



Chief Ombudsman’s opinion under the Ombudsmen Act

Legislation	Ombudsmen Act 1975 ss 13(1), 18(3), 22(1-3); Oranga Tamariki Act 1989 ss 4(A)(1), 5(1)(a), 5(1)(b)(i), 5(1)(b)(iii), 5(1)(b)(vi), 5(1)(b)(vii), 5(1)(b)(viii), 11, 15, 17(1)(a)
Agency	Oranga Tamariki Ministry for Children
Ombudsman	Peter Boshier
Case number(s)	566935
Date	September 2022

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Background

1. The Chief Ombudsman received a complaint against Oranga Tamariki about Malachi (5 years old) from his uncle and cousin.
2. In late June 2021 Malachi's mother was sent to prison. There had reportedly been some discussion in the family regarding Malachi's care, and the complainants understood that Malachi's mother would be leaving Malachi in the care of his cousin.
3. On 21 June 2021 the family were advised that Malachi's mother had placed Malachi in the care of a friend (the caregiver).
4. On 22 June 2021 Malachi's cousin visited an Oranga Tamariki site to make a report of concern.
5. On 28 June 2021 Malachi's cousin emailed a photograph of Malachi to Oranga Tamariki, showing what she suspected as bruising around his eye.
6. Sometime in July 2021 Malachi's cousin complained to Oranga Tamariki regarding its decision about her report of concern.
7. On 1 November 2021 a Child Protection Protocol (CPP) referral was made to Oranga Tamariki by a DHB Family Violence and Child Protection Coordinator, after Malachi was admitted to hospital with significant injuries.
8. On 2 November 2021 Malachi's cousin received a call from Oranga Tamariki advising that Malachi was in a serious condition and there were concerns he would not survive the day.
9. Malachi's uncle reports that on 2 November 2021, sometime between 1:00pm and 3:30pm, he called Oranga Tamariki to ask how to make a complaint. Malachi's uncle recalls receiving advice that there was no complaints process and that he could speak directly to the duty social worker concerned.
10. On 12 November 2021 Malachi died as a result of Non-Accidental Injuries (NAI).

Complaint

11. On 8 November 2021 I received the complaint from Malachi's uncle and cousin, and Oranga Tamariki was notified of my investigation on 17 December 2021.
12. The concerns relate primarily to the care and protection of Malachi; he was 5 years old when he died.
13. The concerns raised by Malachi's uncle and cousin were:
 - a. That there was a failure to properly address the report of concern made by Malachi's cousin.

- b. That incorrect information was provided to Malachi's uncle, namely that Oranga Tamariki did not have a complaints process.

My Investigation

14. Information from Oranga Tamariki records to assist my investigation was provided by Oranga Tamariki on 4 February 2022. In response to my notification of investigation into this matter, Oranga Tamariki did not provide comment on actions taken on the report of concern, advising that:

commenting on this concern may be inappropriate at this time, as there are several processes underway examining the circumstances of this death which are yet to reach outcomes. Oranga Tamariki are supporting Police as the criminal investigation is in progress, as well as we will be likely to provide evidence in the probable coronial matter following.

15. In early May 2022 there was significant media interest in Malachi's death, which included an announcement of Oranga Tamariki's intention to conduct a practice review.
16. On 19 May 2022 my staff met with Oranga Tamariki staff, who advised Oranga Tamariki would be conducting a practice review into Oranga Tamariki's specific actions. There would also be a wider systems review, led by an independent reviewer which would consider issues across agencies.
17. On 10 June 2022 Oranga Tamariki provided me with a draft terms of reference for its practice review (this was subsequently amended in August 2022).
18. After analysing the Oranga Tamariki records provided to me, I completed my provisional opinion on 15 July 2022, with proposed recommendations including apologies. As required by section 18(3) of the Ombudsmen Act 1975, and in accordance with natural justice, I invited Oranga Tamariki to comment by 29 July 2022, before I formed my final opinion.
19. On 3 August 2022 Oranga Tamariki advised that it would appreciate an opportunity to meet following the completion of the practice review to discuss what this may mean for my investigation. Oranga Tamariki had previously contacted my office to schedule a meeting with me on 4 August 2022. However, this meeting needed to be cancelled by Oranga Tamariki shortly before it commenced.
20. I wrote to Oranga Tamariki on 4 August 2022, providing an extension to 10 August 2022 for its response to my provisional opinion.
21. Oranga Tamariki wrote to me on 12 August 2022 seeking more time to respond to my provisional opinion, pending completion of the practice review.
22. I wrote to Oranga Tamariki on 17 August 2022 advising that after careful consideration of the request for more time, I was not prepared to delay my investigation. I further offered

an opportunity for Oranga Tamariki to make comment by 31 August 2022, in particular on the facts considered, my analysis, and feedback on my proposed recommendations.

23. On 31 August 2022 Oranga Tamariki responded to my request, and while detailed comment was not made Oranga Tamariki agreed to provide me a copy of the practice review upon completion. In relation to my proposal for apologies, Oranga Tamariki stated:

If the Practice Review identifies failings, then I will apologise to [Malachi's cousin] and her whānau. Should an apology be considered an appropriate next step, we will look into the findings of the Practice Review and your investigation to help frame our apology to ensure it is accurate and sufficient...

As above, I am open and willing to provide an apology to [Malachi's uncle] where it is supported by the Practice Review.

24. My statutory task under the Ombudsmen Act is to give an opinion on the facts as they present to me. I am required to provide Oranga Tamariki an opportunity to be heard before I form a final opinion, and that opportunity was provided.
25. On 8 September 2022 I formed my final opinion on the complaints and provided that to Oranga Tamariki with recommendations.
26. I subsequently met with Malachi's uncle and cousin on 20 September 2022 to advise them of my final opinion and recommendations. They advised that while they believed apologies were warranted, they wanted this to occur at a time when Oranga Tamariki was ready to engage.
27. Oranga Tamariki met with my staff on 28 September 2022 to provide an update on progress with the practice review.
28. I decided to adjust my recommendations and communicated my revised recommendations to Oranga Tamariki and the complainants on 29 September 2022.
29. On 3 October 2022, Oranga Tamariki advised me it had accepted my recommendations.

Analysis

Action taken on the report of concern

30. Oranga Tamariki did not conduct an investigation into the report of concern made by Malachi's cousin, after completing its intake and assessment process. When a report of concern is received under section 15 of the Oranga Tamariki Act 1989, section 17(1)(a)¹ of that Act requires Oranga Tamariki to commence an investigation, 'if it appears that an

¹ Section 17(1)(a): <https://www.legislation.govt.nz/act/public/1989/0024/154.0/DLM149470.html>

investigation is necessary or desirable'. If investigating, Oranga Tamariki must '*...arrange for an investigation to be commenced into the matters contained in the report to the extent that an investigation is necessary or desirable*'. It is my view that Oranga Tamariki omitted to do all that was necessary and desirable. It reached the wrong conclusion in its intake and assessment process, and should have taken action to investigate the report of concern. In my opinion this omission was unreasonable. I will explore this in further detail below.

31. CYRAS² records indicate that following the receipt of the report of concern on 22 June 2021, a child and family assessment³ (CFA) was to have been undertaken by Oranga Tamariki. While the need for a CFA was flagged before the full intake and assessment process had occurred, a CFA is deemed appropriate if te tamaiti (the child) is at risk of harm or neglect. A safety and risk screen⁴ (the screen) should be completed after the CFA. The screen identifies if there are concerns that warrant immediate action by Oranga Tamariki to secure the safety of te tamaiti. Neither the CFA, nor the screen appear to have taken place. There is no mention of the CFA in the pathway rationale⁵ referenced further below.
32. On 28 June 2021 Oranga Tamariki spoke with Malachi's cousin; she had a photo of Malachi with a suspected bruised eye, which she emailed to Oranga Tamariki following the call. The photograph was received by the relevant Oranga Tamariki site on 28 June 2021. On 6 July 2021, the photograph was recorded in CYRAS as a case note against the 22 June 2021 report of concern.
33. When considering a report of concern, Oranga Tamariki must adhere to its obligations under the Child Protection Protocol (CPP). Concerns which meet the CPP cannot be deemed to require no further action unless consultation has occurred with NZ Police. Oranga Tamariki did not consult with Police in response to suspected bruising around Malachi's eye. The CPP 2016 which applied at the time stated "*The CPP is the joint process that is followed when [Oranga Tamariki] and Police are responding to actions or behaviour that may constitute a criminal offence*". Any single injury such as bruising (if the positioning makes it unlikely to be caused by play or accident) will meet the threshold for referral to NZ Police as a CPP case. There is no record that Oranga Tamariki considered its obligations under the CPP at any stage, nor record of consideration of the suspected bruising.
34. On 29 June 2021 Oranga Tamariki completed a pathway rationale record in which a decision was recorded to take no further action on the report of concern. Information considered as part of the pathway rationale included:

² CYRAS is the online case recording system used by Oranga Tamariki.

³ Guidance: [Initial assessment phase](#); Practice tool: [Report of concern response pathway](#)

⁴ Practice tool: [Safety and risk screen](#)

⁵ The pathway rationale records Oranga Tamariki's decision on a report of concern, following the initial phase of assessment.

- a. Comments from Malachi's mother, which Oranga Tamariki had obtained.
 - b. Concerns raised by Malachi's cousin:
 - i. There was a non-association order between Malachi's mother and the caregiver's mother. Malachi's cousin was concerned Malachi may be used as a blackmail tool to prevent Malachi's mother giving evidence against the caregiver's mother, and therefore at risk of harm.
 - ii. Malachi was not taken to a follow-up medical appointment while with the caregiver.
 - iii. The whānau suspect Malachi had autism, but were concerned there had been no follow-up.
 - iv. Malachi lacked communication skills.
35. It is of concern to me that the photograph of Malachi was not mentioned in the pathway rationale.
36. The rationale used to take no further action was that *"...there is nothing to say that Malachi is unsafe with [the caregiver]. [The mother] has made her decision about who she will support to look after her child. As such, there are currently no care and protection concerns..."*
37. In considering the purpose, principles and general duties within the Oranga Tamariki Act 1989, I consider that Oranga Tamariki was wrong in taking no further action. The circumstances surrounding the report of concern should have triggered investigation under section 17(1)(a).⁶ Sections 4A(1),⁷ 5(1)(a),⁸ 5(1)(b)(i), 5(1)(b)(iii), 5(1)(b)(vi), 5(1)(b)(vii), 5(1)(b)(viii) and 11,⁹ set out expectations to ensure that the welfare and interests of a child is a paramount, and that a child be encouraged and supported to participate and express their views.
38. Oranga Tamariki omitted to meet or speak with Malachi in order to ascertain whether he was safe with the caregiver, or indeed whether he wished to remain in her care. There is no evidence that Oranga Tamariki had considered engaging with Malachi, nor had it otherwise considered conducting a safety check of the caregiver's home. At the time the report of concern was made, Malachi was 4 years old. It is of particular concern that given his age and the concerns raised about his developmental delay and suspected autism, the vulnerable infant and disability practice triggers¹⁰ did not appear to have prompted further action from Oranga Tamariki.

⁶ Section 17(1)(a): <https://www.legislation.govt.nz/act/public/1989/0024/154.0/DLM149470.html>

⁷ Section 4A: <https://www.legislation.govt.nz/act/public/1989/0024/154.0/LMS216298.html>

⁸ Section 5: <https://www.legislation.govt.nz/act/public/1989/0024/154.0/DLM149440.html>

⁹ Section 11: <https://www.legislation.govt.nz/act/public/1989/0024/154.0/DLM149450.html>

¹⁰ Practice tool: [Vulnerable infant practice triggers and disability practice triggers](#)

39. As recognised in the Oranga Tamariki Act 1989 (referred to above in paragraph 36), the well-being of a child must be at the centre of decision-making that affects that child. The pathway rationale noted Malachi's needs which included knowing and being cared for by safe family, and protection from being used as a blackmail tool between his mother and the caregiver's mother. Oranga Tamariki did not appear to have assessed how Malachi's needs might be met by the caregiver, nor had it contacted the caregiver to ascertain whether she was able to meet Malachi's needs. It is apparent from the pathway rationale that Malachi's welfare and interests were not prioritised; they were instead wrongly assumed to be addressed or overridden by his mother's endorsement of the caregiver, in spite of evidence that he may not be safe.

Other matters

40. In July 2021 Malachi's cousin complained to Oranga Tamariki about its decision to take no further action. On 30 July 2021, in response to her complaint, Malachi's cousin was advised that reports of concern were screened based on whether there were specific care and protection concerns.
41. It is apparent to me that Malachi's cousin had raised specific concerns about actual and potential harm to Malachi. I consider Oranga Tamariki's response to her complaint was inadequate; particularly as any person who has concerns about a child's safety and wellbeing, whether due to actual events or potential risks, may make a report of concern under section 15¹¹ of the Oranga Tamariki Act 1989.

Information provided to Malachi's uncle about Oranga Tamariki's complaints process.

42. Malachi's uncle stated that he had called Oranga Tamariki on 2 November 2021 between 1:00pm and 3:30pm, inquiring how to make a complaint. He recalled receiving advice that there was no complaints process and that he could speak directly to the social worker concerned.
43. On 4 February 2022, Oranga Tamariki advised me:
- a. That the agency does not have a record of the aforementioned call.
 - b. The agency does have a record of receiving a call from Malachi's uncle at 9:49pm, where he made reference to speaking with someone earlier that day and being told there was no complaints process. It was noted that Malachi's uncle was subsequently provided advice that there was a complaints process and he was further informed on how to complain.
44. While no record was found of the uncle's call to Oranga Tamariki on the afternoon of 2 November 2021, Oranga Tamariki acknowledged to me on 4 February 2022 that the

¹¹ Section 15: <https://www.legislation.govt.nz/act/public/1989/0024/154.0/DLM149467.html>

uncle was originally misinformed when he was told there was no complaints process. I therefore consider Oranga Tamariki has acted unreasonably in this respect.

45. I am concerned about the advice and information that is made available to the public about Oranga Tamariki's feedback and complaints process. I have reviewed the information on Oranga Tamariki's website, and consider there are barriers to the public in accessing the feedback and complaints service. It appears the email address cited is a generic email, although I am aware that there is an intake email for that service specifically. I am further concerned that there does not appear to be a dedicated feedback and complaints number, as the number on the website is the National Contact Centre number. Further, while there is information available about how to make a complaint there is no information available to the public about the complaints process itself, nor does there appear to be any information about the complaints process on the Practice Centre¹² (a resource both for staff and the public to access).

Chief Ombudsman's opinion

46. Oranga Tamariki has acted contrary to its own policies which require the well-being of children and their families to be central to decision-making. Oranga Tamariki does not appear to have fulfilled the bare minimum of the process required to ensure Malachi's safety. For the reasons set out above I have formed the opinion that Oranga Tamariki has acted unreasonably and wrongly in addressing the report of concern made by Malachi's cousin.
47. It is also my opinion that Oranga Tamariki has acted unreasonably in providing incorrect information to Malachi's uncle.

Recommendations

48. I recommend:
- a. Oranga Tamariki apologise to both Malachi's uncle and cousin at a time and in a way that Malachi's uncle and cousin have agreed. The apologies should recognise the impact of Oranga Tamariki's actions and serve to appropriately restore Malachi's uncle and cousin to a state of balance (ea). I refer in particular to my guidance in [He rauemi tātaki ea – A resource for offering an effective apology](#).
 - b. Oranga Tamariki report to me in a timely manner on its proposal for making the apologies and considers any comments I have before it proceeds.
 - c. Oranga Tamariki provide me a copy of the practice review once it is complete, and report to me within one month of its completion about whether and how the

¹² Practice Centre: <https://practice.orangatamariki.govt.nz/>

practice review findings will influence Oranga Tamariki in terms of its policy, practice and guidance.

- d. Oranga Tamariki report to me, within three months of the systems review, whether and how the systems review findings will influence Oranga Tamariki in terms of its policy, practice and guidance.
49. Oranga Tamariki has accepted my recommendations.
50. I will consider whether any further recommendations are necessary at a later stage.

Appendix 1. Legislation

Ombudsmen Act 1975

13 Functions of Ombudsmen

- (1) *... it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted ... relating to a matter of administration and affecting any person or body of persons in [their] personal capacity, in or by any of the public service agencies or organisations named in [Parts 1 to 1C](#) and [2](#) of Schedule 1 ... or by any officer, employee, or member of any such public service agency or organisation in [their] capacity as such officer, employee, or member.*

18 Proceedings of Ombudsmen

- (3) *An Ombudsman may hear or obtain information from such persons as [they] thinks fit, and may make such inquiries as [they] thinks fit. It shall not be necessary for an Ombudsman to hold any hearing, and no person shall be entitled as of right to be heard by an Ombudsman:*

provided that if at any time during the course of an investigation it appears to an Ombudsman that there may be sufficient grounds for ... making any report or recommendation that may adversely affect any public service agency or organisation or person, [they] shall give to that public service agency or organisation or person an opportunity to be heard.

22 Procedure after investigation

- (1) *The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—*
- (a) *appears to have been contrary to law; or*
 - (b) *was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or any legislation or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or*
 - (c) *was based wholly or partly on a mistake of law or fact; or*
 - (d) *was wrong.*
- (2) *The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant*

grounds or on the taking into account of irrelevant considerations, or that, in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) *If in any case to which this section applies an Ombudsman is of the opinion—*
- (a) *that the matter should be referred to the appropriate authority for further consideration; or*
 - (b) *that the omission should be rectified; or*
 - (c) *that the decision should be cancelled or varied; or*
 - (d) *that any practice on which the decision, recommendation, act, or omission was based should be altered; or*
 - (e) *that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or*
 - (f) *that reasons should have been given for the decision; or*
 - (g) *that any other steps should be taken—*

the Ombudsman shall report [their] opinion, and [their] reasons therefor, to the appropriate department ... and may make such recommendations as [they] thinks fit. In any such case [they] may request the department ... to notify [them], within a specified time, of the steps (if any) that it proposes to take to give effect to [the] recommendations. The Ombudsman shall also, in the case of an investigation relating to a department ... named or specified in [Schedule 1](#), send a copy of [their] report or recommendations to the Minister concerned...

Oranga Tamariki Act 1989

4A Well-being and best interests of child or young person

- (1) *In all matters relating to the administration or application of this Act (other than [Parts 4](#) and [5](#) and [sections 351 to 360](#)), the well-being and best interests of the child or young person are the first and paramount consideration, having regard to the principles set out in [sections 5](#) and [13](#).*

5 Principles to be applied in exercise of powers under this Act

- (1) *Any court that, or person who, exercises any power under this Act must be guided by the following principles:*
- (a) *a child or young person must be encouraged and assisted, wherever practicable, to participate in and express their views about any*

proceeding, process, or decision affecting them, and their views should be taken into account:

- (b) the well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular,—*
 - (i) the child's or young person's rights (including those rights set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld, and the child or young person must be—*
 - (A) treated with dignity and respect at all times:*
 - (B) protected from harm:*
 - ...*
 - (iii) the child's or young person's need for a safe, stable, and loving home should be addressed:*
 - ...*
 - (vi) a holistic approach should be taken that sees the child or young person as a whole person which includes, but is not limited to, the child's or young person's—*
 - (A) developmental potential; and*
 - (B) educational and health needs; and*
 - (C) whakapapa; and*
 - (D) cultural identity; and*
 - (E) gender identity; and*
 - (F) sexual orientation; and*
 - (G) disability (if any); and*
 - (H) age:*
 - (vii) endeavours should be made to obtain, to the extent consistent with the age and development of the child or young person, the support of that child or young person for the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:*
 - (viii) decisions about a child or young person with a disability—*
 - (A) should be made having particular regard to the child's or young person's experience of disability and any difficulties or*

discrimination that may be encountered by the child or young person because of that disability; and

(B) should support the child's or young person's full and effective participation in society:

11 Child's or young person's participation and views

(1) *This section applies to the following proceedings and processes:*

...

(d) *the taking of any other action or making of any other decision (any **other process**) under this Act that would or does significantly affect a child or young person who is the subject of that process.*

(2) *In proceedings or a process to which this section applies, —*

(a) *the child or young person must be encouraged and assisted to participate in the proceedings or process to the degree appropriate for their age and level of maturity unless, in the view of a person specified in subsection (3), that participation is not appropriate, having regard to the matters to be heard or considered; and*

(aa) *except where [section 10](#) (relating to proceedings) applies, the child or young person must be given reasonable assistance to understand the reasons for the proceedings or process, the options available to the decision-maker, and how these options could affect them; and*

(b) *the child or young person must be given reasonable opportunities to freely express their views on matters affecting them; and*

(c) *if a child or young person has difficulties in expressing their views or being understood (for example, because of their age or language, or because of a disability), support must be provided to assist them to express their views and to be understood; and*

(d) *any views that the child or young person expresses (either directly or through a representative) must be taken into account; and*

(e) *any written decision must set out the child's or young person's views and, if those views were not followed, include the reasons for not doing so; and*

(f) *the decision, the reasons for it, and how it will affect them must be explained to the child or young person.*

(3) *The following persons must either perform the duties imposed by subsection (2)(a) to (c) or be satisfied, before undertaking any proceeding*

or process involving the child or young person, that those duties have been performed by another person:

...

(d) for any other process, the person responsible for taking the action or making the decision.

(3A) In any proceeding or process,—

(a) the persons listed in subsection (3)(a) to (d) must perform the duty imposed by subsection (2)(d); and

(b) decision-makers must perform the duty imposed by subsection (2)(e); and

(c) decision-makers must perform the duty imposed by subsection (2)(f) or, within a reasonable period following the making of a decision, satisfy themselves that the duty has been performed by another person...

15 Reporting of concerns to chief executive or constable

Any person who believes that a child or young person has been, or is likely to be, harmed, ill-treated, abused, (whether physically, emotionally, or sexually), neglected, or deprived, or who has concerns about the well-being of a child or young person, may report the matter to the chief executive [of Oranga Tamariki] or a constable.

17 Investigation of report of ill-treatment or neglect of child or young person

(1) If the chief executive or a constable receives a report under [section 15](#) relating to a child or young person, they must,—

(a) as soon as practicable after receiving the report, if it appears that an investigation is necessary or desirable, commence an investigation or arrange for an investigation to be commenced into the matters contained in the report to the extent that an investigation is necessary or desirable;