

Our ref 407247 (Complaint ground: 409208, 423133, 423139)

Contact Anna Down

7 November 2017



Ombudsman
Fairness for all

Callum and Victoria Turnbull
C/- Amanda Hill
Partner
Cooper Legal

By email:

Dear Mr and Mrs Turnbull

Final Opinion under the Ombudsmen Act

I refer to Ms Hill's letter of 4 October 2017 and the enclosed correspondence from you, setting out your response to my provisional opinion.

I have now formed my final opinion in respect of this investigation. I have **enclosed** my opinion, including my recommendations.

In light of your response (including your own comments and those outlined on your behalf by Ms Hill) and further comments from other parties, I have made a number of changes to the provisional opinion sent to you on 13 September 2017.

I comment further as follows.

Section 22 of the Bill of Rights Act 1990

Ms Hill has submitted that in the absence of a positive statutory power to place Rovin in *Room A*, 'he was, on the face of it, arbitrarily detained under section 22 of the Bill of Rights Act', and that it is within the scope of my investigation to acknowledge that the right is engaged.

I agree that Rovin's placement in *Room A* does raise a question about the application of section 22.

However, I note that in *R v Goodwin (No 2)* [1993] 2 NZLR 390, the Court of Appeal discussed what was meant by 'arbitrary' in the section 22 context. In that case (which involved the questioning of the appellant by a Police officer who had told him he could not leave until the police had finished questioning him) the court held that he had been detained and that this was 'arbitrary' because detention for questioning on suspicion of a crime or for some other reason was not lawful under New Zealand statute law. However, the court observed:

We leave open the possibility that there may be some limited exceptions to the principle that, in general, unlawful detention will be arbitrary detention. We have in mind such cases as detention unlawful yet imperative for the safety of the detainee or other persons, or detention in good faith for reasons falling just short of reasonable and probable grounds under ss 36, 37 or 38 of the Crimes Act 1961.

Scope of investigation

As you noted, when I announced my intention to investigate the use of seclusion in schools on 14 October 2016, I referred to the extent of the practice. On 14 December 2016, I wrote to you setting out more specifically the scope of my investigation. By that time, the Ministry had issued new guidelines making it clear that schools should not be using seclusion and the Minister had signalled a legislative change to reinforce that. The Ministry had undertaken a nationwide survey to establish which schools were using seclusion or had done so in 2016, and to engage with those schools as necessary.

As noted in my opinion, under section 18(7) of the Ombudsmen Act (the Act) an Ombudsman may regulate his procedure as he thinks fit. My investigation has focused on those aspects of your complaint that I determined it was necessary to investigate.

Evidence considered

You have raised a number of concerns about the evidence I have relied on in making my findings, including the people I did and did not hear from, and the relevance and/or veracity of the evidence provided to me. As you note, some of the evidence provided to me has been contradictory.

All of the evidence put before me has been assessed and I have carefully considered that which was relevant to my investigation. As noted in my report, under section 18 of the Act an Ombudsman may hear or obtain information from such persons as he thinks fit. My findings are based on my consideration of that evidence, in accordance with my role under the Act. As noted in paragraph 37 of my report, I have not set out in detail all of the evidence gathered; rather I have included relevant contextual information and the information I have relied on in making my findings.

I can confirm that I did consider using my authority under the Ombudsmen Act to summons Ms . There were a number of factors relevant to my decision not to do so. While I am not at liberty to discuss these with you, your concern that Ms 'became more reluctant because of the way she was handled during investigations' does not accord with my assessment of the situation.

Use of force

On pages 6-7 of your letter, you outline your concerns about the frequency with which Rovin was physically restrained and that it involved an excessive use of force. Some of your comments appear to be consistent with my findings (eg, regarding the documentation of the use of physical interventions). However, some relate to matters that were not within the scope of my investigation or to matters on which it is not possible for me to form an opinion.

'Room A'

You will note that I have clarified in my final opinion my concerns about the form or nature of Room A.

I understand that you remain concerned about the consenting and construction of the room, that alterations were made to the window after you saw the room in December 2014, and possible

use of the room after Ruru advised that it was no longer being used (for crisis management purposes).

For the reasons outlined in my opinion and in previous correspondence, my focus in this investigation has been on how *Room A* was used, specifically for Rovin. My concerns about the form of the room therefore relate to this—the way in which the room was used. As I have said in my opinion, I would not had the same concerns about *Room A* had it been used on a voluntary basis only, or for *'mini-timeout'* as described in the 1998 Guidelines. I do not consider that the construction of a time-out room in 1999 was, in and of itself, necessarily a basis on which to criticise the school or the Ministry. I acknowledge that our views in this regard differ.

Recommendations

In response to my proposed recommendation that Ruru provide you and Rovin with an apology, you have stated that a *'forced apology ... is simply not enough, and we reject that recommendation'*. You have requested instead that I recommend the implementation of a dispute resolution service for parents, and the installation of cameras in specialist schools/units, satellite classrooms and in the vehicles of agencies contracted to transport children and young people with additional needs.

While I understand the motivation behind your request, I do not consider that my findings in this investigation provide a sound basis for the recommendations you have proposed.

As you will note from my final opinion, I have recommended that in the event that you wish to reconsider receiving an apology from Ruru, this should be provided. I would be grateful if you could advise my office by **21 November 2017** if you wish to receive this.

Final steps

In accordance with the requirements of section 22(3) of the Ombudsmen Act 1975, I have written to the Minister of Education, providing him with a copy of my opinion. I have also provided Ruru, the Ministry, and ERO with a copy of my opinion.

I have now completed my investigation of this complaint. As previously indicated, it is my intention to publish my opinion in this case on the Ombudsman's website, in accordance with rule 2(1)(b) of the Ombudsmen Rules 1989. I am willing to consider any comments you may wish to make in this regard, provided I receive your comments by 14 November 2017. A copy of the anonymised version of my opinion, which I propose to publish on 16 November 2017, is attached for your information.

Yours sincerely



Peter Boshier
Chief Ombudsman

encl Final opinion
Copy of opinion to be published on Ombudsman website