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Ombudsman
Fairness for all

Office of the United Nations High Commissioner for Human Rights
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Tēnā koe

Submission of the Chief Ombudsman of New Zealand on the fourth Universal Periodic Review of New Zealand

1. Thank you for the opportunity to provide this submission ahead of New Zealand's fourth Universal Periodic Review. I make this submission in addition to the joint submissions of the New Zealand National Preventive Mechanisms[1] and New Zealand's Independent Monitoring Mechanism.[2]

2. As Chief Ombudsman, I am an independent Officer of the New Zealand Parliament, with various roles overseeing the conduct of government. I give effect to a number of key democratic and human rights measures aimed at safeguarding the rights of New Zealanders and promoting government accountability and transparency. My submission is informed by the observations and findings I have made in my various roles as Chief Ombudsman since New Zealand's last periodic review in 2019. These roles include:

    a. as a National Preventive Mechanism (NPM) under the Crimes of Torture Act 1989 and the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT);

    b. as a member of the Independent Monitoring Mechanism (IMM) constituted under Article 33(2) of the United Nations Convention on the Rights of Persons with Disabilities (the Disability Convention);

    c. my complaint-handling and investigations functions in relation to public sector agencies under the Ombudsmen Act 1975; and

    d. reviewing, investigating and resolving complaints about decisions on requests for access to official information under the Official Information Act 1982 and the Local Government Official Information and Meetings Act 1987.

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1 Including Tari o te Kaitiaki Mana Tangata – Ombudsman New Zealand (Ombudsman New Zealand), Te Kāhui Tika Tangata – New Zealand Human Rights Commission (Human Rights Commission), Mana Whanonga Pirihimana Motuhake – Independent Police Conduct Authority, Mana Mokopuna – the Children and Young People's Commission, and the Inspector of Service Penal Establishments.

2 Made up of Ombudsman New Zealand, the Human Rights Commission, and the Disabled People's Organisations' Coalition.

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3. My submission proceeds in two key sections. The first section discusses three cross-cutting human rights issues, while the second section considers issues related to the rights of specific groups and persons, including people deprived of their liberty, disabled people, and children and their whānau (family).

Cross-cutting human rights issues

Aligning New Zealand domestic law with international human rights law and standards

4. Since New Zealand's last periodic review, the New Zealand government has commenced work reviewing several key pieces of legislation related to the rights of New Zealanders. In submissions and feedback that I have provided, I have urged policy-makers to ensure that legislative amendments are aligned with New Zealand's international human rights obligations. For example:

    a. **Repeal and replacement of the Mental Health (Compulsory Assessment and Treatment) Act 1992.** I have previously expressed my view that aspects of current legislation are discordant with contemporary thinking about mental health and human rights.[3] While I welcome the opportunities that the repeal and replacement of the Act presents, based on the information I have seen to date I am concerned that new legislation may not lead to significant progress in protecting the rights of New Zealanders experiencing acute mental illness and distress.[4]

    b. **Amendments to the Corrections Act 2004 and Corrections Regulations 2005**. In my submissions[5] related to the Corrections Amendment Bill (Amendment Bill) and Corrections Amendment Regulations, I raised my concerns that some of the identified proposals would interfere with the fundamental rights of people in the custody of Ara Poutama Aotearoa – the Department of Corrections (Corrections).[6] A particular area of Corrections legislation that I am concerned about relates to the use of less-lethal weapons, and pepper spray in particular, as outlined in the Corrections Regulations. I was consulted on the proposed regulatory amendments and repeatedly raised my concern that Corrections had not sufficiently engaged with human rights guidance and jurisprudence. I expressed my view that the proposed amendments may be in breach of New Zealand's international human rights obligations, and may not comply with the principles of Te Tiriti o Waitangi / the Treaty of Waitangi[7] (Te Tiriti).[8] Nevertheless, the

[3] For example, I have highlighted my view that the current Act privileges a medical model approach at the expense of a social model and rights-based approach. See Ombudsman New Zealand (2021), *Submission on the Mental Health (Compulsory Assessment and Treatment) Amendment Bill*.

[4] I maintain that any new legislation must reflect and embed international human rights standards, including the rights of disabled people, the right to be free from arbitrary detention, and the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

[5] As yet unpublished.

[6] Including, for example, the rights to privacy and to be free from unreasonable search and surveillance by the state; the rights to family life; freedom of thought and expression; and the right to the observance of natural justice when a public body is making decisions that affect an individual's rights.

[7] I acknowledge there are two texts with different meanings.

[8] The Human Rights Commission has expressed similar concerns.

Corrections Amendment Regulations 2023 were approved and came into force in July 2023.[9] With regard to the Amendment Bill, I have raised similar concerns that certain provisions are likely, at face value, to limit the rights of people in custody in ways that may not be lawful, necessary or proportionate. I maintain that the Act and its Regulations should be reviewed in full to ensure that Te Tiriti, the New Zealand Bill of Rights Act 1990 (NZBORA), and relevant international human rights obligations[10] are given greater emphasis.

c. Similarly, in my recent self-initiated investigation into Corrections,[11] I highlighted my view that Corrections must interpret and exercise its powers and obligations, as expressed in the Corrections Act and its Regulations, in a manner consistent with the rights of prisoners to humane treatment. However, I consider that there has been an apparent lack of emphasis on this in the work of Corrections. I also consider that Corrections has adopted an unduly narrow approach to its legal obligations and to the purpose of the corrections system, not giving sufficient emphasis to the NZBORA, Te Tiriti, or international obligations.

d. In March 2023, the New Zealand government introduced the **Immigration (Mass Arrivals) Amendment Bill** (the Bill) for public comment, which proposed to extend the period that a 'mass arrival' (defined as 30 or more people) may be detained without warrant, from 96 hours to 28 days. In my submission on the Bill, I highlighted that the potential detention of any person for up to 28 days without a judicial warrant may amount to a serious infringement of their rights.

e. I also remain concerned that provisions exists within the Immigration Act that specifically allow for the detention of a 'mass arrival', which may include children and families. I consider that such provisions present a significant concern in terms of the rights of refugees and other migrants, including vulnerable persons seeking asylum, and appear to contravene Guideline 4 of the United Nations High Commissioner for Refugees' Detention Guidelines.[12]

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[9] In its response to my concerns, Corrections acknowledged the '*potential for breach in particular cases*', and referred to internal operational guidance and training to support staff in mitigating these risks. While the concerns that I and others had expressed were not heeded at the time, they were subsequently considered and addressed by Justice Ellis in *Cripps v Attorney-General*, citing much the same human rights guidance and jurisprudence that I and others had brought to the attention of Corrections.

[10] Such as the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

[11] Ombudsman New Zealand (2023), *Kia Whaitake | Making a Difference: Investigation into Ara Poutama Aotearoa | Department of Corrections*. This investigation examined why Corrections has struggled to make the improvements that I and other oversight entities had been calling for.

[12] UN High Commissioner for Refugees (2012), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Guideline 4 provides that decisions to detain must not be arbitrary and '*are to be based on a detailed and individualised need assessment of the necessity to detain in line with a legitimate purpose*' (p 15).

[13] Defined as: correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol – the customary system of values and practices that have developed over time and are deeply embedded in the social context.

Te Tiriti, tikanga,[13] and issues affecting the rights of Māori

5. Te Tiriti o Waitangi is considered New Zealand's founding document. It is an agreement between Māori, New Zealand's indigenous people, and the British Crown. Te Tiriti and the rights of Māori, as set out by the United Nations Declaration on the Rights of Indigenous People, are yet to be fully realised, particularly the right of self-determination. I have seen evidence of this in my various roles as Chief Ombudsman. For example:

    a. In my complaint-handling role under the Ombudsmen Act, I have received complaints regarding how Oranga Tamariki – Ministry for Children (Oranga Tamariki) engages with Māori, including both tamariki (children) or their parents and whānau. Issues I have identified during my investigations include Oranga Tamariki failing on occasion to:

        i. respect and engage with Māori in a culturally appropriate way;

        ii. search widely for whānau during the management of a placement of tamariki;

        iii. engage sufficiently with whānau, hapū (subtribe) and iwi (tribes) to ensure placements keep tamariki connected to whakapapa (genealogy and lineage);

        iv. give consideration of a tikanga-informed process to return tamariki to whānau or the impact of removal on the connection of tamariki to whānau; and

        v. consider its own values, cultural frameworks or Te Tiriti obligations when considering ex gratia assessments or payments.

    b. Further, in my self-initiated investigation into the COVID-19 'Managed Isolation Allocation System' (MIAS), designed and administered by Hīkina Whakatutuki – Ministry of Business, Innovation and Employment (MBIE), I considered that MBIE had acted unreasonably by failing to undertake an analysis under Te Tiriti when developing the online allocation system of the MIAS, and by not consulting with Māori sooner in relation to offline allocation.[14]

    c. In my role monitoring places of detention under OPCAT, I have observed a concerning lack of appropriate cultural provision for Māori in New Zealand prisons, despite Māori being disproportionately overrepresented in the prison population.[15] This disproportionality is deeply problematic in and of itself, and, while complex in its causes, demands urgent and sustained attention. I have also frequently raised my serious concerns regarding the conditions and treatment experienced by Māori in health and disability places of detention, including a lack of cultural provision and the

[13] Defined as: correct procedure, custom, habit, lore, method, manner, rule, way, code, meaning, plan, practice, convention, protocol – the customary system of values and practices that have developed over time and are deeply embedded in the social context.

[14] The MIAS was set up to enable New Zealanders abroad during the pandemic to book spaces in Managed Isolation and Quarantine (MIQ) facilities, a requirement to enter New Zealand at that time. It included an 'online', information technology-based allocation system, and an 'offline' allocation system based on urgency and need.

[15] In June 2023, Māori made up 53 percent of people in prison, despite being approximately 17 percent of the general New Zealand population. See Department of Corrections, Prison facts and statistics – June 2023.

disproportionate rate of seclusion of Māori service users in many acute inpatient and forensic mental health services.

6. While there is now clearly better awareness of and respect for Te Tiriti and tikanga throughout the New Zealand public sector, the findings in my oversight work suggest the need for more work in this area.

Right to information

7. Access to information plays a critical role in upholding the right to freedom of expression, enshrined in Article 19 of the Universal Declaration of Human Rights (UDHR). The right to access information is also closely linked to the right to participate in public affairs, recognised in Article 21 of the UDHR.[16]

8. Recent self-initiated investigations I have undertaken into both central and local government have identified weaknesses in the way in which agencies create and/or maintain, in an accessible and retrievable form, official records and information. I consider that this poses risks to the rights of New Zealanders to seek and receive information, which, in turn, may limit their ability to take part in government directly or through freely chosen representatives.

9. The IMM has, further, raised concerns about access to information for disabled people, an issue particularly acute during the COVID-19 pandemic.[17] Article 21 of the Disability Convention affirms that disabled people have the right to seek, receive, and share information in accessible formats. Without this, disabled people are often prevented from participating fully as citizens and being able to realise their rights to be informed and interact with the government and the wider community. Consistent, accurate, and timely information and communications, available in formats that everyone can understand, are vital to ensure that disabled people can receive information on an equal basis with others and, in doing so, participate equitably in society.

Rights of specific groups and persons

Rights of people deprived of liberty

10. In my role as an NPM, I am responsible for monitoring a number of settings where people are deprived of their liberty, to help improve conditions and treatment for detainees and to ensure that safeguards against torture and ill treatment are in place. Such settings include prisons,[18] health and disability places of detention, immigration detention settings, and court cells. Cross-cutting issues that I have observed across these places of detention include:

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[16] As noted by the United Nations Office of the High Commissioner for Human Rights, access to information '*is an enabler of participation and a prerequisite that ensures the openness and transparency of, and accountability for, States' decisions.*' See United Nations Office of the High Commissioner for Human Rights (2018), *Guidelines for States on the effective implementation of the right to participate in public affairs*, p 6.

[17] New Zealand Independent Monitoring Mechanism (2021), *Making Disability Rights Real in a Pandemic*.

[18] And where people are otherwise in the custody of Corrections.

a. **Substandard environmental and material conditions.** Despite making repeated recommendations related to substandard material conditions in many prisons and health and disability places of detention, I remain extremely concerned that people across New Zealand are deprived of their liberty in many facilities that are neither fit for purpose nor conducive to their wellbeing. I consider that the infrastructure and design of many prisons do not support the provision of legislated minimum standards, negatively impacting people in custody and custodial staff. Moreover, a number of health and disability places of detention are in poor condition and lack the appropriate space, facilities or resources to provide a therapeutic environment. This can result in significantly adverse outcomes for the wellbeing and recovery of service users.

b. **Solitary confinement and seclusion**. I remain extremely concerned about practices which may amount to solitary confinement, including segregation in prisons and the use of seclusion in health and disability places of detention.

   i. With respect to prisons, I have often raised serious concerns about segregation practices and their impact on the wellbeing of people in custody. I am particularly concerned by instances where people in custody deemed at risk of self-harm and suicide may have been subjected to solitary confinement,[19] practices that may amount to prolonged solitary confinement,[20] or instances that I consider amounted to undocumented segregation.[21]

   ii. With regard to the use of seclusion in health and disability places of detention, I continue to be concerned about the high numbers of seclusion events and seclusion hours in many mental health services, and instances where seclusion may not have been used a measure of last resort.[22]

c. **Workforce, staffing and occupancy concerns**. Current acute staffing shortages in many New Zealand prisons and across health and disability places of detention are having a significant impact on the wellbeing of people deprived of liberty. While staffing shortages in prisons have been amplified by the COVID-19 pandemic, I had

[19] For example, following an inspection of Invercargill Prison in 2019, I reported that people deemed at risk of self-harm and suicide held in Intervention and Support Unit (ISU) cells were experiencing extended periods of isolation of up to 23 hours. While staff informed Inspectors that opportunities for suitable association in the ISU yard or day room was allowed, this was not occurring at the time of the inspection. See Ombudsman New Zealand (2019), *Report on an unannounced follow up inspection of Invercargill Prison – July 2019*.

[20] Following an inspection of Otago Corrections Facility in 2020, I reported on the fact that people were held in the Management Unit for more than 15 days, and needed to be provided with more meaningful activity and human contact. One person had been segregated for over two years. Another had been segregated for ten months, and two had been segregated for more than six months. See Ombudsman New Zealand (2022), *Report on an unannounced inspection of Otago Corrections Facility under the Crimes of Torture Act 1989*.

[21] During an inspection of Auckland Men's prison in 2020, my Inspectors identified that a number of people in custody were subject to a single unlock regime, meaning that they had no association with other people in custody. In effect, this was a segregation regime without the statutory safeguards. See Ombudsman New Zealand (2020), *Final report on an unannounced inspection of Auckland Prison under the Crimes of Torture Act 1989*.

[22] See, for example, Ombudsman New Zealand (2022), *Report on an unannounced inspection of Ward 21, Palmerston North Hospital, under the Crimes of Torture Act 1989*.

drawn attention to the impact of ongoing staff shortages prior to early-2020. These workforce issues have impacted on human rights, including in the use of overly restrictive regimes, often for prolonged periods or in ways which may lead to ill treatment. Staffing shortages are also a problem for health and disability services, impacting quality of care and again leading to a range of restrictive interventions in these settings, including the use of seclusion and restraint. High occupancy levels, often a result of prolonged inpatient admissions and a lack of appropriate community services, can further exacerbate workforce issues. I have repeatedly raised serious concerns regarding the over-occupancy of inpatient mental health services, and I consider this issue creates a significant risk that service users may be subjected to conditions that amount to ill treatment.[23]

11. I am also particularly concerned about use of force in detention environments that is not consistent with international human rights standards, however is authorised by domestic policies and practice guidelines, including in the use of pepper spray, spit hoods and mechanical restraints. I have observed instances where force has been used on people in custody and mental health services that did not appear to be necessary or proportionate in the circumstances.[24] I have also raised my concerns around record keeping and reviews of use of force and restraint incidents.[25]

Rights of disabled people

Rights of disabled people subject to the 'High and Complex Framework'

12. In January 2019, I commenced a self-initiated investigation into the role of the Ministry of Health – Manatū Hauora (the Ministry) in relation to the facilities and services provided for people with an intellectual disability[26] subject to the High and Complex Framework[27] (the Framework).[28] Overall, I was not satisfied that the Ministry had taken all reasonable steps to

[23] One of the most significant issues that I have raised in relation to unit over-occupancy is the use of non-designated bedrooms to accommodate service users. During my OPCAT monitoring I have observed a variety of inappropriate rooms and areas used as bedrooms, including seclusion rooms, dayrooms and lounges, sensory modulation rooms, and interview rooms. See, for example, Ombudsman New Zealand (2022), *Report on an unannounced follow up inspection of Te Whare Maiangiangi Unit, Tauranga Hospital, under the Crimes of Torture Act 1989*.

[24] See, for example, Ombudsman New Zealand (2022), *Report on an unannounced inspection of Otago Corrections Facility under the Crimes of Torture Act 1989*.

[25] For example, following my 2019 inspection of Waikeria Prison I reported that the use of force review process was not consistently completed in a timely manner. See Ombudsman New Zealand (2020), *Final report on an unannounced inspection of Waikeria Prison under the Crimes of Torture Act 1989*. See also Ombudsman New Zealand (2021), *Report on an unannounced inspection of Tiaho Mai Mental Health Inpatient Unit, Middlemore Hospital, under the Crimes of Torture Act 1989*.

[26] In my investigation report I used the term 'intellectual disability' for consistency with the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; however, some people in the disability community prefer the term 'learning disability' or 'learning impairment'.

[27] The Framework is for people with an intellectual disability who are supported in secure or supervised care, either in a hospital or in the community.

[28] Ombudsman New Zealand (2021), *Oversight: An investigation into the Ministry of Health's stewardship of hospital-level secure services for people with an intellectual disability*.

ensure the Framework operated so as to maximise the opportunity for service users to live balanced, satisfying lives with the greatest possible level of independence. I considered that the Ministry's performance in this regard appeared to be inconsistent with Disability Convention obligations to protect and promote the rights of persons with disabilities, and to prevent breaches of their rights.

Protecting the integrity of the person

13. As noted in the submission of the IMM, disabled New Zealanders continue to receive medical treatment and procedures without their consent. This includes the use of sterilisation and other non-therapeutic medical procedures on disabled children and disabled adults without their prior, fully informed, and freely given consent. The IMM has recently reported that initiatives to address such procedures have stalled, despite a project focusing on protecting bodily integrity being explicitly listed in the government's current *Disability Action Plan*.[29] Such issues significantly impact on the rights of disabled New Zealanders to be treated on an equal basis with all others and be supported to make decisions about matters that affect their health, wellbeing and integrity.

Rights of children and their whānau (family)

14. In August 2020, I published my findings from my self-initiated investigation into policies, practices and procedures for the removal of newborn pēpi (baby or babies) by Oranga Tamariki.[30] Removing a newborn pēpi from their parents is an extraordinary use of the government's power, significantly impacting the rights of pēpi, their parents and wider whānau.

15. The use of 'without notice' applications for interim custody of newborn pēpi is meant to be reserved for urgent cases where pēpi are at immediate risk of serious harm. However, I found that Oranga Tamariki was *routinely* applying for interim custody of newborn pēpi on a without notice basis. I found that decisions were being made late, without expert advice or independent scrutiny, and without whānau involvement. This meant that other options, which may have upheld the rights of all parties involved to a greater degree, were often not fully explored before a without notice interim custody application was made. I also found that the rights of disabled parents were not visible in either policy or practice. All the cases I reviewed required a disability rights-based response from the Oranga Tamariki, but this did not occur. I considered this to be a significant breach of the Disability Convention.[31]

16. In my complaint-handling role under the Ombudsmen Act, I have received complaints directly from tamariki and rangatahi (young people) about the Oranga Tamariki system. A key issue I have identified when investigating some complaints from tamariki and rangatahi include Oranga Tamariki failing to seek or listen to their views. The right for young people to

[29] New Zealand Independent Monitoring Mechanism (2022), *Disability Rights: How is New Zealand doing? Ngā Motika Hauātanga: Kei te pēhea a Aotearoa?*

[30] Ombudsman New Zealand (2020), *He Take Kōhukihuki | A Matter of Urgency*.

[31] As a result of my investigation, I made 23 recommendations for improvement to Oranga Tamariki. Oranga Tamariki accepted all of my recommendations, and I am pleased to note that these have now mostly been achieved.

be involved in decision-making that affects them is enshrined in the United Nations Convention on the Rights of the Child and in section 11(2) of the Oranga Tamariki Act.[32]

Concluding comment

17. I appreciate the opportunity to provide this submission ahead of New Zealand's fourth Universal Periodic Review. I would be happy to discuss or expand upon any of the matters outlined in this submission, should this be of assistance. Any queries may be addressed to Tom Lord, Senior Advisor Strategic Advice (OPCAT) (Tom.Lord@ombudsman.parliament.nz) in the first instance.

Nāku noa, nā

Peter Boshier
Chief Ombudsman

[32] Section 11(2) of the Oranga Tamariki Act provides that all tamariki and rangatahi have the right to have their views sought and heard, regardless of any communication difficulties, for example, due to language or disability. In its response to my concerns, Oranga Tamariki has indicated that it has taken steps towards ensuring that the views of tamariki and rangatahi on decisions that affect them, including decisions about where they will live, are routinely sought.