



Update from the Office of the Ombudsman

Chief Ombudsman Peter Boshier's address to the Mental Health Nurses Section of the New Zealand Nurses Organisation, 4 August, 2017

Tena koutou katoa, and thank you for inviting me to address your Mental Health Nurses Section forum today. The theme of the day, *Risk management in mental health practice*, goes to the heart of much of the Ombudsman's work and I look forward to sharing an update with you.

I'm going to start today by talking about our work under the United Nations Optional Protocol to the Convention Against Torture, or OPCAT, and our monitoring role under the United Nations Convention on the Rights of People with Disabilities. I'll also give you an overview of the work of my Office in the areas of official information, protected disclosures, and working for systemic improvement across the state sector.

First, I want to recognise the vital work of nursing professionals in the mental health sector, and the work you do for our most vulnerable citizens. My acknowledgement as well to the Mental Health Nurses Section of NZNO for the education and support you provide to your members, and for your leadership in advocating for mental health care in New Zealand.

Inspections and monitoring

The Ombudsmen are National Preventive Mechanisms under OPCAT, tasked with inspecting and monitoring places of detention under the Crimes of Torture Act. Our purpose is to prevent torture and other cruel, inhuman and degrading treatment in prison, health and disability places of detention, immigration detention facilities, child care and protection and youth justice residences.

Our OPCAT team made 57 visits to places of detention in the year to 30 June; sixty-three percent of these were unannounced, and thirteen were formal inspections at prisons and at adult mental health, forensic intellectual disability, and elderly/dementia places of detention.

In March this year we released our first thematic OPCAT report, into the care and management of prisoners considered to be at risk of suicide and self-harm. The investigation was prompted by our OPCAT inspectors learning about the extended restraint of a prisoner in the At-Risk Unit at Auckland Prison.

A Question of Restraint investigated practice in At-Risk Units in five prison sites, and found that Corrections had breached the Convention against Torture through its use of tie-down beds and

waist restraints on five prisoners. The circumstances surrounding their use of restraint amounted to cruel, inhuman or degrading treatment under the Convention.

The findings of *A Question of Restraint* came as a shock to many. In one case at Auckland Prison, we found a man had been secured to a tie-down bed for 16 hours at a time, 37 nights in a row. In total, he spent 592 hours restrained and immobilised. On all but one of the 37 instances of restraint, Corrections failed to seek the required medical approval.

While Corrections' view was that the man was tied down to prevent self-harm, I noted that during day time hours he was successfully managed through observation. His restraint each night coincided with reduced staffing levels. Clearly, tying an individual to a bed for up to 16 hours a day is not the way to manage resourcing pressures.

In a case at Otago Corrections Facility, a man was continuously kept in a waist restraint with his hands cuffed behind his back; over a 12-week period, these cuffs were removed for only two hours each day and four hours each night. He was locked in his cell for 21 days and the recommendation that he be treated by an experienced psychologist was not acted upon.

These breaches of the Convention Against Torture were the most concerning finding of our investigation. But there were other serious issues. Leaving prisoners isolated in At-Risk Units for up to 24 hours a day, with no social contact and no material with which to read, write or draw, exacerbates mental health issues. Video monitoring prisoners while they are using the bathroom is degrading. Communications problems between Corrections and Regional Forensic Psychiatric Services, along with resourcing pressures on these services, can result in prisoners not getting the level of healthcare they need.

I absolutely acknowledge that places of detention contain people with very complex and competing needs, and that some detainees are extremely demanding and challenging. But a civilised society should treat all members, including its most vulnerable, humanely and with dignity. A high proportion of our prison population today has mental health or substance abuse issues, or both. The plight of those who are detained and are mentally unwell is extremely concerning to me. We must ensure such prisoners are managed appropriately and can receive the treatment and medication they need.

Even if we choose to ignore issues of basic human rights – and I'm not suggesting for a moment that we do – the reality is that these prisoners will be released back into our communities at some point. I am genuinely concerned about the future impact on our society and communities if we continue to neglect and worsen the significant mental health needs of people who have been incarcerated for a crime.

Expanded programme of inspections

I'm committed to fulfilling our international monitoring obligations under OPCAT, and when I took up the role of Chief Ombudsman in December 2015 it was clear that more resourcing would be required for this.

New funding from Parliament means we now have more inspectors and can do more inspections, and we've committed to publishing our reports on what we find. We've published

two reports so far, following unannounced inspections at Hawke's Bay Regional Prison and at Spring Hill Corrections Facility.

Along with making recommendations for improvement, we highlight good practice. Our report on Spring Hill describes a nurse putting considerable effort into outlining a written treatment plan to a prisoner who was deaf, and spending significant time making sure the man understood how to manage his ongoing health issue.

We're closely engaging with Corrections, who are showing a stronger commitment to improving conditions and implementing the recommendations arising from my inspections; and we're developing a protocol between our agencies to assist the inspections process.

I intend to also establish a regular programme of publishing our reports into OPCAT inspections at health and disability places of detention.

Health and disability places of detention

In our inspections of mental health facilities over the past year, we found areas of good practice across adult acute and forensic services around New Zealand. Service users themselves praised the quality of nursing care they received; and my OPCAT inspectors confirmed the quality of care provided.

At the same time, OPCAT inspectors have noted the risk of staff safety taking precedence over patients' comforts and rights. Staff concerns over their own safety are absolutely legitimate, and the challenge for facilities is to achieve a regime that maximises both staff safety and patient wellbeing.

Inspectors have expressed concerns about seclusion rooms being used as bedrooms in some facilities. Seclusion rooms are not fit long-term accommodation for any individual, a fact highlighted in the case of Ashley Peacock, whom I'll talk more about shortly.

Other issues included the need for DHBs to have a zero-tolerance approach to violence and respond appropriately to any violent incidents that do occur. Inspectors noted a serious assault on a patient had not been reported to Police, even though the man was injured severely enough to need surgery. Inspectors have also raised concerns about patients not being clear about whether or when they may be allowed to leave a facility for an outing, and are even concerned about the possible consequences if they do.

OPCAT Inspectors have observed an excessive level of risk aversion in mental health inpatient units, resulting in staff safety taking too much precedence over patients' comforts and rights. They've noted a staff focus on control of individuals rather than on their treatment, and an anticipation of disruptive behaviour, especially in the case of a number of long-term mental health patients whose behaviours were perceived as wilful rather than distressed. In some cases, the management of patients appeared to have a punitive element.

I want to note that currently in New Zealand, there is no independent body with oversight of privately run dementia units. This seems to me a real gap, particularly in light of our ageing

population. I would like to see our OPCAT team designated and resourced for this task, and this is another of my priorities for the coming year.

The case of Ashley Peacock

Now I'm going to reflect on how our OPCAT work has played out in the much-publicised case of Ashley Peacock.

Ashley is in his late thirties and has a complex neurodevelopmental disability and autism spectrum disorder. He loves the outdoors, fishing, gardening, and animals, and for five years he was housed in the seclusion area at the Tawhirimatea Unit in Porirua, managed by the Capital and Coast District Health Board.

Ashley was locked in his tiny seclusion wing for long periods, with no company, and was frequently unable to do simple things like make a cup of tea or watch a DVD because of lack of staff.

In these isolated and utterly unstimulating conditions, Ashley's mental and physical health and general behaviour deteriorated markedly. His parents grew increasingly concerned that his treatment had an emphasis on control rather than rehabilitation.

Our OPCAT Inspectors first picked up on Ashley's situation during an inspection visit to the Tawhirimatea Unit in September 2011. We had significant concerns, and recommended then that CCDHB find suitable accommodation.

In our follow-up visit in June 2012, we found that Ashley was no longer on seclusion – that is, prevented from leaving his wing -- but was still permanently living in a seclusion room as a bedroom. Once again, we recommended the CCDHB find satisfactory alternative accommodation.

In February last year the OPCAT team made an unannounced visit to Tawhirimatea Unit and found Ashley still living in the seclusion room. The resulting report noted that Ashley's circumstances had been identified as unacceptable some time ago; that he was nonetheless still living in a seclusion room; and that this living situation was cruel, inhuman or degrading treatment or punishment under the Convention Against Torture.

For the third time, the Office recommended that as a matter of urgency more appropriate accommodation be found for Ashley. Again in June last year, we wrote to CCDHB noting that Ashley's living arrangements were highly unsatisfactory, had persisted for far too long, and that action had to be taken to transfer Ashley to an appropriate placement in the community.

I commend Ashley's parents for their enduring focus on finding more humane and therapeutic accommodation for their son; a battle that may last be showing signs of possible success. In May this year, Marlene and David Peacock announced that CCDHB had agreed to find Ashley a suitable facility that will allow him to be cared for and live in the community.

Finding the right home for Ashley will take time, although I hope this can be achieved as quickly as possible. In addition, having been institutionalised for 10 years and with much of that time in seclusion, Ashley's transition will need careful management.

While I'm pleased by what appears to be a potentially good outcome for Ashley, I don't regard his story as a victory by any stretch. The process has been excruciatingly slow and in my view the time it is taking to resolve his situation is unacceptable.

I say this not as a personal advocate for a patient; that's not my role, or the role of the OPCAT team. I say it as the head of an independent monitoring body charged with ensuring the conditions of detention and the treatment of detainees is humane, and meets international human rights standards.

Just last week, as the result of an OIA request, we learned about the placement of more than 200 patients in seclusion rooms in the psychiatric unit at Tauranga hospital over the past three years.

According to the information provided, each room had a bed, an ensuite bathroom, a large external window, a water supply and a staff member outside the door at all times for the person in seclusion to see and speak to if needed.

This is important contextual information, and the Bay of Plenty DHB states that it's working to reduce the use of seclusion and has tight provisions around its use. Nonetheless I note the comment from the Mental Health Foundation that three other DHBs have successfully eliminated seclusion altogether within their mental health services.

My Office is currently investigating the use of seclusion rooms in schools. This is a self-initiated investigation under the Ombudsmen Act, following allegations that two primary schools used seclusion to restrain two children with autism. Last year the Secretary for Education wrote to all schools asking them to stop using seclusion altogether and to use safer practices such as time out to manage difficult behaviour.

UN Convention on the Rights of Persons with Disabilities

In 2007, New Zealand signed up to the United Nations Convention on the Rights of Persons with Disabilities. The purpose of the Convention is to promote, protect and ensure the full and equal enjoyment of human rights and fundamental freedoms by all persons with disabilities, and describes in practical terms how this can be achieved.

Article 33 states that signatories will appoint independent mechanisms to monitor the Convention's progress. New Zealand's Independent Monitoring Mechanism is made up of the Human Rights Commission, the Ombudsman, and the Convention Coalition, a group of disabled people's organisations. The three of us work together to promote and report on New Zealand's implementation of the Convention.

In December 2012 the IMM produced *Making disability rights real*, setting out a baseline picture of the state of disabled people's rights in New Zealand and making seven recommendations to address the main issues identified in areas like accessibility and education. We're publishing our next report this year, in which we will provide a comprehensive review of progress since 2012.

A ground-breaking piece of guidance we've produced with our IMM partners is *Reasonable accommodation of persons with disabilities in New Zealand*. Reasonable accommodation is an important concept in the Disabilities Convention, and it means to make a change that is reasonable to accommodate the need of a person with a disability. It can be as simple as changing attitudes, providing alternative means of communication, or improving the physical accessibility of a space. An example I've mentioned was the nurse at Spring Hill who took care to accommodate the needs of a deaf patient.

The guide is available on our website in New Zealand Sign Language, Easy Read, and Braille on request. We've had really positive feedback that it's providing practical, usable information to the people who need it, and that a particular strength is that it looks at accommodation in all areas of life; not only in employment, as previous publications have done.

Ombudsmen Act

Our work under OPCAT and the Disabilities Convention help meet our country's international obligations under the UN. The New Zealand legislation that defines our role is the Ombudsmen Act 1975. We also have statutory functions under the Official Information Act 1982, Local Government Official Information and Meetings Act 1987, the Land Transport Act 1998, and the Protected Disclosures Act 2000.

We have jurisdiction over more than four thousand state sector entities, including district health boards, the Ministry of Health, Pharmac and the Health and Disability Commissioner. Under the Ombudsmen Act we can undertake in-depth investigations of actions or omissions of public sector agencies, either in response to a complaint or as a self-initiated investigation.

Disclosure, our recent report into the Canterbury schools reorganisation following the earthquake of early 2011, is an example of a self-initiated investigation; and I'm going to say a few words about *Disclosure* because to me its findings go to the heart of accountability and transparency in the state sector.

Disclosure found significant flaws and gaps in the Ministry of Education's engagement with Canterbury schools. In fact, we found that there were essentially two processes running, one visible to the public, one not. While schools and communities thought they were engaging on big-picture plans for the future shape of their schooling network, a Cabinet business case was progressing behind the scenes. In addition, the way the final plans were announced to schools was poorly handled and insensitive.

The Ministry accepts there were things it could and should have done very differently. It's working with the education sector on a much better process for school closures and mergers, and is working to rebuild trust and relationships with the schooling sector in Canterbury.

Something that struck me about the community reaction to *Disclosure* was gratitude that an independent body had confirmed what the community had been saying for years. Since late 2012 people had been asking for an apology, or even acknowledgement, from the Ministry, but only received one once an Ombudsman's report was tabled in Parliament.

Official Information Act

And so to the Official Information Act (and its local government counterpart the LGOIMA), the legislation for which my Office is perhaps most widely best known.

These two pieces of legislation are lynchpins of our constitutional framework and a key reason for New Zealand being seen internationally as a world leader in perceived lack of corruption. That's where we sit at the moment, first equal with Denmark in the Transparency International Index, and that's where I very much want us to stay.

State sector agencies are subject to the OIA, while the LGOIMA covers local authorities and council-controlled organisations. When I refer to the OIA from here, you can take it that my comments apply to LGOIMA as well.

The underpinning principle of the legislation is that official information should be made available unless there are compelling reasons to withhold. The essential question that must always be asked when an information request is received is not *'Why should we, or how can we, withhold this information?'* but *'How can we quickly and responsibly make a good decision to release as much information as possible?'*

Compelling reasons to withhold information include prejudice to interests such as New Zealand's security, a person's privacy, a company's commercial position, or protecting the ability of officials to generate free and frank advice.

The Act also has the strong principle of timeliness. Agencies must respond to an OIA request within 20 working days, including if they need an extension to that timeframe.

An OIA request can be made by email, over the phone, or in a letter. It doesn't have to fit a particular format or even mention the OIA. Put simply, if the requester is seeking information held by a Minister, state entity or local authority, then it's an OIA request and there are legal rules that must be complied with as to how to handle that request.

If a request is unclear, the agency is obliged to help the requester to be more specific, clarify what information they're seeking, and the time period covered. Information must be released without undue delay, unless there is good reason to delay or withhold; if this is the case, the agency must tell the requester its reasons for doing so, and let them know they are entitled to complain to the Ombudsman.

In an OIA opinion released last year, former Ombudsman Professor Ron Paterson was strongly critical of the current state of information in New Zealand's health sector, and noted that we lag behind other jurisdictions in this respect. Professor Paterson was commenting on a decision by five District Health Boards to refuse an OIA request for information on the outcomes of public hospital work by cardiothoracic and neurosurgeons.

He agreed that releasing the outcome data in its current state would do more harm than good, given the poor state of information and reporting in the health sector; and he recommended that the Ministry of Health and the Health Quality and Safety Commission work toward publication of meaningful quality of care measures across specialties by June 2021.

In another case, Professor Paterson investigated a complaint about the Health and Disability Commissioner's withholding of the names of District Health Boards in a report concerning complaints about DHBs. The Commissioner's grounds were that the information was subject to an obligation of confidence, and making it available would damage the public interest. The Ombudsman disagreed, and the commissioner released the information on the Ombudsman's recommendation.

Working with agencies

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

We're steadily increasing the range and depth of guidance available on our website. The most recent is a model protocol for agencies and ministers to use when engaging with each other on responding to OIA requests, which I released along with my final opinion on my KiwiRail OIA investigation.

I'm really encouraged by the attitude of public sector agencies to getting the OIA right. Officials know there are gaps in understanding and compliance and they want to lift their game.

The impetus for change really began in 2015, when I took on the role of Chief Ombudsman, and my predecessor Dame Beverley Wakem had just issued a detailed report on central government agencies' compliance with the OIA.

Not a game of hide and seek found that overall, agencies were motivated to be compliant with the Act. But that compliance and goodwill were not universal.

Our investigation found that too many agencies were simply not complying with the law, both in terms of the content provided in a response and in the time taken to respond. Some agencies 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 was clearly not acceptable and needed to change. *Not a game of hide and seek* identified the need for training, adequate staffing and systems, and strong leadership from Ministers and Chief Executives to restore the OIA to the status it deserves.

My consistent message is that the OIA is not a bureaucratic compliance exercise. Properly used, the OIA is an excellent tool for enhancing the reputation of agencies, for engaging constructively with communities, and for demonstrating that government processes and decision making will withstand public scrutiny.

When I became Chief Ombudsman it was clear that substantial change was also needed within my Office to give agencies and complainants a better and more responsive service.

At the end of June this year, my Office's backlog of aged complaints was nearly halved, and we've already reached our target of resolving 70 percent of complaints within three months of

receiving them. By 2020 I want no complaint, no matter how complex the investigation, to take longer than 12 months to resolve.

We've achieved 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.

Another new practice is the publication every six months of OIA statistics, showing the number of OIA complaints we've received, which agencies they concern, and what work has been done to resolve them. I believe over time this practice will encourage stronger compliance with both the spirit and law of the OIA. The next publication will be in September and will show statistics for the six months to the end of June.

Protected Disclosures Act

Finally this morning, I'll cover my Office's role in protected disclosures, or whistleblowing. Under the Protected Disclosures Act we provide guidance to people who discover serious wrongdoing in their workplace. We can also receive and investigate disclosures relating to public sector agencies.

My office is currently working with the State Services Commission and with New Zealand and Australian universities on research into whistleblowing processes in New Zealand organisations, with a particular focus on the protections for staff who make a protected disclosure.

As with the OIA, the way New Zealand organisations handle protected disclosures, or whistleblowing, is crucial to maintaining our international reputation as an open and honest place to live, work, visit, and conduct business.

A research programme led by Australia's Griffith University, *Whistling While They Work 2*, has just released important data on the state of whistleblowing procedures in organisations on both sides of the Tasman. It shows we have some work to do, to say the least.

Nearly 700 organisations in Australia and New Zealand took part in the research, including 65 New Zealand public sector agencies. This high participation rate is pleasing, as it shows the importance our public sector leaders are placing on whistleblowing and integrity issues.

Our results, however, are very mixed, with some organisations scoring well but also many scoring poorly. I'm hopeful that the next phase of the *Whistling While They Work 2* project will give us a more in-depth picture of what we need to do to strengthen our processes around whistleblowing and avoid the problems that can arise when it's not handled well.

The fact is that people can behave badly, for any number of reasons, and our workplaces are by no means immune from financial irregularities and other misconduct. The Kiwi '*she'll be right*' attitude doesn't cut it when it comes, for example, to the amount of taxpayer money lost each year through fraud.

The next phase of *Whistling While They Work 2* is called *Integrity@WERQ*. It's an online survey for people from all levels of an organisation — board members, employees, volunteers, bosses — about how they see the ethical climate of their organisation and the strength of its whistleblowing processes.

And let's be clear: we must measure the strength of these processes not only by how quickly and effectively the alleged wrongdoing is addressed, but also by the protections and safety afforded to the person or people who raise the concerns.

People have an obligation to speak up if they see wrongdoing, but to meet that obligation they have to know they are safe and will not suffer detriment, and that their concerns will be heard and acted upon.

The research will also help us to further examine whether our Protected Disclosures Act has the usability and relevance it requires for today's world. The Act came into force in 2000, and 17 years later may be a good time to look at this.

Conclusion

I've covered a lot of ground this morning, and I thank you for your attention. The Office of the Ombudsman occupies a place of considerable constitutional importance in New Zealand. The more we can let people know about the work we do the more impact that work will have.

I want to close by again thanking you for your professional commitment to mental health services in New Zealand. Your field of expertise and mine share a lot of common ground and I am happy to take your questions.