It is unethical to incarcerate people with disabling mental disorders. Is it also unlawful?

Erik Monasterio

"Morales y luces son nuestras primeras necesidades" ("Morals and lights are our first necessities") – Simon Bolivar

A Royal Commission of Inquiry is underway. This is investigating abuses to tamariki, rangatahi and adults in State and faith-based care in Aotearoa New Zealand between 1950–1999. Commissioners have established a vision for the Inquiry. They want to ensure that both the outcome of the Inquiry and the process for engaging communities and survivors will transform the way care is provided to the most vulnerable people in our communities.[1] The full report is not expected until 2024. However, a case study report, *Beautiful Children,* which investigated the Lake Alice Child and Adolescent Psychiatric Unit, has been published.[1] This catalogues extensive and disturbing human rights abuses. An editorial review comments "*the Lake Alice story is also a story of a toxic culture, systems failures, staff complicity, institutional racism, and a litany of failings by State agencies*."[2] In decades to come, can we expect an Inquiry into the human rights abuses in our prisons of the 2020s, much like the current Royal Commission of Inquiry? Are we willing to allow history to repeat itself?

After 23 years of work as a forensic psychiatrist, I spent the last 7 as Clinical Director and Forensic Director of Area Mental Health Services (DAMHS) in Canterbury. Despite trying as hard and creatively as I could, systemic factors meant I could not discharge that leadership responsibility to a reasonable standard. I therefore felt no option other than to resign. This article explains those systemic factors which led to my decision. I do so in the hope of advocating for people suffering from severe and disabling mental illnesses, who are excluded from care and living in the most precarious and traumatic of conditions—whether in prison or at the margins of our community. I seek to bring attention to what stood in the way of me helping care for this group of people, leading me to be unable to meet my responsibility as Forensic DAMHS. If these impediments are not well understood and addressed, the human rights of patients will continue to be breached. There will be further loss of staff and deeper entrenchment of the current crisis, with increased risks to patients and the community.

Human rights breaches

In March 2020, all Clinical Directors and DAMHS of Aotearoa New Zealand Forensic Services took the unprecedented step of publishing an editorial in the *New Zealand Medical Journal*, which highlighted human rights violations of acutely mentally ill people in our prisons.[3] This followed a previous publication warning of a looming health crisis in prisons.[4] It gave a united opinion of an expanding mental health crisis in which prisons were being used to contain patients with severe mental health problems who needed immediate care. In particular, the editorial sought to draw urgent attention to the failure of successive governments to address the need to care for and protect some of our society's most vulnerable people, echoing the failures that led to the current Royal Commission of Inquiry.

Widely cited data from two key Aotearoa New Zealand prison studies show the high and increasing prevalence of substance use and mental health disorders (including severe psychotic disorders) among people in prison.[6,7] Prisoners' health is public health, and improving their health outcomes is central to reducing health inequalities and improving public health.[5]

The 2020 editorial followed a failure to make any headway with the Director-General of Health, the Ministry of Health and the Health Minister. Together with other Forensic Clinical Directors, I met with former Health Minister David Clark in December 2018. We presented data on the frequent use of solitary confinement cells in prison to contain acutely mentally disordered prisoners

who could not be transferred to hospital because there was not a bed available. Regional forensic services consistently reported data to the Ministry of Health on waiting lists for urgent admissions, including for patients detained in Intervention and Support Units (ISU) in prisons. The median waiting time for transfer to a Forensic bed was 4 weeks,[3,8] meaning more than half of people waited over a month for care that would have been immediately available had they been in the community.

Detention in ISU involves 23-hour per day solitary lockdown, at times without access to natural light and fresh air. There is a wide body of research that shows that detention in solitary confinement is harmful, disproportionally so for those who suffer from mental illness. It is associated with a range of serious cognitive impairments, severe emotional distress and exacerbation of symptoms. There is an increased risk for self-harm, suicide and future impaired functioning.[8,9] Those so detained were often too unwell to accept medications, engage in talking therapies or participate in therapeutic activities. Often, they could not even maintain basic self-care.

The editorial made clear that detention in ISUs, in the opinion of the authors, the Ombudsman Office and the Human Rights Commission, constituted Human Rights abuses and breached national and international agreements on the minimal standard of care for prisoners.[3,8,9] A recent finding by the European Court on Human Rights found that use of solitary confinement, as occurs in the ISUs, constitutes a Human Rights breach: *"The Court considers that prolonged solitary confinement entails an inherent risk of harmful effects on any person's mental health, irrespective of the material or other conditions surrounding it"* (para. 140).[10]

The situation at the time of the 2020 editorial was intolerable. Now it is far worse. Instead of increased psychiatrist staff and bed numbers, across many of the regional forensic and general adult services there has been unprecedented increase in psychiatric staff departure and vacancies. The Canterbury forensic service alone has lost over half its senior medical staff within 3 years. At the same time, hospital management reduced the service's acute inpatient bed capacity by 20% without consultation with the remaining senior medical staff, and seemingly with no understanding of the impact of this decision on the rights of mentally ill people in prison.

He Ara Oranga report

The incoming Labour-led Government in 2017 brought optimism to beleaguered specialist mental health services. This Government set itself the goal of understanding and addressing the mental health crisis, underscored by *"the politics of kindness"*.[11] Their approach was to commission the *"once-in-a-generation"* He Ara Oranga report.[12] The incorrect assumption before commencing the Inquiry was that specialist mental health services were already available for the 3% of people with the most severe mental health needs (page 8).[12] The Inquiry therefore largely ignored this group and promoted extension of services to up to 20% of the population with mild to moderate mental illness and distress, within 5 years of the inquiry.[12] However, between 2016 and 2020, Aotearoa New Zealand was ranked thirty-second out of 38 OECD countries for the number of hospital psychiatric beds. Aotearoa New Zealand reported 31 beds per 100,000 population, which was far below the OECD average (69 beds per 100,000 population) and well below the minimally required number (50 beds per 100,000 population).[13] Also, the consistent advice and data on waiting lists' numbers for urgent hospital admissions and the use of prison beds (including ISUs) to contain the acutely mentally disordered before the Inquiry was unambiguous. Submissions made on behalf of forensic mental health services went unheeded. There has therefore been no increase in acute mental health beds for the past 7 years.[14] Moreover, consistent loss of specialist mental health staff and erosion of morale has lowered the capacity to treat those who are most severely and chronically ill. A recent investigative report has found that despite the $2 billion investment following the Inquiry, there has been little tangible benefit in the general population, and the situation for those with serious mental illness is no better.[15] Experts have argued there is an urgent need to re-focus: the limited resources must be targeted towards those with serious mental illness, in areas with the highest levels of deprivation.[13,16]

Unlawful detention of people with "mental disorders" in prison?

There are increasing numbers of people with mental illnesses detained in Aotearoa New Zealand prisons, with overrepresentation of Māori and Pasifika. Over 90% of the prison population have a lifetime diagnosis of a mental health or substance

use disorder, with 61% prevalence within the past year.[6,7] The prevalence of most psychiatric disorders, and in particular of psychotic symptoms, is far higher in prison than in the general community.[6] The risk of imprisonment after inpatient discharge has increased in the past decade, with nearly 1% of people entering prison within 28 days.[17] Much of this increase is made up of men of Māori or Pacific ethnicity who present with aggression in the context of substance use and psychotic disorders.

The *Mental Health (Compulsory Assessment and Treatment) Act 1992* (*MHA*) provides the legal framework to protect and care for those who fulfil the criteria for a "mental disorder" and who, as a consequence, are at risk to themselves or others or have significantly diminished capacity for self-care. The *MHA* has inbuilt legal safeguards. These include access to independent legal advice, review by a District Inspector, prompt review by a Judge, access to a psychiatric second opinion and a requirement that patients who have capacity to do so can give consent for treatment. Part 3 of the *MHA* also explicitly states that *"this Act shall bind the Crown"*. The intention of the *MHA* is to ensure treatment and protection for those with qualifying mental disorders who cannot be treated in a less restrictive manner. Failure to exercise the *MHA* deprives mentally unwell people of those legal rights which are enshrined within the *Act*. As the *MHA "binds"* the Crown, for people who are acutely mentally disordered appearing before a criminal court or who are detained in custody, it is legally unjustifiable not to resort to the use of *MHA*, if instead those people will be excluded from care and will suffer serious harm.

The longstanding lack of psychiatric inpatient beds has now normalised the use of ISUs. The situation will continue into the future unless urgent steps are taken. For health and corrections staff, working in an environment where human rights are breached and from which there is no obvious relief causes moral injury.[18] It breaches the basic principle we have all vowed to adhere to—*"primum non nocere"*. For health training institutions, as are all Regional Forensic Services, the exposure to and seeming acceptance of such practices for trainees on placement models unethical practices. For those in leadership positions the conflict is more serious. The Forensic DAMHS are appointed by the Director-General of Health (Ministry of Health) to be responsible for the adequate management of the *MHA*, and the persistence of this practice makes it impossible to discharge this duty to a minimally acceptable standard. Disturbingly, this situation parallels the abuses that occurred in Lake Alice Hospital, and it should not be ignored.[1,2]

Specialist mental health courts

Mental health courts are specialised courts that offer an alternative (or diversion) to standard prosecution for people with mental health problems who are charged with an offence. These courts are available across a number of states in Australia, but they have not been introduced in Aotearoa New Zealand. The courts have been shown to achieve successful outcomes, particularly for lower risk offenders.[19] The advantage of these courts is that they identify offenders with immediate mental health needs early and can divert to psychiatric care, rather than resorting to incarceration.[19,20] This, in turn, permits forensic specialist mental health services to focus limited resources on the treatment of higher risk offenders with mental illness.

Proposed solutions

1. **Re-focus on serious mental illness:** there are insufficient resources to provide adequate care for those with serious mental illness. Unless it is to be accepted that prisons will be utilised to contain the mentally ill, inpatient psychiatric beds will need to be increased to at least 50 beds/100,000 population (the OECD average is 69) with commensurate staff resources to manage this.[13,16]
2. **Clarify legal parameters of the MHA:** it is the author's opinion that the discretionary application of the *MHA*, in situations when not to invoke its use leads to exclusion from care and serious harm, is not only inconsistent with the spirit of the *MHA* but may also be unlawful (pursuant to Part 3, "*This Act shall bind the Crown*"). Putting this matter to the court will resolve this question and determine whether an amendment to the *MHA* is required to protect the seriously mentally disordered in the criminal courts.
3. **Urgently introduce specialist mental health courts in Aotearoa New Zealand.**
4. **Drug courts:** drug courts have been successfully piloted in Aotearoa New Zealand since 2012 but have not yet been rolled out throughout the country. They

are more widely available in Australia and provide more flexible sentencing options and diversion to treatment for people who have offended, including alternatives to prison.[20]

5. **Quantify the extent of staff loss and talk to staff:** in my experience working across various regions of Aotearoa New Zealand, there have been unprecedented departures of specialist mental health staff, including forensic psychiatrists. Issues raised in this editorial are likely to contribute to this. It is imperative to quantify and acknowledge staff shortages, and in particular to determine the reason for the staff loss. Without understanding the reason for staff losses, measures to counter this will not be able to be instituted. A recent editorial in the *Journal* has cautioned that the healthcare workforce is the foundation of Aotearoa New Zealand's mental health system and is on the brink of collapse, requiring urgent action.[22]

Conclusion

This editorial highlights pressing challenges which preclude Forensic Clinical Directors and DAMHS in Aotearoa New Zealand from discharging their ethical and legal duties. Aotearoa New Zealand is failing to provide a minimal standard of care for seriously mentally ill people. There is a disproportionally negative impact on Māori and their whānau, in breach of the Crown's duty to protect as part of its Te Tiriti obligations. The impact on Pasifika is also dire.

It is not morally acceptable or legally defensible to utilise prisons to deal with this health crisis. The Royal Commission of Inquiry into Abuse in Care shows we must front up to and learn from our past mistakes. It is not too late to tackle this problem head on. Doing so now may prevent the need for a future Inquiry into the mistreatment of mentally unwell people in our prisons.

COMPETING INTERESTS
Nil.

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