In the matter of the
Complaints Commissioner Law (2006 Revision)

Re: "Mental Health and Place of Safety: Investigation into the unreasonable or unjust operation of the Mental Health Law (1997 revision) Section 15 (1) (a) (b)." – An Own Motion Investigation by the Office of the Complaints Commissioner tabled before the Legislative Assembly 22 October 2009.

SPECIAL REPORT to the Legislative Assembly

Prepared by the Office of the Complaints Commissioner

Date: 24 April 2012

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Aim of the Office: To investigate in a fair and independent manner complaints against government to ascertain whether injustice has been caused by improper, unreasonable, or inadequate government administrative conduct, and to ascertain the inequitable or unreasonable nature or operation of any enactment or rule of law.

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Ministry of Health

Failure to Comply with Recommendations within a Reasonable Time

File number CO809-11642. Tabled on 22 October 2009

Prepared and published under the authority of the Office of the Complaints Commission

24 April 2012

1. Foreword

The Original OCC Own Motion Investigation (OMI) was conducted in accordance with S.11 (1) – (4) of the Complaints Commissioner Law (2006 Revision).

The Special Report has been prepared pursuant to the Commissioner's powers under S.18(3) – (5) of the 2006 Law and in accordance with such powers His Excellency the Governor will be provided with a copy of this report in advance of its presentation to the Legislative Assembly under S.18(4) of the Law.

2. Executive summary

On 8 April 2009 the Office of the Complaints Commissioner launched an Own Motion Investigation (OMI) into the unreasonable or unjust operation of the Mental Health Law (1997 Revision) section 15 (1), subsections (a) and (b) and related provisions.

The focus of the investigation was on two issues:

1. the steps taken in the process of making a recommendation to His Excellency ("H.E.") the Governor to certify Her Majesty's Prisons as a place of safety under the Mental Health Law (1997 Revision); and
2. the publication of patients' identity and medical information.

For the purposes of the Special Report, only Issue 1 above is relevant.

The investigation concluded that the specific procedures for prescribing a "place of safety" as set out in the Mental Health Law (1997 Revision) 15(1) have never been defined; thereby allowing the administration of this law to be carried out in an *ad hoc* fashion.

In the light of this the following OCC recommendation was made:

RECOMMENDATION

It is recommended that the Ministry research and develop a process as prescribed by the Mental Health Law (1997 Revision), (to be put forth as a Regulation) to administer the designation for a place of safety giving due consideration to the preservation of patient privacy.

The Own Motion Investigation Report dated 28 September 2009 was tabled before the Legislative Assembly on 22 October 2009. Once this was done, the OCC began monitoring the recommendation for compliance. As of the time of writing this Report, whilst the OCC accepts that some efforts towards compliance have been made by the Ministry, this falls far short of substantial compliance. This is particularly serious bearing in mind the following:

1. The importance of the issue itself;
2. The Human Rights implications of non-compliance
3. The extensive correspondence between the OCC and the Chief Officer of the Ministry concerned; and
4. The great age of the matter – **30 months** since the matter was tabled in the Legislative Assembly and **3 years** since the launch of the OCC investigation

Having monitored the recommendations for compliance since 22 October 2009, with no substantial compliance and no immediate signs of resolution, this Special Report has been prepared pursuant to S.18 of the Complaints Commissioner Law (2006 Revision), in particular S.18(3) which states:
"….Where the Commissioner has made a recommendation under subsection (1) and within the time specified or a reasonable time thereafter, he is of the opinion that no adequate action has been taken to remedy the injustice, he shall lay before the Legislative Assembly a special report on the case".

3. Background

The Mental Health Law (1997 Revision) outlines how to care for a mentally disordered person. Among its provisions and protections, the law also provides the framework for the detention of the mentally ill patient if they are found to pose a safety risk to themselves or others and are deemed by a medical team to be incapable of making decisions on their own. The Mental Health Law (1997 Revision) Section 15 (1) (a) sets out by way of Regulation, the way in which a 'place of safety' can be designated for a mentally disordered person. Section 15 (1) (b) of that Law outlines that the "Governor may, by regulations – prescribe procedures to be used in the administration for this Law."

4. Investigation findings and recommendations

In conducting the Own Motion Investigation, the OCC focused on two issues:

1. the steps taken in the process of making a recommendation to the Governor to certify Her Majesty's Prisons as a place of safety under the Mental Health Law (1997 Revision) – the subject of this Special Report; and
2. the publication of patients' identity and medical information.

Several documents were gathered and reviewed, and interviews conducted, including one dated 2 April 2009 with the then Chief Medical Officer Dr. Gerald Smith. Dr. Smith submitted an e-mail history on communications that led up to the designation of Fairbanks prison as a place of safety for this mentally disordered patient.
On 8 April 2009 the OCC interviewed CCR Rattray. Follow-up questions were responded to the next day by the Director of Prisons, Dwight Scott. In a signed formal statement CCR Rattray gave his opinion on Fairbanks prison being designated as a "place of safety":

"Her Majesty's Cayman Islands Prison Service like prison services in the United Kingdom, are not mental hospitals. The prison officers whilst trained in interpersonal skills and physical restraint if necessary are not mental health nurses. Consequently, it is my view that Fairbanks is not adequate as a place of safety for mental health patients who have not been committed to prison as an untried prisoner waiting for sentence or sentenced to imprisonment by a court.....imprisoning someone on the grounds that they have a mental health problem but have committed no offence is a violation of their human rights."

How a "place of safety "is designated

Chief Medical Officer Smith was of the view that in general, HMP Fairbanks is "*not really an 'appropriate' place* [of safety] *per se, it is the best we can do with what is and is not currently available to us and with the particular patient situation.*"

At the time of the OCC Own Motion Investigation there was no documented process on how to achieve the designation of a 'place of safety' for a mentally ill patient. An *ad hoc* process was used, which resulted in at least three problems: no inspection of premises before recommendation made by the Chief Medical Officer; violation of patients' rights as false imprisonment; and lack of adequate treatment.

Inadequate Mental Health Care facilities

Generally speaking in terms of patients with dual diagnosis the mental health care facilities are sorely lacking. A description of the state of affairs of facilities for mental

health care patients was given in a draft consultant paper in 2001 (Bradley and Palmer, 2001) at Section C 9:

"At present there are few facilities in the Cayman Islands for the assessment and treatment of acutely mentally disordered persons. Persons who are believed to be acutely mentally disordered and a danger to themselves or other persons may be taken to a prison or to a police lock-up. This applied to juveniles as well as to adults at the time of our visit to the Cayman Islands. Such places seldom have clinical facilities available and neither is appropriate nor suitable for mentally disordered patients, especially those who have not been convicted or accused of criminal offences."

Dr. Lockhart stated; "I stand behind that 100%". Dr. Lockhart also explained that since this paper in 2001, the 8 bed facility (NB, 8 beds as at the date of writing the 2009 OCC Report) for mental health care was built at the Health Services Authority hospital and while it has helped as a type of stabilization unit, it is still inadequate to care for all of the mental health needs for all three of the Cayman Islands. He stated: "while we do have one facility, that facility is not appropriate for all the types of presentations of mental disorders and when I say all the types – we deal with things like geriatrics, people with dementia, elderly people with severe depression or other psychiatric issues. Those people are admitted to this unit. We have people with dual diagnosis from a substance standpoint – meaning they have depression, bi-polar disorder, anxiety disorders but they also have substance abuse and related disorders and that's one of the definitions of dual diagnosis – we also deal with people with underlying psychiatric disorders, developmental issues – whether it be mental retardation, Cayman disease, dual diagnosis and other types of developmental issues. These are people that we treat at times on the ward. Because of that wide mix in a small, confined area we have to be very careful about sometimes admitting a violent or an unusually aggressive person/patient into that milieu, in to that mix because of the increased danger that it poses to an elderly person and so on that may be there. Another major area that we're lacking attention is dealing with juveniles. We cannot admit, ethically, a child or a young person to an adult facility. And again, the reason is primarily the safety of the child. Not only are they in most cases not physically able to defend or protect themselves but it can cause an additional trauma in many cases".

Dr. Lockhart further explained that this 2001 report (Bradley and Palmer, 2001): "…coherently addresses some of the issues that we are still facing today", and further that: "While we have made a few steps forward, it is my opinion that the steps we have made forward have not been equal to our population growth, and the overall incidence or prevalence of emotional and psychiatric disorders and substance abuse cases that we have faced as a society. So we've taken two or three steps forward but we need to have taken seven or eight steps forward."

The 2001 report (Bradley and Palmer, 2001) is supportive of the coping skills of the prison staff who have been asked to handle patients when they are not trained to do so: *"In stating this we do not criticize those police officers and prison staff who have had to deal with the problem and who do so with humanity. They should not be asked or expected to do so and they are to be congratulated for having managed so well for so long with inadequate facilities and staff."*

The OCC firmly believes it is not appropriate to incarcerate the mentally ill who are not convicted of crime - not only because it is unlawful, but also because imprisonment is a punishment for crime; and prison is not equipped to treat mentally disordered patients. At this point in time this is the only option available for specific cases with particular need for a place of safety. This is not a lawful excuse.

It also unnecessarily exposes the Prison Service to legal claims should something go wrong.

5. Recommendations and Monitoring.

As a result of the conclusion reached in the OCC Own Motion Investigation report:

"There is no process by which a designation of a "Place of Safety" is made. An *ad hoc* process has been carried out in both the cases examined by the OCC. The Mental Health Law (1997 Revision) Section 15(1) (b) states that "the Governor may, by regulations-prescribe procedures to be used in the Administration of this Law."

The following Recommendation was made:

"It is recommended that the Ministry research and develop a process as prescribed by the Mental Health Law (1997 Revision), (to be put forth as a Regulation) to administer the designation for a place of safety giving due consideration to the preservation of patient privacy."

The OCC Own Motion Investigation Report dated 28 September 2009 was tabled before the LA on 22 October 2009. Once this was done, the above recommendation then fell to be monitored for compliance.

6. Ministry efforts at compliance.

On 25 November 2009 the former OCC Administrative and Investigative Officer, Susan Duguay, sent a follow-up email to the Chief Officer, Jennifer Ahearn, asking for an update on compliance.

After no response was received, Mrs. Duguay again sent the Chief Officer a follow-up email dated 8 December 2009 and a read receipt was received.

On 9 December 2009 Mrs. Duguay also left a message for the Chief Officer regarding this.

On 5 January 2010 Mrs. Duguay again emailed the Chief Officer to set up a meeting to discuss this matter. Shortly thereafter Mrs. Ahearn informed the OCC that a Mental Health Task Force was currently being formulated and that the terms of reference were currently being finalized and work should be started in the last quarter of the fiscal year, and feedback reported to the Ministry within 6 months. The terms of reference were to include a review and re-write of the law and regulations.

After a series of emails from the OCC, Chief Officer Ahearn responded to Commissioner Williams on 27 April 2010 to inform her of the following:

- A Mental Health task Force was due to meet on or about the second week of May 2010.
- Nominees were to be finalized, but there would be approximately 12 on the Task Force.
- The Terms of Reference for the Task Force had been approved by Cabinet.

On 8 June 2010, Commissioner Williams emailed the Chief Officer, who responded the same day to update her as follows:

"*The Mental Task Force had had its second meeting last week (week of 1 June 2010) and they had started looking at the amendments to the Mental Health Law which were necessary to provide for a legislative framework that was more responsive to our current needs, including the process for designation of places of safety. The goal of the committee was to arrive at some legislative amendments that provided the tools needed to balance the need to protect the patient's rights and the need to protect society as a whole (in case of mentally ill persons who may pose a danger to others). The committee was to meet*

again in two weeks to continue their work on the updates to the legislation, and you were all hoping to have a report for the Minister by the final quarter of that calendar year (2010) which he could take to Cabinet to receive their approval to commence the drafting of the updated legislation".

On 29 June 2010 after Commissioner Williams had contacted the Chief Officer, she responded, informing the Commissioner that the Task Force had met on 24 June 2010 and continued to review the Mental Health Law; that they were to meet again; and that you had expected that it would take another two to three meetings to complete the discussions on the proposed amendments and draft the briefing note for the Minister.

On 23 November 2010 Commissioner Williams again emailed the Chief Officer to request an update on this matter before 10 December 2010. No response was received.

On 18 January 2011, the Executive Assistant to the Commissioner e-mailed the Chief Officer on behalf of the Commissioner in order to request a meeting.

On 26 January 2011 Commissioner Williams spoke to the Chief Officer following up on the information provided in June 2010 – namely, that the Mental Health Task Force would review the Mental Health Law, and would be in a position to have a briefing note for the Minister by the end of 2010. The Chief Officer informed the Commissioner that a Cabinet paper had been put to the Minister before Christmas, and that she estimated that within 2 – 4 months (by end of June 2011 latest) the law would be amended and new Mental Health Regulations created (none had existed at this time). The Task Force was to meet again on 28 January 2011 to discuss the formation of a Mental Health Commission.

On 10 February 2011 the Chief Officer e-mailed Commissioner Williams to inform her that the Cabinet Paper requesting approval of the Drafting Instructions for amendments to the Mental Health Law was approved in Cabinet that week.

On 4 March 2011 the Commissioner again emailed the Chief Officer for an update.

On 7 March 2011, the Chief Officer responded with the following information:

"We have received Cabinet approval in principle for the drafting instructions to be issued for the amendments to the Law, however after discussing it with Legal Drafting and the Taskforce it has been decided to finish the work on the Regulations prior to sending anything on to Legal Drafting. The Taskforce continues to meet and work on the instructions for the Regulations and I anticipate that we should have those submitted to Cabinet sometime in the next three months – it is a rather large task as we don't have existing regulations to work from, and we are introducing a Mental Health Commission to help protect the patient's rights and provide an appellate body which does not currently exist. In the interim, in order to prevent a repeat of the patient's name being published in the Gazette, we are in discussion with Legal regarding the necessary steps to "permanently" designate Northward and Fairbanks as "place of safety" so that we do not have to do "patient specific" Gazettes when the need arises from time to time. I'm hoping that this will be completed within the next month or so".

On 26 April 2011, Commissioner Williams again emailed the Chief Officer that she wanted to enquire as to the current Ministry position in regards to the Mental Health Law and Regulations Review.

On 30 June 2011 Commissioner Williams was informed that a bill had been sent to legal drafting and that the Mental Health Task Force would meet on or before 30 September 2011. However, there have been no updates to say that this meeting ever took place or whether a date had been set.

On 12 July 2011, The Commissioner e-mailed Chief Officer Ahearn stating the following: *"....**I am concerned that this is now of some age with relatively little forward movement in 21 months**. When we spoke on 26 January this year you had estimated that the Mental Health Law would have been amended and new Mental Health Regulations created by end June 2011 latest. I appreciate we have communicated since then (e-mail of 7 March below refers), but I would be grateful if you could give me a firm estimate as to when the OCC Recommendation will be complied with.*
I await your earliest reply....".

On 3 October 2011, the Commissioner again e-mailed the Chief Officer, stating the following:
".....I recall we discussed this and you expressed the hope there would be some forward movement by 30.9.11. Please let me know what the current position is.

This matter has the unfortunate distinction of being by far the oldest matter that the OCC is dealing with....."

On the same day, Chief Officer Ahearn replied:
".....Unfortunately I have not yet received the draft law from Legal Drafting – I have emailed them again for an update and will let you know asap once I hear from them....."

On 7 October 2011, the Commissioner once again e-mailed the Chief Officer:

I have tried to contact you this week without success.
In the sole recommendation contained in the above named Own Motion Investigation Report, the Ministry was to "....research and develop a process as prescribed by the Mental Health Law.....to administer the designation for a place of safety giving due consideration to the preservation of patient privacy."
In your e-mail to me dated 7 March, you stated:

In the interim, in order to prevent a repeat of the patient's name being published in the Gazette, we are in discussion with Legal regarding the necessary steps to "permanently" designate Northward and Fairbanks as "place of safety" so that we do not have to do "patient specific" Gazettes when the need arises from time to time. I'm hoping that this will be completed within the next month or so.

I know there are other steps the Ministry has been taking with regard to, inter alia, amending the law. However, please advise whether this, at least, has been done.
It is almost exactly 2 years since this recommendation was made....."

On 31 October 2011, the Commissioner took the serious step of writing a letter prior to the issue of a Special Report pursuant to S.18 (3)-(5) of the CCL 2006, setting out the extensive chronology set out above. In the letter, the Ministry was given until 15 November 2011 to reply, thereby affording them an opportunity to be heard pursuant to S.18 (5) of the Complaints Commissioner Law 2006. No reply was forthcoming.

On 12 December 2011, the Commissioner wrote to the Honourable Minister Mark Scotland, referring to the letter dated 31 October 2011 previously sent to Chief Officer Jennifer Ahearn, and also referencing 3 additional e-mails that had not been previously referred to in the 31 October letter. The Commissioner also stated:
*".....I find it deeply regrettable that I have been forced to write to your Ministry for a **second** time on what, on any view, is a very serious matter –*

where there has been a protracted history of non-compliance for over 2 years warranting the issuance of a Special Report....", and exceptionally granted the Ministry a further 7 days if they wished to be heard pursuant to S.18 (5) of the Law.

On 12 December 2011, Chief Officer Ahearn replied to the Commissioner's letter of 31 October, stating: *".....As I have indicated in previous correspondence and conversations, the Mental Health Taskforce has continued to work very diligently on reviewing and updating the Mental Health legislation. We are presently working with Legal Drafting on the draft bill and are making good progress. We had our last meeting for the year last week, and will be reconvening early in the New Year to continue our work. I am hopeful that the Minister will be able to table the revised Law in the first half of the calendar year 2012, and that the necessary regulations will follow sometime in the third or fourth quarter of 2012. Once we have arrived at a draft Law, we will be sending it to the Human Rights Commission and a Human Rights Consultant for PAHO to ensure that it is compliant with the necessary conventions. While this may serve to delay the legislation somewhat, I'm sure you will agree it is an important and necessary step.*

The issue of the designation of place of safety, and the processes of designating same when the Mental Health Unit at the hospital is full and alternate locations are required, is something that we have discussed at the Taskforce and agreed that the status quo is not acceptable and we will ensure that the revised legislative framework addresses this. In the interim should the need arise to Gazette a place of safety we will take the necessary steps to ensure the patient's privacy is protected.

As I have outlined in our discussions on this matter, it has not been the case that we have not taken any action. On the contrary, the Ministry and the Mental Health Taskforce have been working very diligently and continuously on this important legislative review. It has been one of our more dedicated groups in terms of meeting attendance and discussion contributions, and I am confident that once we complete the review the country will have a Mental Health Law that not only addresses the issue of the designation process for "Place of Safety", but also puts in place a robust and updated legislative framework that addresses many other important aspects of mental health and protects the rights of the patient and the public....."

In her letter in reply to the Chief Officer dated 19 December 2011, the Commissioner wrote: *".....Thank you for your e-mail dated 12 December 2011, which I accept under the provisions of S.18(5) of the Complaints Commissioner Law 2006. I have read and carefully considered it, along with previous correspondence (some of which you have referred to in paragraph 2 of your e-mail), including the most recent letters dated 31 October and 12 December respectively sent to both you and Honourable Minister Mark Scotland.*

The decision to issue a Special Report, provide a copy of same to His Excellency the Governor, and lay it before the Legislative Assembly, is not one that is taken lightly, hence the relatively few such reports that have been issued since the OCC was established in 2004.

Normally the Commissioner moves to Special Report where there has been no substantial compliance within 12 months. This mater was the subject of an Own Motion Investigation, which in itself is an indication of the level of seriousness of the matter. The recommendation was made on 22 October 2009. It was only because of my personal regard for you that I did not take action as early as October 2010, which I would have been legally entitled to do.

For the avoidance of doubt, contrary to the first line of the penultimate paragraph of your e-mail, I have never said or intended to imply that the Ministry has not taken any action. However, it is now over 2 years since the recommendation was made; not only has there still been no substantial compliance after all this time, there is no likelihood of such compliance anytime soon, as you mention a timescale in paragraph 2 of your e-mail that could conceivably run to "the third or fourth quarter of 2012" – an additional 9 - 12 months.

For these reasons, I find, pursuant to S.18(3) of the Complaints Commissioner Law 2006, that no adequate action has been taken to remedy the injustice within the time specified or a reasonable time thereafter, and consequently the matter will now proceed to Special Report...."

7. Ministry reply pursuant to S.18 (5) of the Complaints Commissioner Law2006

On 20 April 2012, Chief Officer Ahearn responded to say, *"...Minister and I have reviewed your draft report and we note its contents. By way of update I would like to advise that the Mental Health Taskforce has continued to meet on a regular basis and has been in constant contact with the Legislative Drafting department to review and*

revise the draft Bill and provide instructions regarding the regulations. The processes surrounding all aspects of the legislation, including the designation of "Place of Safety", are under active consideration and discussion by the Taskforce.

Due to workload issues, the Legislative Drafting Department has advised that they will not be able to provide us with an updated draft Bill until mid-May, however we will continue our work on the instructions for the Regulations in the interim while we wait for the updated draft Bill.

The need for appropriate facilities is one that the Taskforce, and the Ministry, are acutely aware of and the need for a long-term solution is under active consideration by all parties. However, I'm sure you can appreciate that identifying the capital funds for such a project is a particular challenge given the Government's current financial circumstances."

8. Conclusion

As stated in the Executive Summary, the OCC Own Motion Investigation Report dated 28 September 2009 was tabled before the Legislative Assembly on 22 October 2009. Since this date, the OCC has been monitoring the recommendation for compliance. As of the time of writing this Report, whilst the OCC accepts that some efforts towards compliance have been made, such efforts fall far short of substantial compliance. To quote the Commissioner's letter to Chief Officer Ahearn dated 19 December 2011: "*....not only has there still been no substantial compliance after all this time, there is no likelihood of such compliance anytime soon, as you mention a timescale in paragraph 2 of your e-mail that could conceivably run to "the third or fourth quarter of 2012" – an additional 9 - 12 months....."*

All of the above is particularly serious bearing in mind the following:

1. The importance of the issue itself;
2. The Human Rights implications of non-compliance
3. The extensive correspondence between the OCC and the Chief Officer of the Ministry concerned (see Section 7 above); and
4. The great age of the matter – **30 months** since the matter was tabled in the Legislative Assembly and **3 years** since the launch of the OCC investigation

Having monitored the recommendations for compliance since 22 October 2009, with no substantial compliance and no immediate signs of resolution, a Special

Report has been prepared pursuant to S.18 of the Complaints Commissioner Law (2006 Revision), in particular S.18(3) which states:
"….Where the Commissioner has made a recommendation under subsection (1) and within the time specified or a reasonable time thereafter, he is of the opinion that no adequate action has been taken to remedy the injustice, he shall lay before the Legislative Assembly a special report on the case".

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