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The Official Information Act

Māori with Lived Experience of Disability, and New Zealand Disability Data: a case study

Abstract

This article presents a case study of the use of the Official Information Act 1982 (OIA), for research commissioned by the Waitangi Tribunal in 2018 into disability-related issues for Māori. The responses of Crown organisations to OIA requests examined in this research highlight both issues with inconsistent application of the OIA, and limited access to information held and made available by Crown agencies for Māori with lived experience of disability.¹ The statutory time frame for responses to OIA requests was rarely met. Organisations also resisted providing information, while crucial information for ensuring equity for Māori with lived experience of disability was often

not able to be released because it was not collected at all. The impact of these limitations is discussed, particularly pertaining to core government roles of performance monitoring and ensuring accountability.

In addition to querying who benefits from, and is privileged by, the OIA and its application, questions are raised around the necessary components of a legislation rewrite in order to deliver on a modern approach to official information that ensures equitable, high-performing and truly democratic public administration.

Keywords disability, Māori, Official Information Act, Waitangi Tribunal

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Background

The Official Information Act 1982 (OIA) aims to make official information accessible, applying a general principle that information held by the New Zealand government should be made available unless there is a legislated ground for withholding it or refusing the request (ss5, 6). The approach taken with the OIA is in contrast to its predecessor legislation, the Official Secrets Act 1951. This made it an offence to release official information without authority (s6). However, the general report of the Committee on Official Information published in 1980 found that various government departments tended to

proceed on the assumption that there is in practice an implied authority to disclose a great deal. But the nature of the information which is seen to be covered by such an authority has depended heavily on departmental and ministerial attitudes. (Committee on Official Information, 1980, p.13)

Thus, the new Official Information Act was intended not only to make information more available, but to do so in a way that was both consistent across agencies and built trust and confidence in the operation of government (Committee on Official Information, 1980; New Zealand Law Commission, 2012; OIA, s4). Members of Parliament have since spoken in favour of the intent of the OIA, Labour's Adrian Ruurawe stating:

[t]he Official Information Act is one of the few mechanisms of democratic accountability: it gives taxpayers and voters the confidence that decisions are made on their behalf, and that they are right and proper. (Ruurawe, 2016)

Concerns have been raised, however, about inconsistent application of the OIA by government agencies and by ministers. Research over a decade ago examining over 690 OIA requests, across a wide range of government agencies, found issues with the application of the OIA that 'seriously compromise[d] the OIA's ability to fulfil its constitutional role of promoting accountability, participation and good

... 'the Tribunal's researcher encountered considerable difficulty in gaining full and timely access to official records through the centralised Official Information Act procedure orchestrated by Crown counsel'...

governance' (Price, 2005, p.50). In 2012 the New Zealand Law Commission made a range of recommendations on amendments to the OIA itself, as well as on guidance to agencies regarding application of OIA provisions, particularly around the withholding of information (New Zealand Law Commission 2012).

In 2019 the minister of justice sought input from a select group of experts, as well as public submissions, on whether to review the OIA. More recently, the minister has stated to the media the government's commitment to rewriting the OIA (Macdonald, 2020). Publicly available submissions, and excerpts reported on from the submissions, have highlighted a number of concerns regarding 'an apparently broken process, with ... excessive delays and deletions, overuse of vague withholding grounds, political interference and an ombudsman appeal process made ineffective by sometimes years-long waits' (ibid.), and the need for consequences for organisations that apply the OIA poorly. For instance, one submission states:

[t]here need to be real sanctions for delays caused by inefficient and overly complicated processes for dealing with

information requests, and for deliberate delay and obstruction. There is far too much scope for organisations to delay responding to a request until the information is no longer useful. And there should be a time limit on the provision that allows an organisation to withhold information if it will 'soon be publicly available'. Soon should not mean 'in two years' time'. (Transparency International New Zealand, 2019, p.2)

Although there is regular informal commentary about issues with the application of the OIA (Macdonald, 2020), there is very little information in the available literature that focuses on the way the OIA is implemented currently across a range of Crown organisations to which its provisions apply. This article presents the findings from a case study of the use of the OIA within the context of research commissioned by the Waitangi Tribunal in 2018.

Waitangi Tribunal research using the OIA to collect information

The Waitangi Tribunal is a permanent commission of inquiry, set up under the Treaty of Waitangi Act 1975, with its primary purpose being to receive and report on claims of Crown breaches of the principles of the Treaty of Waitangi (Baker, Baxter and Crampton, 2019; Treaty of Waitangi Act 1975, s5). The inquiry into health services and outcomes (known as Wai 2575) is one of 11 kaupapa inquiries signalled by the Tribunal and includes over 200 claims, organised into stages. The first of these was primary healthcare, reported on by the Tribunal in July 2019 (Waitangi Tribunal, 2019).

The second stage of the inquiry focuses on claims connected with disability, mental health, and alcohol, tobacco and substance abuse (Waitangi Tribunal, 2018a). In anticipation of this stage of the inquiry process, the Tribunal commissioned disability-focused research in late 2018. The purpose of the research was to examine how the contemporary health and disability system recognises and provides for the needs of Māori with lived experience of disability, and to what extent Crown acts or omissions have contributed to inequities in disability services and outcomes for

Table 1: Time frames of Crown organisation responses to OIA requests

Time frame for response	Number of responses	Percentage of responses
Within 20 working days with complete answers	10	30.3%
Within 20 working days with incomplete answers	4	12.1%
Beyond 20 working days with an extension	15	45.5%
Beyond 20 working days without an extension	3	9.1%
Has yet to respond	1	3%

Māori with lived experience of disability (King, 2019).

Background to the Waitangi Tribunal research and use of the OIA

Kaupapa Māori researchers were commissioned by the Tribunal to examine the historical and contemporary issues relevant to Māori with lived experience of disability. This required access to both primary and secondary sources of information from a range of Crown organisations with roles relevant to Māori with lived experience of disability.

A precedent had been set for use of the OIA by earlier Tribunal research commissioned for the inquiry into Napier hospital and health services (Waitangi Tribunal, 2001). The OIA process was instigated by Crown organisations, with Crown Law running a centralised process to release information. However, in this case the process appears to have been unsatisfactory, with the Tribunal report noting that ‘the Tribunal’s researcher encountered considerable difficulty in gaining full and timely access to official records through the centralised Official Information Act procedure orchestrated by Crown counsel’ (Waitangi Tribunal, 2001, p.20).

As the Tribunal’s research had to be completed within five months (Waitangi Tribunal, 2018a, 2018b), and due to previous use of the OIA for Tribunal-commissioned health research, the researchers opted to use the OIA to access information. This was considered appropriate by the researchers given both the statutory time frame for OIA requests to be responded to of 20 working days, and assumptions that each of the relevant Crown organisations would have adequate processes in place for responding swiftly to OIA requests. It was also reasonably assumed by the researchers that some of the issues previously raised

regarding a centralised Crown Law process around the release of information would be remedied by the researchers, not Crown Law, coordinating the requests, and within the broader context of stronger central agency guidance developed for Crown organisations in order to ensure swift and reasonable release of information (Kibblewhite and Boshier, 2018; Office of the Ombudsman, 2019).

The OIA request process

For the initial research, OIA requests were sent to 33 Crown organisations, including all 20 district health boards (DHBs), the Ministry of Health, the Accident Compensation Corporation, other health sector Crown entities (such as the Health Quality and Safety Commission), the Office for Disability Issues, the Ministry for Children, the Department of Corrections and Te Puni Kōkiri. All requests clearly indicated that the information was sought for the Tribunal-commissioned research project. In accordance with the New Zealand Disability Strategy, which uses the United Nations Convention on the Rights of Persons with Disabilities definition, disability was defined as ‘long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder ... full and effective participation in society on an equal basis with others’ (Office for Disability Issues, 2016, p.20).

Findings on the use of the OIA

Initial resistance by Crown organisations to providing responses to requests

The OIA requests generally sought information on how Māori with lived experience of disability were involved in decision making, policy development, service design and delivery; provision of data for Māori with lived experience of

disability; and how this data was used to monitor health and disability system performance. There was initial resistance from some Crown organisations to providing responses to the OIA requests. For instance, a professional services organisation for DHBs contacted the researchers stating that the majority of the questions were ‘subjective’ and because of this were outside the scope of the OIA. Questions considered ‘subjective’ included a request for a breakdown of DHB board membership by ethnicity (the two categories requested were Māori and non-Māori) and by disability (King, 2019). Further clarification was sought from this organisation on how a request for disaggregation of DHB board membership by ethnicity and disability could be considered ‘subjective’, but no further rationale or correspondence was provided to the researchers.

Delays in providing substantive responses to requests

Fewer than a third of Crown organisations provided responses within the statutory time frame of 20 working days to all aspects of the initial OIA requests made of them (ten organisations out of 33). A further four agencies responded to the initial request on time but did not provide complete answers. One other organisation did not acknowledge the request for 30 working days, and is yet to provide a final substantive response more than a year after the initial request was made. These findings align with those of Price (2005), who found that one out of every eight OIA responses exceeded the statutory time frame (without requests for extensions having been made).

Table 1 sets out the time frames for the first request and response for all 33 Crown organisations. Note that for some organisations there were follow-up OIA requests, which are not covered in this table.

The OIA allows agencies to set extensions for ‘a reasonable period of time having regard to the circumstances’ (s15A(2)). The Office of the Ombudsman provides agencies with further guidance, emphasising that the concept of ‘reasonable’ will depend upon the circumstances of the particular case (Office of the Ombudsman, 2019). Three agencies replied to the OIA

requests late, without seeking an extension. Fifteen Crown organisations set extensions ranging from a few days through to an additional 25 working days. Not enough information was provided by these agencies to determine if the extensions could be considered 'reasonable', but it is noted that in one example a Crown organisation sought an extension of 20 working days in order to answer a single question.

Incomplete responses were often provided

As previously noted, four agencies did respond to the initial OIA requests on time but did not provide complete answers. Incomplete answers were fairly common and included responses where information was withheld without sufficient rationale, responses were too general to address the requests adequately, wording of requests was repeated in responses without providing any additional information, or the rationale provided for withholding information seemed implausible (for instance, the information was already publicly available or had been released under a previous OIA request, when, in fact, this was not the case).

Variation across the 20 district health boards in approaches to the OIA

As set out in the New Zealand Public Health and Disability Act 2000, all 20 DHBs have the same roles and functions. This includes objectives to: 'promote effective care or support for those in need of personal health services or disability support services' within their districts; 'promote the inclusion and participation in society and independence of people with disabilities'; 'reduce, with a view to eliminating, health outcome disparities between various population groups'; and improve 'health outcomes for Māori and other population groups' (s22(1)). Although it was found wanting by the Tribunal (Waitangi Tribunal, 2019), the governing legislation of DHBs also provides mechanisms to give effect to the principles of the Treaty of Waitangi/te Tiriti o Waitangi regarding participation of Māori in decision making and service delivery. For this reason, it was anticipated that DHBs would hold information pertaining to issues relevant to Māori with lived experience of disability.

Table 2: Variation in DHB responses to OIA requests

OIA request	DHB responses
Ethnicity and disability information on DHB board members	Thirteen DHBs indicated they did not hold this information. The Ministry of Health subsequently provided this data on behalf of all DHBs, but was only able to identify whether DHB board members were Māori or non-Māori, not whether they had lived experience of disability.
Spending on Māori with lived experience of disability compared with non-Māori with lived experience of disability	Only eight DHBs were able to provide information on spending, with the rest providing partial information or stating that they did not hold this information.
Data disaggregated by: Māori, non-Māori, Māori with lived experience of disability, and non-Māori with lived experience of disability	Across all DHBs, variations of the following response were common: '[the] DHB does not collect patient data/information specific to a person's disability or impairment. There is therefore no basis for understanding how well we respond to those with impairment or disability' (King, 2019, p.159). Some DHBs sought clarification on the definition of disability before declining the request on the basis that they do not collect information on disability.

Although every DHB was sent the same set of OIA requests, there was variation in the responses as to what information they held, what information they released, and the reasons why they withheld information (Table 2). For instance, seven DHBs provided responses that were unclear or simply did not address the questions outlined in the OIA request. One DHB reiterated what its professional services organisation had previously stated, that a number of the questions in the request were 'outside the scope' of the OIA (King, 2019).

Complicated funding and accountability arrangements within the health and disability system make navigating OIA processes challenging

The specific arrangements between DHBs and the Ministry of Health and the range of functions carried out by each DHB can be complicated. Intentionally or not, this can make direct answers difficult to obtain, which has implications for citizens attempting to navigate the OIA process. For instance, one DHB referred to funding arrangements with the ministry as limiting the information that DHBs hold for Māori with lived experience of disability if they are under 65 years of age.

It can be argued that this rationale does not stand up to scrutiny, as there are a number of services that DHBs are responsible for providing to Māori with lived experience of disability. Although the Ministry of Health has funding responsibility for a limited range of disability support services for people under 65 (Ministry of Health, 2020), DHBs still have funding and statutory responsibilities for healthcare and disability support services for their entire population, including Māori with lived experience of disability (New Zealand Public Health and Disability Act 2000, s22). In this specific case, a complicated funding arrangement appears to have been used as a means of avoiding answering an OIA request.

DHBs have both a provider function relating to services delivered by the DHB and its staff – for example, in hospitals – and a funder function covering the purchasing of services delivered in the community (Gifford et al., 2020), and DHB responses to OIA requests were often unclear around which of these two functions was being referred to. For instance, one DHB responded to a question asking about workforce development within its district by providing an answer

Table 3: OIA requests refused under sections 18(e) and 18(f) of the legislation

Ground for refusing request	Subject of requests
Section 18(e) ... that the document alleged to contain the information requested does not exist or, despite reasonable efforts to locate it, cannot be found.	Membership of ministerial committees disaggregated by ethnicity and disability
	Number of providers contracted to provide health or disability support services to Māori with lived experience of disability
	Proportion of Vote Health targeted for healthcare and disability supports for Māori with lived experience of disability
Section 18(f) ... that the information requested cannot be made available without substantial collation or research.	Number of disabled Māori and disabled non-Māori in care and protection residences and youth justice residences
	Number of disabled Māori and disabled non-Māori in prisons who have been referred to disability support services
	Staff training in cultural competence/safety and disability responsiveness
	Number of mechanical restraint incidents disaggregated by ethnicity and disability

that pertained to a specific part of a hospital. Based on responses, it was difficult for the researchers to ascertain whether or not DHBs even considered issues around workforce development when purchasing services for communities within their district.

Not all Crown organisations appear to have well-implemented OIA processes

There were a number of administration issues with the OIA responses. For example, some Crown organisations did not calculate the 20-working-day time frame accurately. Although most organisations acknowledged the receipt of an OIA request, this was not universal, and in one case the original OIA request was not logged officially, causing delay in the overall response.

Understanding of the OIA also appears varied among Crown organisations. For instance, one organisation requested that the researchers keep the material provided in the OIA response confidential (despite it being released under the OIA without redactions and without there being any obvious personal information). These variations were substantially more common among Crown organisations outside central government. The Law Commission has previously noted difficulties in administering the OIA faced by ‘smaller agencies who have not had frequent experience in applying the legislation’ (New Zealand Law Commission, 2012, p.9).

There are serious gaps in official information for Māori with lived experience of disability

Across four central government agencies, a number of requests were refused because information did not exist or would require unreasonable efforts to locate or compile (see Table 3). The information covered by these requests related to data that would support service planning and funding decisions, as well as health and disability system monitoring. For example, information requested would support an understanding of the effectiveness of the Ministry for Children and the Department of Corrections in meeting the health and disability needs of people in their care. It is concerning such information either does not exist, or is not held in a way that means agencies can be accountable to Māori with lived experience of disability.

Discussion

The findings of the Waitangi Tribunal-commissioned research overall demonstrated the disconnect between the Crown’s stated objectives and its actions (or inactions), which disproportionately, unfairly and unjustly impacted on Māori with lived experience of disability (King, 2019). The findings of this case study around use of the OIA to access information relevant to Māori with lived experience of disability further illuminates how Crown action (and inaction) unfairly and unjustly affects this group. The use of the OIA has also served to highlight the

lack of data collection when it comes to Māori with lived experience of disability. This is not an issue with the legislation governing the release of government information, but it shows that legislation on information availability is not enough in and of itself to provide appropriate levels of democratic accountability and transparency to all population groups.

The well-documented inequities between Māori and non-Māori (Ministry of Health, 2015) and increasing information available on the inequities faced by Māori with lived experience of disability (King, 2019; Ministry of Health, 2019a) have highlighted government failures in meeting the health and disability needs of Māori. This is echoed by the chief ombudsman, who recently investigated the collection, use and reporting of information about the deaths of people with intellectual disabilities. There the ombudsman found that ‘[t]he Ministry [of Health]’s systems did not support the collection of complete, accurate or sufficient information, in the context of its fundamental responsibilities and obligations’ (Office of the Ombudsman, 2020, p.8).

Additionally, the lack of information held by central government agencies raises questions about the ability of these agencies to give effect to their obligations under te Tiriti o Waitangi. In mid-2019 the Tribunal released its Wai 2575 report examining two primary healthcare claims. The Tribunal found that a number of principles of the Treaty had been breached by the Crown in its approach to primary healthcare and critiqued the Crown’s adoption of principles of ‘partnership’, ‘participation’ and ‘protection’ (Waitangi Tribunal, 2019). The Tribunal articulated instead a broader set of five principles: the guarantee of tino rangatiratanga; the principle of equity; the principle of active protection; the principle of options; and the principle of partnership. All five of these principles require good quality ethnicity and disability data to support policy development, service design, funding, monitoring and evaluation. The guarantee of tino rangatiratanga goes further, emphasising that Māori should have access to high-quality information in order to monitor the performance of government systems.

The suggestion that collating data on mechanical restraints used on Māori and/

or Māori with lived experience of disability, or providing information about contracted providers of health or disability support services for Māori with lived experience of disability, would require 'unreasonable efforts' is of concern. This indicates that the test of what constitutes 'reasonable efforts' is unrelated to the seriousness of the issues, or the impact on Māori generally and Māori with lived experience of disability specifically. This is a variation on the findings of Price (2005), which highlighted an inadequate balance of public interest considerations. That study reported that three out of four OIA responses failed to explicitly balance public interest considerations in the decisions made to withhold information. With regard to what should be part of decisions on whether effort to collate information is reasonable, public interest should take into account government obligations under te Tiriti o Waitangi, human rights legislation (the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990) and various international human rights instruments that have been ratified by New Zealand (United Nations, 1946, 1966a, 1966b, 1966c, 1979, 1989, 1990, 2006, 2007).

In the case of information relating to seclusion and restraint, there is heightened interest driven by human rights concerns at its overuse (Committee on the Rights of Persons with Disabilities, 2018) and evidence demonstrating inequities for Māori in the use of seclusion and segregation units (King, 2019; Ministry of Health, 2019b; Shalev, 2017). The United Nations Convention on the Rights of Persons with Disabilities (ratified by the government in 2008) also articulates a clear obligation on states to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the convention (United Nations, 2006, article 31). International human rights instruments ratified by government also state the right to the enjoyment of the highest attainable standard of health for Māori with lived experience of disability (United Nations, 1966c, article 12; 1989, article 24; 2006, article 25; 2007, article 24), a right which requires high-quality information in order to be given full effect.

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Responses to the OIA requests in this case study suggest that the government obligations under international human rights instruments are not being fully met by Crown organisations.

The lack of high-quality data available for Māori with lived experience of disability is likely to have practical implications for the day-to-day operations of Crown organisations. High-quality DHB-level data can support decision making and improvements in health and disability services, and elimination of inequities in terms of both DHB funding arms responsible for the allocation of the DHB's share of Vote Health resources, and the DHB provider arms that have responsibility for specific service areas (Gifford et al., 2020). This information is clearly incomplete when it comes to Māori with lived experience of disability, severely limiting the ability of DHBs to carry out their core functions.

In accordance with findings from commentators (Macdonald, 2020; New Zealand Law Commission, 2012; Price, 2005), this case study highlights that, where information does exist, the application of the OIA across government agencies requires knowledge and resources (including time) in order to navigate OIA requests and government responses. Within the context of information sought for a population group that already experiences multiple forms of structural

oppression (King, 2019), such findings stress the considerable limitations of the OIA in providing a means of truly democratic accountability for all population groups within New Zealand. In some notable instances, Crown organisations contributed to some of the delay in OIA responses and created seemingly unnecessary difficulties for the researchers: for instance, describing OIA requests as 'subjective' and therefore not within the scope of the OIA (King, 2019). Given the gaps in disability information for Māori held by Crown organisations, such delays could potentially appear to be tactics to avoid further scrutiny. This is particularly concerning given the critical importance of this information and the ongoing failures of Crown organisations in meeting the needs of Māori with lived experience of disability (King, 2019; Ministry of Health, 2019a).

Conclusion

The findings of this case study indicate that, despite the OIA being nearly 40 years old, Crown organisations are not consistent in their approach to it; nor are they reliable when it comes to providing official information on time. Given alignment between issues identified in this case study and the findings of Price (2005), it appears that, for well over a decade, developments pertaining to the OIA, including improved guidance to agencies (Office of the Ombudsman, 2019), have been insufficient. Some of these issues could be the result of organisational immaturity (particularly outside central government); however, regardless of the reasons why, historical and current application of the OIA appears to be against the spirit of information availability and democratic accountability that the OIA was founded on.

The OIA has been purported to increase trust and confidence in government. This case study has indicated, however, that for some parts of the population, who already experience multiple forms of structural oppression, there is limited information on which to build this trust and confidence. The demonstrable reinforcement of existing power structures means that many of the benefits of the OIA are reserved for those

who hold the most power and privilege within New Zealand society. The growing understanding of how Crown organisations must apply the principles of te Tiriti o Waitangi to their work, and the increased focus on human rights obligations since

the introduction of the OIA, raise questions for the government about how to address the inadequacies of current legislation and urgently make the changes required to deliver on a modern approach to official information that ensures equitable, high-

performing and truly democratic public administration.

¹ The authors use the term 'Māori with lived experience of disability', acknowledging that there are a range of terms that may be used instead.

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