resident is involved in these processes to the fullest extent possible.

Residents' rights are promoted and protected. Residents, their Enduring Power of Attorney/Welfare Guardian (Authorised Representative), and their whānau are routinely and fully informed of their rights, including the ability to challenge the level of care needed as well as how to raise a concern/complaint and access advocacy services.

Residents' independence and autonomy is maintained to the fullest extent possible, and is central to their care. Independence is protected and nurtured by the facility environment and culture.

Residents are safe from harm, abuse, or neglect. Risks are identified and addressed.

Examples of areas of interest

Placement in the facility

Residents are in a facility that is appropriate to their needs. Their placement is lawful and correct processes have been followed.

Consultation

Residents, their Authorised Representative, and whānau (as appropriate) are informed about and consulted on decisions or actions that impact the resident.

Concerns, complaints, and feedback

Residents and others are listened to when they raise concerns or make complaints, their views are taken seriously and responded to sensitively. Complaints processes are accessible, well communicated, timely and effective.

Advocacy and support

Residents, their Authorised Representative, and whānau (as appropriate) are informed of, and able to access, independent advocates or support persons. This includes residents having whānau or others, such as trusted community members, with them when this is their preference.

Free from abuse or neglect

Residents are not subjected to discrimination, coercion, harassment, bullying, or any form of exploitation. All concerns (including potential concerns or indications) regarding exploitation, violence, abuse or neglect are promptly documented and investigated, or referred to the appropriate authority for investigation.

Restrictions

Residents are not subject to greater restrictions than are individually necessary for safety.

Restrictive practices (such as withholding items, mail or phone calls, cancelling or preventing visits or outings) are not used unless in accordance with a resident's care plan and based on documented clinical indication.

Restraint

Restraint, in all its forms (including environmental, mechanical, physical, personal, chemical) is recognised as a serious intervention with potentially harmful effects on the resident.

Chemical restraint (the use of medicines to ensure compliance and to render a resident incapable of resistance) is never used.

Other types of restraint are never used for a reason other than the immediate safety of a resident or others. All other, less restrictive, options are considered first. Where restraint is used it is authorised, practised and documented appropriately.

3. Dignity and respect

Expectation: Residents are treated with dignity and respect.

All residents are valued. Residents' rights are protected, and they do not experience discrimination. Residents are recognised as experts in their own experience, and on their needs

and wishes. The facility employs fair processes, while ensuring it respects and accommodates individuals and their differences.

Staff and leadership respect the diversity of residents, and there is not a 'one size fits all' approach. The facility demonstrates its responsiveness to diversity through specific strategies and services based on the residents living in the facility, including the different causes and symptoms of dementia.

Residents are treated with humanity, compassion and decency. The facility provides an open and safe environment for residents to be themselves, without judgement or reprimand.

Examples of areas of interest

Respect for the individual

Residents' wishes, views, and preferences, are sought, recorded, and evident in their care. They are respected as individuals, whose background, current health status, culture, religion or nationality, among other factors, inform the nature of the support they receive.

Choice

Residents' choices are respected and honoured wherever possible, including choices about day to day life such as what clothes to wear, grooming, food, where to spend time and with whom, entertainment, and daily routine (eg, when to shower, get up, or go to bed).

Whānau and community connections

The importance of residents' loved ones in the life of the resident is acknowledged and valued. The facility promotes contact with whānau, and the wider community, in diverse ways and in line with the resident's preferences.

The role of kaitiakitanga (caregiving) for the oranga wairua (spiritual wellbeing) of the collective whānau is understood and respected. The role of whānau as a key part of residents' care is recognised and respected.

Culture, identity, faith and lifestyle

Diversity is welcomed. No resident experiences discrimination based on their culture, identity, faith (or spirituality) or lifestyle. Residents, their Authorised Representative, and whānau (as appropriate) are asked about what matters to the resident, and this is reflected in the resident's life at the facility.

Communication and language

Residents are supported to communicate as freely as possible, including through functioning devices, communication tools, and practices, as needed.

Information, resources, and activities are provided in the languages and formats that reflect the needs and preferences of residents.

Language is understood to being central to a resident's identity and well-being. Residents are facilitated to speak in whatever languages they chose, or which come naturally to them. Professional interpretation services are used as often as needed.

Privacy and confidentiality

Residents' privacy and confidentiality are respected and preserved.

4. Health and care

Expectation: Residents enjoy the highest attainable standard of physical and mental health.

The facility takes all necessary steps to ensure the wellbeing of residents. Residents are listened to, and their health needs are effectively identified and addressed. Residents receive timely care from appropriate professionals, and have access to the range of services they need. Health is understood in its broadest sense, and all aspects of life at the facility are conducive to the positive holistic wellbeing of residents.

Examples of areas of interest

General care

Residents receive the care and support they require in a manner that is person-centred and maintains dignity.

Care plans

Residents' participation and preferences are central to care planning. Residents, their Authorised Representative, and whānau (as appropriate) are given the time and assistance to understand and contribute to the planned care, which includes thinking about and planning for the future.

Medical care

Residents' mental and physical health is supported by suitably qualified health professionals, who are available when residents need them. Residents, their Authorised Representative, and whānau (as appropriate) are able to access health professionals and discuss the resident's care needs.

Medication

Residents' medication needs are met by staff who are qualified and competent to do so.

Residents, their Authorised Representative, and their whānau (as appropriate) are helped to understand the functions, expected outcomes, limitations, and potential side effects of the medication the resident has been prescribed and contribute to decisions about medication.

Activities

Residents are able to spend active and meaningful time with other people.

Residents, their Authorised Representatives and their whānau (as appropriate) are consulted about the resident's interests and preferences. Suitable activities are offered and available for residents throughout the day.

Responding to Behavioural and Psychological Symptoms of Dementia (BPSD)

BPSD issues are managed in a manner that promotes residents' dignity. Complex behaviours are addressed with an emphasis on humane, individual, and compassionate interventions based on current, evidence-based best practice.

Referrals and access to services

When required, residents are referred to appropriate physical and mental health services and specialists in a timely manner. Residents are supported to access services and resources of their choice, including those that are associated with specific cultural, spiritual or other practices.

5. Living environment

Expectation: Residents live in an environment that promotes their safety, independence, dignity, and health.

Residents enjoy a safe and healthy physical environment, which is fit-for-purpose for aged residential care. The accommodation promotes resident wellbeing, dignity, and independence. Residents are able to have control over their living environment to the greatest extent possible, including personalisation of their private space. Design and resourcing of the facility ensures an environment that is appropriate for the varied needs of the residents living there. Residents have ready access to the natural environment, and are able to spend time outdoors, according to their preference. Spending time outside or away from the facility is encouraged and supported for those who wish to. Residents' basic needs are met, including adequate food, clothing, activities and entertainment.

Examples of areas of interest

Physical environment

Residents live in an appropriate (eg. dementia-friendly) building that is well maintained. The physical and sensory environment promotes the health and wellbeing of residents and their enjoyment of daily life.

Outside space, fresh air, and nature

All residents can freely access an outside area/garden. The outside area/garden provides space for social interaction, engagement with the natural environment and therapeutic exercise.

Residents have the opportunity to leave the facility regularly, based on their personal preferences and needs.

Food, drink and nutrition

Safe drinking water and nutritious food is available to all residents in sufficient quantity. Food and drink options are varied. Residents have input into the options provided.

Food and drink are recognised to be potentially important to residents, including culturally and/or emotionally. The facility is thoughtful on how food can bring people together, help residents feel at home, but also to the challenges food and eating can bring to residents for a variety of reasons.

Personal possessions and property

Residents are able to personalise their space and have possessions that are familiar or important to them, especially in their personal space (such as bedroom).

Bedrooms and sleep

Residents have a dedicated and comfortable place to sleep, store their belongings, and relax in privacy.

Emergency preparedness

The facility has clear, comprehensive strategies for dealing with disasters and emergency situations, preventing infection, and managing potential infection outbreaks. Policies and practices prioritise residents' rights, needs, and preferences. These are well communicated, tested and understood.

6. Staffing and quality improvement

Expectation: Residents are cared for by skilled, motivated, and engaged people.

Staff are diverse, appropriately trained, and employed in sufficient number. Continuous quality improvements and innovation are evident. Transparency and openness are part of the culture.

The facility carefully selects and trains staff, since the residents' safety and well-being depends upon the staff members' integrity, humanity, skills, and personal suitability. Staff are supported and equipped to provide the highest attainable standard of care.

Examples of areas of interest

Quality improvement

Staff members feel free to raise any concerns they may have, in particular about the conditions or treatment of residents. Concerns raised are dealt with properly, fairly and in a timely manner.

The facility has a quality improvement strategy, used to continuously assess and improve the care of residents. The strategy includes responding to lessons from past issues, incidents and complaints. Best practice models and up to date research are used to improve care. Staff, residents, Authorised Representatives, and whānau are able to influence and contribute to quality improvement initiatives.

Staff resourcing

The facility employs sufficient permanent and diverse staff with the appropriate knowledge to ensure the facility is safe, and resident needs are met, including residents' cultural connectedness. Staff resourcing prioritises residents' safety and independence. Residents are never unsafe due to staffing shortages.

Staff recruitment, training, and development

Staff are recruited and supported to provide a high standard of care to every resident. They receive training on, and are familiar with, residents' rights under Aotearoa New Zealand law, and relevant international law, including on the prevention of torture, and cruel, inhuman and degrading treatment or punishment, and the rights of people with disabilities.

Cultural competency is valued at all levels within the facility and organisation, and reflected in training opportunities being provided and required for all staff.

Staff are aware of the important role they, as care providers, play in the treatment and conditions of residents.

Appendix 1. Overview of OPCAT Legal Framework

The Optional Protocol to the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) is an international human rights agreement that Aotearoa New Zealand ratified in 2007[4].

OPCAT establishes international and national monitoring mechanisms to inspect places where people are detained, with the overall aim of preventing torture and other cruel, inhuman or degrading treatment or punishment (ill treatment).

Monitoring places of detention, including through inspections, helps to ensure that people who are deprived of their liberty are treated humanely, and their rights are respected, protected and fulfilled. It also ensures Aotearoa New Zealand is seen nationally and internationally as a good global citizen, adhering to agreed international human rights conventions.

The Crimes of Torture Act 1989 (COTA) was amended by the Crimes of Torture Amendment Act 2006 to enable Aotearoa New Zealand to meet its international obligations under OPCAT.

Places of detention

Section 16 of COTA identifies a *'place of detention'* as:

> *…any place in New Zealand where persons are or may be deprived of liberty*

Pursuant to section 26 of COTA, an Ombudsman holding office under the Ombudsmen Act 1975 (Ombudsmen Act) was designated a National Preventive Mechanism (NPM) by way of Gazette Notice for certain places of detention, including health and disability places of detention[5]. In 2018 the wording of the designation was amended to explicitly include privately-run aged care facilities.

Under section 27 of COTA, an NPM's functions include:

- to examine the conditions of detention applying to detainees and the treatment of detainees; and
- to make any recommendations it considers appropriate to the person in charge of a place of detention:
  - for improving the conditions of detention applying to detainees;
  - for improving the treatment of detainees; and

[4] Both OPCAT and the UN Convention it supplements – (the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment) are on the UN Human Rights Office of the High Commissioner's website (www.ohchr.org).

[5] Gazette Notice 2020-go2845, Designation of National Preventive Mechanisms, 2 July 2020 available at https://gazette.govt.nz/notice/id/2020-go2845

- for preventing torture and other cruel, inhuman or degrading treatment or punishment in places of detention.

Carrying out the OPCAT function

Under COTA, Ombudsmen are entitled to:

- access all information regarding the number of detainees, the treatment of detainees and the conditions of detention;
- unrestricted access to any place of detention for which they are designated, and unrestricted access to any person in that place;
- interview any person, without witnesses, either personally or through an interpreter; and
- choose the places they want to visit and the people they want to interview.

Section 34 of COTA provides that when carrying out their OPCAT function, Ombudsmen can use their Ombudsmen Act (OA) powers to require the production of any information, documents, papers or things (even where there may be a statutory obligation of secrecy or non-disclosure) (sections 19(1), 19(3) and 19(4) OA). To facilitate his OPCAT role, the Chief Ombudsman has authorised inspectors to exercise these powers on his behalf.

More information

Find out more about the Chief Ombudsman's OPCAT role, and read his reports online: ombudsman.parliament.nz/opcat.

Appendix 2. Examples of evidence sources

- Observation of daily activities
- Observation of interactions amongst staff and residents
- Observation of daily routines such as scheduled activities and provision of care
- Observation of meetings and review of minutes
- Discussions with residents and their Authorised Representatives (such as EPOA)
- Discussions with whānau
- Discussions with staff, including volunteers and outside agencies or services, e.g. Chaplain
- Discussions with advocacy services
- Review of resident files and clinical notes
- Review of policies and procedures
- Review of documentation such as complaint registers, restraint logs and incident reporting
- Review of post-incident debrief documents
- Review of staffing data, including rosters
- Review of staff training records
- Review of menus, activities schedules
- Survey responses (for those who are sent a survey, eg staff and whānau)

Appendix 3. Domestic legislation & international conventions, standards and guidance

These lists are not exhaustive:

Table 1: New Zealand legislation, standards and guidance

Full title	Type	Abbreviation
Crimes of Torture Act 1989	Legislation	COTA
New Zealand Bill of Rights Act 1990	Legislation	NZBORA
Protection of Personal and Property Rights Act 1988	Legislation	PPPR Act
Human Rights Act 1993	Legislation	HRA
Mental Health (Compulsory Assessment and Treatment) Act 1992	Legislation	Mental Health Act
Te Tiriti o Waitangi / the Treaty of Waitangi	Treaty	Te Tiriti o Waitangi / the Treaty of Waitangi
Health and Disability Services (Core) Standards	Guidelines	NZS 8134.1:2008

Table 2: International treaties, standards and guidelines

Full title	Type	Abbreviation
UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Treaty	'Convention against Torture' or 'the Convention'
UN Optional Protocol to the Convention Against Torture and other Cruel, Inhuman, and Degrading Treatment	Treaty	OPCAT
UN International Convention on the Elimination of All Forms of Racial Discrimination	Treaty	CERD
UN International Covenant on Civil and Political Rights	Treaty	ICCPR
UN International Covenant on Economic, Social and Cultural Rights	Treaty	CESCR
UN Convention on the Rights of Persons with Disabilities	Treaty	UNCRPD
UN Convention on the Elimination of All Forms of Discrimination against Women	Treaty	CEDAW
UN Declaration on the Rights of Indigenous Peoples	Declaration	UNDRIP

Full title	Type	Abbreviation
UN Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment	Principles	BOP
UN Principles for Older Persons	Principles	
Yogyakarta Principles and Yogyakarta Principles plus 10	Principles	
Institutional Treatment, Human Rights and Care Assessment (2010)	Guidance	The ITHACA Toolkit
Practice Guide to Monitoring Places of Detention (2004) – Association for the Prevention of Torture	Guidance	APT guidelines
World Health Organisation QualityRights Tool Kit: Assessing and Improving Quality and Human Rights in Mental Health and Social Care Facilities (2012)	Guidance	WHO QualityRights Tool Kit
World Health Organization Freedom from Coercion, Violence and Abuse: WHO QualityRights Core Training: Mental Health and Social Services (2019)	Guidance	WHO QualityRights Tool Kit