

## PERSPECTIVE

# Contribution of the Health Ombud to Accountability: The Life Esidimeni Tragedy in South Africa

EBENEZER DUROJAYE AND DAPHINE KABAGAMBE AGABA

### Introduction

Between October 2015 and June 2016, 1,711 people were relocated from mental health facilities operated by long-term provider Life Esidimeni in the South African province of Gauteng to alternative facilities managed by multiple nongovernmental organizations (NGOs). The result of the change in providers, and the manner in which the transfers were managed, became a tragedy that culminated in the death of 144 mental health care patients and the exposure of 1,418 others to torture, trauma, and poor health outcomes.<sup>1</sup> The state was unable to ascertain the whereabouts of a further 44 patients.

The tragedy began in October 2015, when the then member of the Executive Council for health in the populous Gauteng province, which includes Johannesburg and Pretoria, announced the termination of a 40-year contract between the Department of Health and Life Esidimeni for the provision of mental health services.<sup>2</sup> The NGO facilities to which the patients were transferred were ill prepared and ill equipped for the influx of patients.<sup>3</sup> The tragedy drew further public attention in September 2016, when, responding to a question raised in Parliament, the member of the Executive Council for health said that about 36 former residents of Life Esidimeni had died under mysterious circumstances following their transfers.

South Africa's minister of health then requested that the newly established Office of the Health Ombud investigate the circumstances surrounding the deaths of mentally ill patients and advise on the way forward.<sup>4</sup>

### Accountability and the health ombud

Accountability serves to constrain or limit power and prevent its abuse or misuse.<sup>5</sup> Mechanisms are required to track the actions of those in power, sanction any misuse of authority, and avert or redress abuses of power.<sup>6</sup> Accountability creates avenues by which those with responsibilities explain the interventions they have implemented and steps taken to remedy any gaps that have been identified.<sup>7</sup> To promote transparency around accountability, states are obligated to fulfill the right to access information and the freedom to form and belong to associations.<sup>8</sup> Within health systems, accountability is often exercised at several levels,

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including the legal, social, administrative, and political.<sup>9</sup> With regard to ensuring accountability in realizing the right to health of vulnerable groups, the *LC v. Peru* case emphasized the need for states to put in place legal avenues, national tribunals, and other public institutions to ensure accountability in the realization of women's rights.<sup>10</sup>

South Africa established the Office of the Health Ombud to promote accountability. The office is empowered to receive verbal and written complaints and to investigate and dispose of these complaints in an economical, fair, and expeditious manner.<sup>11</sup> Health ombudspersons are not unique to South Africa. England, New Zealand, and Australia, for example, also have health ombudspersons (who are sometimes also referred to as health commissioners). England appointed its first ombudsperson in 1973, New Zealand in 1994, and Australia in the 1980s (through the appointment of state-level health complaints commissioners).<sup>12</sup> An ombudsperson usually refers to an official elected by parliament or government with a mandate to represent citizens' interests and to investigate and deal with complaints concerning public (and sometimes private) agencies.<sup>13</sup>

In South Africa, the Office of the Health Ombud is an independent body established by the National Health Amendment Act of 2013. The office is functionally located in the Office of Health Standards Compliance (OHSC) and is assisted by persons designated by the OHSC.<sup>14</sup> The OHSC, which was also created by the National Health Amendment Act of 2013, has the overall mandate of promoting and protecting the health and safety of users of health services. Under the OHSC, the ombud office is officially designated as "Complaints Management and the Ombud."

The health ombud is responsible for addressing lapses and malpractices in the health setting with a view to protecting the rights of patients and users of the health care system.<sup>15</sup> For each complaint, the ombud is required to report his or her findings and recommendations back to the complainant and the health facility; to make recommendations for action to the chief executive officer of the OHSC, who must then ensure that the recommendations are imple-

mented; and to conduct a thorough investigation with the assistance of OHSC staff by obtaining statements and evidence from relevant individuals.<sup>16</sup>

In June 2016, the first health ombud (Malegapuru William Makgoba) was appointed by the minister of health. In making the appointment, the minister emphasized that the ombud would act as a "public protector" for health, since he would deal with complaints from those who were dissatisfied with health service delivery.<sup>17</sup> The minister asserted that this move was prompted by the significant increase in claims of medical negligence and by a failure to address litigants' claims, which resulted in the government spending large sums of money on compensation. He stressed that the ombud office would not only receive and address complaints but also pursue effective enforcement and remedial measures.<sup>18</sup>

### The health ombud's findings regarding the Life Esidimeni tragedy

Following a request from the minister of health, the Office of the Health Ombud conducted a thorough investigation that relied on evidence provided by numerous stakeholders, which culminated in the publication of a comprehensive report entitled *The Circumstances Surrounding the Deaths of Mentally Ill Patients: Gauteng Province*.<sup>19</sup> The office's investigation found that 94 patients (subsequently increased to over 100) died between March 23, 2016, and December 19, 2016, in three hospitals and 16 NGO facilities. The report notes that all 27 NGO facilities involved in the patient transfers operated without a license and that all of the patients who died did so under "unlawful" circumstances. Overall, about 95% of the deaths occurred in NGO facilities.<sup>20</sup>

The Office of the Health Ombud also found that the decision to terminate the contract with Life Esidimeni contradicted South Africa's National Mental Health Policy Framework and Strategy. Rather than the deinstitutionalization of patients being carried out gradually, as envisaged by the policy, it was rushed and disorganized, and functional community-based services were not in place.<sup>21</sup> The report stated that the cost rationale for termination

of the contract was not acceptable because it failed to respect the fundamental rights of the patients. Furthermore, the Gauteng Department of Health failed to develop a plan to ensure that the money that had been saved from the contract's termination was used for the benefit of the patients.<sup>22</sup> The investigation also found that the psychiatric hospitals to which some of the patients were moved cost almost twice as much as care at Life Esidimeni. Although some of the NGO facilities were far less expensive, the ombud observed, they offered substandard care and lacked certain vital health services, which ultimately led to the patients' suffering and death.<sup>23</sup> This is inconsistent with the government's obligation to realize the right to health of vulnerable people.

The ombud reported that the Gauteng Mental Health Marathon Project, as it became known, was done in a rush, with "chaotic" execution. The patients were transferred in an inhumane and degrading manner, with no written plan for their transportation. Some had their hands and feet tied throughout the move, some suffered trauma as a result of being moved without their families knowing where they had gone, and some were transferred without their clinical records and personal belongings.<sup>24</sup>

The report notes that most of the NGO facilities where the patients died lacked the necessary experience and capacity to deal with the situation. Conditions included overcrowding, poor hygiene, low-quality or insufficient food, a lack of qualified staff, and a lack of access to medicines and other supplies.<sup>25</sup> The causes of the deaths were unnatural and preventable and included chronic hepatitis, liver failure, pneumonia, uncontrolled seizures, and neuroglycopenic brain injury.<sup>26</sup>

Issues of noncompliance with health regulations were identified, including accommodating more patients than permitted by the operating license and NGOs being granted licenses to operate without being registered as legal entities or without adequate staffing. Some facilities were simply residential premises.<sup>27</sup>

## The health ombud's recommendations

One of the key recommendations of the ombud was

to overhaul the health care system for mentally ill patients. He also recommended disciplinary action against government officials for their complicity in the deaths of more than 100 patients.<sup>28</sup>

In responding to the recommendations, the government held a press conference in February 2017 in which the minister of health, Aaron Motsoaledi, announced that disciplinary processes had been initiated against several senior health officials.<sup>29</sup> During the arbitration process, it was reported that 1,418 patients who had suffered trauma and poor health but survived had been returned to Life Esidimeni facilities for continued care.<sup>30</sup>

Another recommendation of the ombud called for an "alternative dispute resolution process" led by a credible and experienced South African. This led to a comprehensive arbitration process that culminated in the acknowledgment by government officials of those who died or suffered as a result of the move from Life Esidimeni.<sup>31</sup>

In March 2018, the arbitrator, Justice Dikgang Moseneke, delivered an elaborate and stinging arbitration award.<sup>32</sup> In agreement with the health ombud report, the arbitrator asserted that the public officials behind the project had acted irrationally and had abused their power. He concluded that the project had been characterized by mismanagement, secrecy, a lack of accountability and transparency, and ulterior motives that remained unknown, all of which led to the suffering and death of mental health care users. The arbitration revealed that the human rights violations suffered by the patients had amounted to torture. Torture includes systematic acts that are not only unkind but also hateful and directed at bodily and psychological pain and harassment. As one expert witness stated:

If you take a group who didn't know the move was coming, weren't prepared for it and are moved on the backs of trucks, tied with sheets without identity documents, without wheel chairs, that amounts to torture. And then they are moved into filthy dangerous environments as if they are not human ... All those are features of actively torturing people in these institutions.<sup>33</sup>

The arbitrator further emphasized that by pre-

maturely terminating the Life Esidimeni contract without a reasonable alternative, the state violated mental health care users' rights, including the rights to life; to freedom from torture and cruel, inhuman, or degrading treatment; to human dignity; and to health and its underlying determinants (such as food and water). He noted that by exposing mental health care users to under-resourced NGOs, the state facilitated the abuse of users' rights by third parties.<sup>34</sup> He further asserted that the Gauteng Mental Health Marathon Project treated mental health care users and their families as recipients of—and not active participants in—decisions affecting their lives. Patients and families were not involved in the decision to move them from Life Esidimeni, and any attempts to contest the move were ignored or met with disdain.<sup>35</sup>

Having laid out the egregious violations, the arbitrator ordered the government to pay appropriate compensation to the families of those who died. This amount was to be in addition to the 20,000 rand (US\$1,390) that the government had offered, leading to a total of 1.2 million rand (US\$8,000), which was to be paid within three months.<sup>36</sup> While giving his ruling, the arbitrator pointed out that he was aware that several other potential claimants had not appeared before him and that if these individuals came forward, they were to be compensated in the same way, rather than requiring a new litigation process.<sup>37</sup> The arbitrator ordered the government to provide counseling and support services to all claimants who requested them. He also ordered it to construct a monument at its expense within 12 months of the publication of the award to commemorate the suffering caused by the project.<sup>38</sup> The provincial department of health was ordered to provide the Office of the Health Ombud and claimants with a recovery plan aimed at systemic change in the delivery of mental health care.<sup>39</sup> It was required to report to the ombud within six months.

The negative press and attention caused by both the ombud's report and the arbitration proceedings forced the resignation of the three senior officials who had been in charge of the Gauteng Mental Health Marathon Project.

In June 2018, the media reported that the

Gauteng government had paid compensation to the families involved in the arbitration and was also providing counseling.<sup>40</sup> At the time of writing, inquiries and investigations by several state bodies—including the police, National Prosecuting Authority, and Special Investigations Unit—were underway to ascertain the possibility of filing criminal charges against those at the helm of the Gauteng Mental Health Marathon Project.<sup>41</sup> Disappointingly, it was recently reported that one of the public officials implicated in the tragedy had been reelected to the Provincial Executive Committee of the African National Congress, which drew the condemnation of many.<sup>42</sup>

While the health ombud's role in the Life Esidimeni tragedy has been applauded, his handling of a more recent case has come under criticism for being more critical of a whistle blower than of the complaints made by him.<sup>43</sup> The South African Medical Association has said that even if there were discrepancies in the whistle blower's complaint, by focusing on him, the ombud had discouraged others from coming out and reporting incidences of malpractice and human rights violations.

Nonetheless, with regard to the Life Esidimeni tragedy, the ombud played a crucial role in promoting health accountability in South Africa. His comprehensive report was instrumental in producing a chain of events leading to redress and compensation of the mental health care users who had suffered as a result of the project, including the families of those who had died.

## Improving the accountability role

### *Monitoring and enforcing remedies*

In practice, accountability entities tend to lean toward either monitoring the actions of duty-bearers or enforcing remedies. Monitoring focuses on gathering information and asking duty-bearers to justify their conduct.<sup>44</sup> Enforcement examines sanctions or remedial and corrective measures to meet standards, and it aims to ensure that remedies are fulfilled and improper behavior is addressed.<sup>45</sup>

Human rights commissions and bodies often tend to focus on monitoring and exposing human

rights violations.<sup>46</sup> Similarly, the health ombud often takes on a monitoring role and produces and disseminates reports arising from complaints. This is one element of access to information.<sup>47</sup> But the ombud's enforcement role can be limited.

The powers given to the health ombud by the National Health Amendment Act are, to a large extent, "recommendatory." The act empowers the ombud to conduct an investigation and then submit a report that includes his or her findings and recommendations to the chief executive officer of OHSC. If the OHSC fails to address the recommendations, the ombud may ask the minister of health to intervene.<sup>48</sup> The challenge with this arrangement is that the ombud's enforcement and remedial powers are dependent on an external source. This may pose a challenge if the chief executive officer of the OHSC or the minister of health do not prioritize the recommendations.

In Queensland, Australia, the ombudsperson has enforcement powers in certain cases. The Queensland Health Ombudsman Act of 2013 grants the ombudsperson the authority to take immediate action if there is a risk to persons and to safeguard public health and safety. The ombudsperson can suspend health practitioners, impose conditions on their registration, and prohibit or limit them from practicing.<sup>49</sup> In New Zealand and England, as the roles of the health ombudspersons have evolved, their investigative and disciplinary powers have been strengthened through legislation. They have the power to ask agencies to report back on steps that have been taken to implement the recommendations.<sup>50</sup>

In doing so, these countries have strengthened ombudspersons' accountability role by enabling them to enforce their remedies. Thus, it is hoped that the relatively new position of the health ombud in South Africa will eventually go beyond monitoring to include enforcement as well.

There is also the issue of the office's capacity to deal with complaints. After it was reported that in 2016/17 only 15% of investigations had been finalized by the ombud within six months of the complaints' filing dates, the budget for the complaints management process (which includes the Office of the Health Ombud) was slated to be increased from 14.8

million rand in 2017/18 to 20.5 million in 2020/21.<sup>51</sup>

### *Nature of complaints*

Another element of the ombud's accountability role is the individualized and retrospective nature of the complaints that the ombud may receive. South Africa's health ombud is empowered by the National Health Amendment Act to receive both written and verbal complaints pertaining to any act or omission by the owner or an employee of a health establishment or a facility charged with providing health services. The ombud is then required to investigate each complaint fairly and expeditiously and then inform the complainant of his or her findings.<sup>52</sup> This is an individualized process involving the ombudsperson, the complainant, and the health establishment.

In commenting on New Zealand's complaints system, Ron Paterson notes that "an ombudsman is little more than the proverbial ambulance at the bottom of the cliff if all that is achieved is retrospective analysis of how and why a patient's rights were breached."<sup>53</sup> He illustrates that if a health provider implements the ombudsperson's recommendations by doing away with the shortcomings in the provider's practice, then it may be said that the ombudsperson's role has been realized at the individual level. Paterson explores how the resolution of such individual complaints can then be exploited to enhance health service delivery at a broader level. He proposes the utilization of the reports that are produced by the ombudsperson for educational purposes and for advocacy on behalf of health care consumers.<sup>54</sup>

In the case of South Africa, a series of issues contributed to the health ombud's taking up of the Life Esidimeni case. The arbitration award was a result of over two years of varied tactics, including rights education; advocacy; engagement with the government, the United Nations Special Rapporteur on the right to health, and watchdog bodies (such as parliamentary portfolio committees, the Mental Health Review Board, and the South African Human Rights Commission); and litigation by various actors, such as Section 27, NGO networks, mental health support and advocacy groups, professional



associations, and families of people using mental health services.<sup>55</sup> These strategies also ensured that the media never lost interest in the case, which prompted the minister of health to request the newly appointed ombud to conduct an investigation.<sup>56</sup> The release of the ombud's report led to a series of actions aimed not only at preventing similar deaths from occurring in the future but also at improving the mental health care system in general.<sup>57</sup>

The question that arises here is what happens with cases that are not picked up by the media, civil society, or the public. Will such cases remain "individualized" to the complainants and health establishments involved? This remains to be seen, as the Office of the Health Ombud is still relatively new and in the process of establishing its mode of operation. Still, it is vital that accountability entities such as the health ombud do not work in isolation. Accountability is the result of a concerted and dynamic effort by a series of actors using various strategies over time.

In order to enhance the ombud's educational role, the National Health Amendment Act also requires the ombud to prepare a report on the functions and affairs of its activities, which the minister of health then presents to Parliament.<sup>58</sup> In this way, accountability is not an isolated activity but rather an integrated one aimed at improving quality of health care for health consumers and at strengthening the health system. The enhancement of the accountability role of the health ombud is vital in the South African health system, which has a legacy of challenges related to its apartheid past, including inequalities and disparities in access to health exacerbated by large numbers of people living in poverty, a public-private divide, failure by health leadership to overcome mismanagement at the provincial and district levels, and a lack of health workers in public health facilities.<sup>59</sup>

## Conclusion

South Africa's establishment of the Office of the Health Ombud is a commendable step toward improving health accountability in South Africa. The newly established health ombud played a critical

role in promoting justice in the Life Esidimeni tragedy. However, not all of the ombud's recommendations have been fulfilled, particularly those involving criminal liability.

The ombud's enforcement and remedial powers need to be strengthened so that its recommendations are not stalled by people in positions of power. The complaints mechanism would be more effective if it focused less on individual complaints concerning past events and more on system failings. Consequently, the health ombud should aim not just to resolve individual claims but to use its educational and information-sharing roles to address the numerous challenges facing South Africa's health system.

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