EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE YOUTH COURT
AT AUCKLAND

I TE KŌTI TAIOHI
KI TĀMAKI MAKAURAU

CRI-2022-204-000225
[2023] NZYC 238

NEW ZEALAND POLICE
Prosecutor

v

[CB]
Young Person

Hearing:	3 February 2023 and 13 March 2023
Appearances:	M Djurich for the Prosecutor S Norrie for the Young Person
Judgment:	3 April 2023

RESERVED JUDGMENT OF JUDGE A J FITZGERALD
[Lawfulness of an arrest and admissibility of a DVD interview]

CONTENTS

INTRODUCTION

[1] [The victim] was at home in [location 1] on 9 August 2022 with her 10-month-old daughter. Throughout the evening they could hear the sound of car tyres skidding outside. When her daughter was woken by those sounds in the early hours of 10 August, [the victim] went outside to see who was making the noise and saw a hatch back car which reversed up to her. [CB] was a rear seat passenger in that car, his friend [MA] was the driver, and two other friends were with them.

[2] As [the victim] approached the car, she yelled out that she had the number plate, that they had woken her daughter and they should go somewhere else. [CB], who was holding an air rifle, fired it in [the victim]'s direction and the pellet hit her in the chest. She was taken to Auckland Hospital in a critical condition where she underwent emergency surgery to remove the pellet from her right lung. She spent seven days in hospital.

[3] [CB] has said that he and his friends had been shooting cans that evening using the air rifle that belonged to his brother. In the early hours of 10 August 2022, as they were returning to their homes, they encountered two men on bicycles who hit the windows of the car. One of the men had a machete. The boys turned back around towards the men and, in retaliation, [MA] fired at one of them with the air rifle. [CB] then took the air rifle, rested it on the back passenger side window and fired. He did not know the person he shot was a woman until one of his friends told him so.

[4] On 11 August 2022, [CB], his sister and [his father], as well as [MA] and his mother, went to the [location 2] Police Station to hand themselves in for the shooting. Whilst there, [CB] was arrested and participated in an interview recorded on DVD. He was initially charged with wounding [the victim] with intent to cause grievous bodily harm.[1] That has since been amended to wounding her with reckless disregard for her safety.[2]

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[1] Crimes Act 1961, s 188(1). Maximum penalty 14 years imprisonment.
[2] Crimes Act 1961, s 188(2). Maximum penalty 7 years imprisonment.

ISSUES

[5] I must determine whether the arrest was lawful, and whether the DVD interview is admissible as evidence against [CB].

[6] The arrest and the interview occurred during the investigation of the alleged offending. Therefore, under the Oranga Tamariki Act 1989 ("The Act"), [CB]'s vulnerability as young person entitled him to special protection.[3] An assessment of the process that was followed and the protections provided to [CB], including his father playing the part of the nominated person, is required.

[7] Deciding these issues also requires recognising that the law that applies to young people[4] is qualitatively different to the law that applies to adults. A careful analysis of the relevant provisions of the Act is necessary to understand the legal context properly.

[8] Also, the Act requires that [CB]'s rights under the United Nations Convention on the Rights of the Child ("the CRC")[5] must be respected and upheld. Therefore, the relevant rights and guarantees in the CRC must be considered too, especially those contained in articles 37, relating to arrest and detention, and 40 which relates to criminal proceedings against children.

[9] As will become clear, the protections provided currently under our domestic law for a young person during the investigation stage of alleged offending are not special and are markedly at odds with a young person's rights under the CRC. I will need to address how those differences are reconciled.

[10] In addition to the Act and the CRC, a young person's rights under the New Zealand Bill of Rights Act 1990 ("the BOR Act") are also relevant considerations.

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[3] Section 208(2)(h).
[4] "Young person" is defined in s 2 of the Act as a person of or over the age of 14 years but under 18 years. The meaning also extends to include some young adults for certain purposes under s 386AAA.
[5] United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC].

[11] Before turning to consider such things, it is necessary to set out the evidence about the decision to arrest [CB], the process followed, and that in relation to the interview recorded on DVD.

EVIDENCE

[12] [CB], his sister and his father, with [MA] and his mother, arrived at the [location 2] Police Station ("the station") at about 9.30 am on 11 August 2022. They were met soon afterwards by [Constable A], who asked how he could help them. When [MA]'s mother said they wanted to talk about the shooting in [location 1], and that the boys were involved, [Constable A] immediately stopped her from saying any more and explained that the matter was being investigated by the police crime squad and he needed to contact someone there.

[13] At 9.48 am, [Constable A] called crime squad supervisor, [Detective Sergeant B] and explained that two boys, with parents, were at the station wanting to talk about the shooting in [location 1]. He said they had not been questioned and asked for advice about the next steps. [Detective Sergeant B] said he would send two officers from his team to the station to speak with the boys and that they would give them their youth-rights caution when they arrived. Although [Detective Sergeant B] could not remember [Constable A]'s exact words during the conversation, the clear impression he had was that the boys were wanting to hand themselves in and were indicating that they were responsible for, or were involved in, the offending. Although he does not think the word "suspects" was used during the conversation, he accepted that the boys were suspects. He did not say anything to [Constable A] about arresting the boys.

[14] [Detective Sergeant B] sent an officer to Auckland Hospital where [the victim] was in the ICU. Because of her condition, the police were unable to get any information about the incident from her. Until hearing from [Constable A], the crime squad had no leads or suspects.

[15] At about 10.00 am, [Detective Sergeant B] phoned [Constable C] and [Constable D]. He directed them to go to the station, to speak to the two boys, deal

with one of them each and give them both the youth-rights caution. He assumed those rights would be given to the boys before the officers began speaking to them.

[16] During the discussion, [Detective Sergeant B] said [the victim] had been wounded and as such there were reasonable grounds to suspect that the offence of wounding with intent to cause grievous bodily had been committed. Section 214(2) of the Act[6] applied as this was a Category 3 offence carrying a maximum penalty of 14 years imprisonment. He also thought the boys may be in possession of the firearm used in the shooting, or have it hidden somewhere, and so s 214(1)(a)(iii) of the Act[7] might also apply.

[17] [Detective Sergeant B] explained to [Constables C and D] that the young people could be arrested but that a charging decision would be made later. However, he said that if the boys needed to be arrested, they could be. Because they were dealing with the boys inside the station, they could also be arrested because it was not practicable or safe to have them get up and be free to walk around the station.

[18] [Detective Sergeant B] considered alternatives to arrest but the information they had was very limited and he thought the alternatives to arrest did not achieve what was needed at that time. There was a firearm outstanding, they did not know who was involved, what clothing they were wearing and what vehicle was used. A concern was that the boys could get up and go and tamper with or destroy the evidence. There was also a concern about the risk to the public in relation to the outstanding firearm. The information the police had, indicated that this was a random crime involving someone driving around [location 1] shooting people. There had also been previous shootings that year in [location 1]. [Detective Sergeant B] therefore suggested that an arrest was likely to be appropriate and that the boys would probably need to be arrested to achieve the necessary goals.

[19] Although [Detective Sergeant B] acknowledged that they could have spoken to the boys voluntarily and not arrested them, the main concerns about adopting that approach were that the firearm was outstanding and, the boys could have left at any

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[6] Below [70].
[7] Below [69].

time or started walking around the station and might have had access to the firearm. He also thought they could be unlawfully detained if the police had them there at the station voluntarily despite believing they had enough to justify an arrest. He did not think it would have been lawful to keep them there voluntarily in such circumstances. He said that he was taught that if in your own mind a person is not free to go, then you are unlawfully detaining them if they are not arrested because they are being technically detained, and you are tricking them in to thinking they are there voluntarily.

[20] However, [Detective Sergeant B] told [Constables C and D] that the boys *could* be arrested rather than that they should be arrested. He said that if they turned up with all the evidence including the firearm, so that the public safety concerns were addressed, an arrest was perhaps not required. He conceded that it was hard for him to say they should be arrested without knowing all the relevant information. The person who was best placed to make the ultimate decision about arrest was the person who was dealing with them at the time who was making those enquires and could make that assessment in the moment. He therefore did not direct [Constables C and D] to arrest the boys but provided guidance and he accepted the possibility that an arrest might not be required.

[21] At about 10.15 am, [Detective Senior Sergeant E] was notified that the two young suspects were at the station wanting to "hand themselves in" in relation to the shooting. He started making his way to the station.

[22] At 10.22 am, [Constables C and D] arrived at the station. They were met by [Constable A] who explained that he had not given any youth-rights advice to the boys and then showed them into the room where the boys were waiting with the parents. [Constable C] was tasked with dealing with [MA] and [Constable D] with [CB].

[23] [CB] and his father agreed to accompany [Constable D] into an adjoining room. After entering, he asked [CB] for his name, date of birth and address. [CB]'s father introduced himself. [Constable D] then asked [CB] what he had come to the station for. [CB] said something like, "about the shooting. I shot the lady". [Constable D] then stopped [CB] saying anything further, arrested him and said he needed to give

him advice about his rights before they talked further. He said [CB] was in a very emotional state.

[24] When [Detective Senior Sergeant E] arrived at the station soon after this, he liaised with [Constables C and D]. In consultation with them, he made a plan to interview the two boys in the presence of their family members who were also at the station. [Detective Senior Sergeant E] did not have any input into the decision to arrest either of the boys. That decision had been made already and his thoughts turned to the charging process. [Constable D] told him that [CB] had made an admission about the shooting, but he did not say that the admission was made before [CB] received advice about his rights.

[25] [Detective Sergeant B] knew that [Constables C and D] would need help at the station because of the things that needed to be done in addition to interviewing the boys. He therefore spoke to [Detective Senior Sergeant E] who helped deal with such things as getting the firearm, seizing clothing and monitoring interviews. [Detective Senior Sergeant E] was best placed to manage such things and he took over command of the situation.

[26] At 11.01 am, [Detective Senior Sergeant E] had a telephone conversation with Youth Court prosecutor, [Detective Sergeant F]. They discussed whether the two boys should be charged and bail opposed, or whether they could be dealt with by way of the Family Group Conference ("FGC") process. The focus of the discussion centred around s 214(2) of the Act. That is, the seriousness of the charge and the public interest. They decided that the boys could be charged given the seriousness of the matter, reflected in the maximum penalty of 14 years imprisonment for the initial charge. In [MA]'s case, there was also the fact that he was already facing serious charges in the Youth Court.

[27] [CB], however, was not. He had never been charged with anything before, nor had he ever appeared in court. At the time of [Detective Senior Sergeant E]'s discussions with [Detective Sergeant F], the evidence against [CB] was lacking detail which was the reason they wanted to interview him. At that point they did not know

where the firearm was, who was responsible for the shooting, who was driving the car and who else was in it.

[28] For [Detective Senior Sergeant E], the public interest test was met. The community had expressed concern about what had occurred via media sources. The ongoing effect of other serious offences committed by young people in the [location 1] area was another consideration. [Detective Senior Sergeant E] said the public interest test he had in mind here was the test for prosecution and not the test for arrest. He felt that both boys should be charged in relation to the incident, but he went on to say that it did depend on what information came out of the subsequent interviews. [Detective Senior Sergeant E] was satisfied that there was enough evidence to charge [CB] at the conclusion of the interview given [CB]'s comments and the firearm that had been handed in. He disregarded the alternatives to charging [CB] due to the seriousness of the offending, the fact that they had outstanding people involved and ongoing enquiries to make. The seriousness of the matter warranted a degree of control in relation to [CB] and his movements, tracking down other potential offenders and witnesses and other evidence.

[29] When it was put to him that the police had virtually everything they wanted by the end of the interview, [Detective Senior Sergeant E] said they still did not know if the information was accurate, it had not been verified and there were potential further enquiries to be made. However, he conceded that no further evidence came to light.

The arrest

[30] [Constable D] said that [CB]'s utterance about "shooting the lady" in response to being asked why he had come to the station, was enough for him to suspect on reasonable grounds that [CB] had presented himself to make an admission about the shooting and so he arrested him. He believed that the legislative provision that empowered him to arrest [CB] was s 315 of the Crimes Act.

[31] Between his first conversation with [Detective Sergeant B] at about 10.00 am, and the arrest at 10.24 am, [Constable D] says he gave the issue of arrest independent thought. He considered interviewing [CB] without arresting him, but the concern was

the outstanding firearm and, because they were inside a police station, [CB] would be free to walk about inside the station which was a security issue. The use of a firearm elevated the public interest in an arrest especially because there had been other firearm related incidents in Auckland. That, plus the seriousness of the injuries to [the victim], elevated the public interest.

[32] As a result of his conversation with [Detective Sergeant B], [Constable D] knew that the two boys at the station were suspects in relation to the shooting and that they could be arrested. He also knew that [the victim] was in hospital in a critical condition having been shot in the chest. In the back of his mind, he thought it could become a homicide investigation. He and [Constable C] had been directed to deal with the boys as suspects and there was a discussion about the possibility of arrest. However, [Constable D] did not remember if [Detective Sergeant B] said the boys could be, or if they should be arrested, nor did he recall whether the grounds for arrest were discussed but accepted they could have been.

[33] The decision to arrest [CB] was made when they were in the room that he took [CB] and his father into. Before getting to the station, [Constable D] thought all possibilities were open and he was not necessarily going to arrest [CB] but just to assess the situation and take it a step at a time when they got there. He knew the decision about whether to arrest [CB] or not was for him to make. He kept no notes of what was going on during this part of the process. He did not make enquiries as to whether [CB] had ever been to a police station before, or whether he had ever been arrested or charged with a criminal offence before. He accepted that this would have been useful information to obtain in advance of speaking to [CB].

[34] Despite the importance of the utterance about shooting the lady, [Constable D] did not record that in his notebook. He does not recall the exact order of events but believes that he gave [CB] his rights first and then arrested him. He accepts it could have been the other way round. Apart from giving [CB] advice of his rights, he did not remember explaining what arrest meant nor did he explain to [CB] that having been arrested he was not free to leave the station. [Constable D] could not be sure whether he told [CB] why he was arrested. His initial evidence was that he said it was

for shooting the lady "or something" but he subsequently said he was under arrest for wounding or "something along those lines".

[35] Before asking [CB] why he had come to the station, he did not explain that he did not have to answer that question, nor did he have to speak about anything. He now accepts he should have done so. Up until that point, there was no discussion or indication given to [CB] or his father that they had a choice as to whether to stay at the station or not. The time it took to move from one room to the other, and for the question and answer about why [CB] had come to the station to occur, was a minute or less according to [Constable D]. He was not sure whether he asked [CB] other questions at this point, such as who else was involved and what car was used. He thinks he did that later, but accepts it is possible he asked those questions then and he regrets not making notes at the time. He did not ask [CB] whether he understood that he was to be detained and just assumed he understood. He did not explain to [CB] the jeopardy he faced including [the victim]'s critical condition in hospital, nor the maximum penalty for the charge he was likely to face based on the view the police were taking at that time.

[36] Having taken [CB] to a different room in the police station, he also believed it was fair to arrest him. He had closed the door and thought it was best practice to arrest him and give him his rights advice then rather than waiting and doing so later if [CB] tried to leave the room. Also, he was not going to tell [CB] he was free to go while the firearm was still outstanding because that was not in the public interest.

[37] He accepted however that [CB] had given no indication that he wanted to leave the room and acknowledges that [CB] was compliant throughout the entire process.

[38] [Constable D] did not accept that he invited an inculpatory statement from [CB] by asking him the question about why he had come to the station before giving him the caution and thought he was doing everything correctly. Nor did he accept that there were other reasonable alternatives to arrest at that stage. In his view, it was both fair and best practice to arrest [CB] immediately.

Initial rights advice

[39] [Constable D] gave [CB] advice about his rights by reading from the Checkpoint App on his police cell phone. He says he ensured that [CB] understood each of his rights by asking him what they meant to him. This was done for a first time upon arresting [CB] then a second time in the DVD interview. However, he did not record any of what was said by either of them in his notebook when the rights were first given. He says this was because he was going to do a DVD interview and would be repeating the rights then. He did not make any enquiries about [CB]'s level of verbal and written comprehension nor when he had last attended school and at what level he was then.

[40] When explaining the rights to [CB] before the DVD interview, he did not explain what a lawyer is or how one might assist him. He just told him that he can speak to a lawyer if he would like to. Because [CB] was 16 years old, [Constable D] believed he would know what a lawyer is and so did not explain that, but he acknowledges he did not check [CB]'s understanding about this. [Constable D] did not explain that [CB] might not go to court or that a decision still had to be made about whether he would be charged with a criminal offence.

[41] [Constable D] did not ask [CB] or his father whose idea it was to come into the station, but it did not appear to him that [CB] was there under coercion or pressure. However, there was no enquiry at that stage about their motivation for voluntarily coming into the station.

[42] [Constable D] though that it would be best practice rather than standard practice to record a young person's responses when they are asked to articulate their understanding of the right's advice but eventually conceded that he should have made more notes in his notebook.

Nominated person

[43] After being arrested, and before the DVD interview, [CB] was asked who he wanted to nominate to support him, and he chose his father. [Constable D] gave [CB]'s father the nominated person form but cannot recall when he did so.

[44] Initially, [Constable D] could not recall whether he explained the nominated person's duties to [CB]'s father before or after he asked [CB] whether he wanted to do a DVD interview but later confirmed that the nominated person process was carried out after he had obtained [CB]'s agreement to do the DVD interview.

[45] [Constable D] does not "fully remember" how he explained the nominated person process and duties to [CB]'s father and whether he checked to see if he understood the duties. He says his standard practice with nominated people is to go through the form with them, and also get them to read the form and tell them to ask him questions about it if they do not understand anything. He assumes he followed his standard practice on this occasion but does not remember exactly what was done nor how long it took. He kept no notes about these things. He also tells nominated persons that they must not answer questions on the young person's behalf and that if they want to talk to the young person to let him know because the interview can be put on hold.

[46] [Constable D] thinks that the duration of the conversation he had with [CB]'s father about the nominated person role was about five minutes. He remembers telling [CB] and his father they could talk in private before deciding whether to continue on with the DVD but did not say they should do so. On the police check list form, [Constable D] recorded that the consultation period provided for [CB] and his father was "at all times".

[47] Between 10.24 am and 11.04 am, [CB] and his father were taken to the DVD interview room while [Constable D] went to prepare notes for the interview. He thinks he left the room between giving [CB]'s father the nominated person form and the start of the interview, but he cannot remember timing and cannot remember if he left the

room more than once. He thinks that he would have left for more than a minute and for around about five minutes.

DVD Interview

[48] There are two features of the interview that are the focus of counsel's submissions: the way [CB]'s rights were explained to him by [Constable D] and the way that [CB]'s father carried out his role as the nominated person.

Rights

[49] The interview began by [Constable D] reminding [CB] that he had been previously given his rights, before proceeding to recite and explain them again:

> [D] And ah, as I gave you your caution rights before, I just repeat them again and make sure you understand.
>
> [CB] Yep.
>
> [D] The, you have the right to remain silent. Ah what does it mean to you?
>
> [CB] I can just stay silent.
>
> [D] You do not have to make any statement or answer any questions.
>
> [CB] Just be quiet pretty much.
>
> [D] And so mate, basically if you do not want to answer any of my question, you don't have to.
>
> [CB] Yeah.
>
> [D] Um, if you agree to make a statement ah and answer my questions ah you can change your mind at any time and stop. What does it mean to you?
>
> [CB] It means I can, just stop at any moment.
>
> [D] Yeah. Anything you say will be recorded and may be given ah in evidence in the court ah this means that if you are taken to court ah, what you say maybe re-told to the Judge or jury…
>
> [CB] …Yeah.
>
> [D] …what does it mean to you?
>
> [CB] It's pretty much what it says.
>
> [D] Ah, can you please tell me, just in your words

[CB] Um, whatever I could say, can be told in, yeah, in court.

[D] Yep. You have the right to speak to a lawyer or any person nominated by you.

[CB] Yep.

[D] Or both without delay and in private before deciding whether to make any statement or answer any questions. What does it mean to you?

[CB] I can talk to my dad or my lawyer before I do anything.

[D] Yep, before you want to answer any questions.

[CB] Oh, (inaudible) say anything yeah.

[D] Yeah. You have the right to have your lawyer or nominated person or both ah with you, while you make any statement or answer any questions. What does this mean to you?

[CB] Oh can you say that again please.

[D] Yeah. So you have the right to have your lawyer or nominated person present when you make a statement or answer any questions.

[CB] That, I don't know how to explain that.

[D] Yeah, so, if you wanna make a statement ah you can have your nominated person already here or you can have your lawyer as well.

[CB] Yeah, yeah.

[D] Yeah, ah, police have a list of lawyers you may speak to for free.

[CB] That means I can get me a lawyer, like provide my me one.

[50] [Constable D] says that his guidelines are to give the rights, make sure they are explained, that they do understand and that at the end of the day it is for them to choose if they want a lawyer there or not. He said the police, "…are not expected to explain each definition of what a judge is, what the jury is…it's not standard practice and I have not done it." He did not explain how a judge and a jury might use [CB]'s statements when deciding if he had committed a criminal offence.

[51] [CB] was distressed and crying at times during the interview whenever the topic turned to the woman he had shot. He made full and frank admissions about his involvement in the shooting during the interview.

Nominated person

[52] [CB]'s father intervened several times during the interview. On some occasions that was to encourage [CB] to talk to [Constable D], telling him to "just slow down", "take your time" and telling [CB], "it's alright son, I got you".

[53] At one point he interjected to clarify the date when the shooting occurred. At another, when [CB] became frustrated by having to repeat information to [Constable D], his father told him to "…just keep cool, it's hard."

[54] He later interjected to say, "I advised my son to only answer questions relating to him and the events…not to do with anyone else" and, "we [are] here to deal with his stuff."

[55] Later on, he told [Constable D] that he had the firearm used in the shooting in his car to hand in and that it was his older son's air rifle. This was the first mention of the whereabouts of the firearm. [Constable D] saw no issue with [CB]'s father raising the whereabouts of the firearm.

[56] At the end of the DVD interview, [CB]'s father says:

> "…I just know that ah, friends of the victim um, went round and threatened violence on [CB] and on [MA]" and that, "…they have until 12 o'clock today to turn up the shooter or they were gonna come and do something about it."

[57] [Constable D] responds by saying they will address that matter after the interview. In his evidence, [Constable D] acknowledged that this information provided probable motivation for [CB] and his father to have voluntarily attended at the police station and may have impacted [CB]'s decision to make a statement to the police.

After the interview

[58] After the DVD interview was finished, [Constable D] did numerous things, including getting [CB] to mark-up a map showing the location of things relevant to the incident, taking a series of photographs of [CB], asking him additional questions about ammunition, getting information about what he was wearing and where that

clothing was. All of this happened without reminding [CB] of his rights or recording these things in any way as he was required to do in accordance with the Chief Justice's Practice Notice on Police Questioning[8] ("the CJ's practice note").

[Constable D]'s training and experience

[59] In August 2022, [Constable D] had been a constable for four and a half years. He had just finished his detective development course but had not been given the designation of Detective Constable. During that period, he had arrested and interviewed about five young people. He had received no specialised training in relation to dealing with young people, just basic police training. The first training he received about how to arrest a young person was at police college. He said he may have done some online training since then but he did not remember when and could not describe what he had learnt from any such training.

[60] [Constable D] said he knew that the law for arresting young people is different to adults because young people are more vulnerable and not mentally as mature or capable of making decisions. He said the principles applying to young people include that their interests should be paramount, and they should not be put into the justice system unless it is serious enough. He knew young people have the right to have a nominated person and/or a lawyer present if they want one. Apart from that, young people should have just normal courtesy like needing to have breaks. He was not aware of obligations under the CRC that might apply nor any under the Treaty of Waitangi. He said he was aware of the CJ's practice notice, "but not to the fullest degree".

Report to the Commissioner of Police

[61] [Constable G] is a youth aid officer who was present at the station on the morning of 11 August 2022 and was briefed by [Constable A] about the two young people who had come to the station with parents. [Constable G] was responsible for submitting the arrest notification to the Commissioner. The only conversation he had with [Constable D] was in relation to the time of arrest.

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[8] Elias CJ "Practice Note on Police Questioning (s30(6) Evidence Act 2006)" (16 July 2007).

[62] The statutory provision under which [Constable G] recorded the arrest being made was s 214(2) because [CB] had made admissions about being involved in a serious offence carrying a 14-year imprisonment maximum penalty and because it was in the public interest to arrest. He said there was discussion amongst the Youth Aid team who all agreed that it was the appropriate reason to arrest. That discussion did not include [Constable D].

LAW

[63] The Act governs the Youth Justice system and the Youth Court's place in it. It specifies purposes and principles which must govern the way decisions are made about [CB] by everyone exercising powers in relation to him. The purposes and principles most relevant in this case must be considered as well as the provisions governing arrest, the Youth Justice pathways and the rights of young people when questioned, charged or arrested.

The Act and its purposes[9]

[64] The purposes of the Act are to promote the well-being of young people,[10] their family, whānau, hapū and iwi[11] by complying with a long list of obligations including the following:

> (a) Adopting approaches that are designed to affirm mana tamaiti, are centred on their rights, promote their best interests, advance their well-being, address their needs, provide for their participation in decision making that affects them, advance positive long-term health, educational, social, economic, or other outcomes and are culturally appropriate and competently provided.

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[9] Section 4.

[10] Because [CB] is a young person, I will only refer to "young person" or "young people" throughout the rest of this judgment and not also refer to children unless it is relevant.

[11] [CB] is identified in some documents on file as being of Māori and Pakeha ethnicity. However the information is very limited and his hapū and iwi affiliations are referred to as "currently unknown".

(b) Young people must be supported and protected to prevent them from suffering harm, including harm to their development and well-being as well as preventing offending or reoffending or in response to offending.

(c) Families, whānau, hapū and iwi must be assisted at the earliest opportunity to prevent young people from offending or reoffending and be assisted to fulfil their responsibility to meet the needs of young people.

(d) Responses to alleged offending by young people must be carried out in a way that promotes their rights and best interests, acknowledges their needs, prevents or reduces offending or future offending, recognises the rights and interests of victims, holds them accountable, and encourages them to accept responsibility for their behaviour.

Four primary considerations[12]

[65] In the Youth Justice provisions of the Act, there are four primary considerations. In relation to each of these, regard must be had to the general principles[13] and the Youth Justice principles of the Act:[14]

(a) the well-being and best interests of the young person; and

(b) the public interest (which includes public safety); and

(c) the interests of any victim; and

(d) the accountability of the young person for their behaviour.

[12] Section 4A.
[13] Section 5.
[14] Section 208.

General principles[15]

[66] Every person who exercises any power under the Act must be guided by the principles in s 5 which include the following:

(a) a 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 young person must be at the centre of decision making that affects them, in particular, their under the CRC must be respected and upheld, and they must be treated with dignity and respect and protected from harm;

(c) taking a holistic approach that sees a young person as a whole person including a wide range of considerations of both immediate significance as well as long term ones such as developmental potential;

(d) endeavours should be made to obtain the support of a young person for the exercise or proposed exercise of any power under the Act and endeavours should also be made to obtain the support of the parents for the exercise of any power under the Act in relation to that young person.

Youth Justice principles[16]

[67] The most relevant Youth Justice principles are:

(a) unless the public interest requires otherwise, criminal proceedings should not be instituted against a young person if there is an alternative means of dealing with the matter;[17]

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[15] Section 5.
[16] Section 208.
[17] As a result of this principle, a broad average of about 80 percent of young people who come to police attention are dealt with in the community by alternative action and that includes some young people facing serious charges. Therefore, most young people who appear in the Youth Court are facing serious

(b) any measures for dealing with offending by young people should be designed to strengthen the family of the young person concerned and to foster the ability of families to develop their own means of dealing with offending by young people;

(c) any measures should have proper regard for the interests of any victims and the impact of offending by them;

(d) the vulnerability of young people entitles them to special protection during any investigation relating to the commission of an offence by them.

Youth Justice pathways

[68] An arrest is one of the two pathways by which a young person can be brought before the Youth Court. However, the power to arrest a young person without warrant is limited.

[69] Under s 214(1) of the Act, a police officer can only arrest a young person if satisfied, on reasonable grounds, that it is necessary to:

(a) ensure the young person's appearance in court; or

(b) prevent that young person from committing further offences; or

(c) prevent the loss or destruction of evidence relating to an offence the young person is suspected of committing, or preventing interference with any witness; and

in respect of all three grounds, proceeding by way of summons would not achieve that purpose.

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charges some of whom have not been arrested but have been through the FGC process before being charged and brought to court.

[70] Under s 214(2), a young person can also be arrested if there is reasonable cause to suspect that he or she has committed a category 4 offence or a category 3 offence for which the maximum penalty is life imprisonment or at least 14 years, and the constable believes, on reasonable grounds, that the arrest of the young person is required in the public interest.

[71] Within three days of making an arrest, the officer must provide a written report to the Commissioner of Police stating the reason why the young person was arrested without warrant.

[72] There is only one other pathway by which a young person can be brought before the Youth Court. When a police officer believes a young person has committed an offence, but grounds for arrest are not met, a charging document cannot be filed in court unless the following criteria have been met:[18]

(i) The officer believes criminal proceedings are required in the public interest; and,

(ii) Consultation has taken place between the officer and a youth justice FGC coordinator; and,

(iii) The matter has been considered at a youth justice FGC.

[73] In this way, the FGC operates as a diversionary mechanism to avoid charging young people. It is one of the ways of giving effect to the first of the Youth Justice principles, that a young person should not be charged and brought to court if there is an alternative means of dealing with the matter.

Domestic case law

[74] The onus is on the police to satisfy the Court that the relevant conditions under s 214 of the Act are met.[19]

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[18] Section 245.
[19] *Police v Z K W-W* [2013] NZYC 580 at [17].

[75] In YP v The Youth Court at Upper Hutt Mallon J said:[20]

> "An arrest ensures that criminal proceedings are commenced promptly – they do not need to await the consultation and family group conference. This might be appropriate where an offence is particularly serious and there is a need for the community to see that prompt and adequate steps are being taken."

[76] And further on in the same judgment, her Honour made the following comments about the public interest:[21]

> "An arrest under s 214(2) bypasses the steps that must be taken in s 245 before any information can be laid. Those steps include a requirement that the informant believe that criminal proceedings against the young person are 'required in the public interest'. Where there is reasonable cause to suspect that a purely indictable offence has been committed, criminal proceedings will ordinarily be appropriate. When the arrest procedure is invoked the young person does not receive the potential benefit that may arise from consultation between the informant and a youth justice co-ordinator and consideration of the matter at a family group conference. The public interest in an arrest should therefore be such as to outweigh the objectives of those requirements in s 214."

[77] Mallon J said that because the term "public interest" is not defined in the Act, it was intended to be interpreted broadly.[22] Her Honour also stated that the seriousness of the alleged offence is a relevant consideration when assessing whether the arrest is in the public interest.[23] The matters referred to in s 214(1) are also relevant in considering the public interest. This includes the need to ensure bail conditions are set where there is a risk of further offending or interference with witnesses.[24]

[78] In *R v H,* Simon France J held that consideration of the public interest includes the principles set out in ss 4, 5 and 208 of the Act.[25] He said:[26]

> "The statutory test focuses on the officer's belief being based on reasonable grounds. This allows scope of competing views on the wisdom of the decision without making it unlawful. I have noted I consider it was an incorrect decision but that is not the appellate issue. I consider it was a wrong decision because greater weight should have been given to keeping a child out of the Court system, and to giving the Act's alternative processes a chance.

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[20] *YP v Youth Court at Upper Hutt* HC Wellington CIV-2006-485-1905, 30 January 2007 at [58].
[21] At [57].
[22] At [56].
[23] At [58].
[24] At [59].
[25] *R v H* [2017] NZHC 3223 at [15].
[26] At [23].

Rights of a young person when questioned, charged or arrested

[79] Sections 215 to 226 of the Act govern the rights of young people when questioned, charged with an offence, or arrested and the admissibility of statements made by them. The following are the parts of those sections that are most relevant here.

[80] An officer who has reasonable grounds to suspect that a young person has committed an offence is required to explain the following things before asking the young person any question that is intended to obtain an admission:[27]

(a) the young person is under no obligation to make a statement; and

(b) if he or she consents to make a statement, the consent can be withdrawn at any stage; and

(c) any statement made can be used in evidence in any proceedings; and

(d) the young person is entitled to consult with a lawyer and any person they nominate.

[81] If a young person makes an enquiry of an officer in relation to any of the matters in s 215, the officer must explain those matters to the young person.[28]

[82] Those rights must also be explained to the young person by an officer upon arrest.[29]

[83] The explanation of rights shall be given in a manner and in language that is appropriate to the age and level of understanding of the young person.[30]

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[27] Section 215.
[28] Section 215A.
[29] Section 217.
[30] Section 218.

[84] The consequence of not complying with s 215 is inadmissibility of the statement[31] unless it is a spontaneous statement[32] or there is reasonable compliance with the requirements of s 221.[33]

[85] A young person may nominate a parent, guardian, adult family or whānau member, or any other adult to consult with before making a statement.[34] The nominated person must:

(a) take reasonable steps to ensure that the young person understands the rights in s 215 that are explained to them by the officer; and

(b) support the young person before and during any questioning and when making a statement if they agree to make one.

[86] It is also important to note that under s 225 of the Act, a young person also has the benefit of the protections available to adults under the Bill of Rights Act 1990 ("the BOR Act") and the Evidence Act.

Domestic case law

[87] The onus is on the police to show, on the balance of probabilities, that [CB] understood his rights and was in a position to make an informed decision whether or not to exercise them.[35]

[88] The following guidance has been provided by the Higher Courts in relation to these issues:

[89] In *R v Z*, the Court of Appeal said the starting point is the over-riding principle in s 208(h).[36] This section places a positive obligation on investigators to provide special protection to young people during any investigation. This must be done in a

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[31] Section 221.
[32] Section 223.
[33] Section 224.
[34] Section 222.
[35] *Elia v R* [2012] NZCA 243, (2012) 29 FRNZ 27 at [80]. *R v Z* [2008] NZCA 246 at [40].
[36] At [32].

manner that respects the autonomy of the young person, with (if possible) the support of his or her parents in accordance with the principles set out at s 5(d)[37] and s 5(e)[38] of the Act.[39] It also requires taking into account any special characteristics of the particular child or young person, such as any medical condition or disability.[40]

[90] The special protection afforded by the Act requires the use of language appropriate to a young person's age and level of understanding, and that questioning be, as far as possible, at age-appropriate times and in age-appropriate conditions.[41]

[91] Police officers need to explain rights to a young person in a manner that ensures that the particular young person understands the various rights, but also how to exercise them. The term "explain" in s 215 as against "inform" in s 23 of the BOR Act, means there is a necessity to ensure full comprehension reinforced by the existence of s 215A. This requires further explanations to be given where a child or young person makes an inquiry or what could reasonably be interpreted as inquiry.[42]

[92] The Act is drafted on the assumption that most young people will have little or no understanding or experience of what a lawyer is, how to instruct one, and what functions a lawyer will perform hence the use of the more expansive word "explain".[43] Merely informing a young person of the right to a lawyer, even in age- appropriate language would not meet the requirements of s 218.[44]

[93] Section 215(1)(f) requires police officers to explain the right to instruct a lawyer, the assistance that a lawyer could provide, and the mechanics of instructing a lawyer in a manner which depends on the age and level of understanding of the particular young person, with the view of ensuring that he or she understands the right and can make an informed decision whether or not to exercise that right.[45]

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[37] Requires the wishes of the young person to be taken into account.
[38] States endeavours should be made to obtain the support of parents.
[39] At [32]
[40] At [33].
[41] At [33].
[42] At [35].
[43] At [37].
[44] At [38].
[45] At [42].

[94] Also, in *R v Z*, the Court comments that the role of the nominated person includes taking reasonable steps to ensure the young person understands the rights explained to them and provide support during the interview. The Court said the nominated person is not merely a cipher. To carry out their role they need to know the jeopardy faced by the young person they are asked to support.[46]

[95] The Court of Appeal recorded its concern that the young person in that case was facing questioning over a serious charge without having had the benefit of legal advice and commented that there must be a real issue as to whether more ought to be done to try and ensure that a young person in Z's situation takes legal advice, given the duty to offer special protection under s 208(h).[47]

[96] The Court also commented with approval on the Canadian approach of giving a brochure to parents and guardians, positively encouraging them to ensure that legal advice is obtained for their children and telling them not to urge their children to "confess" straightaway as this will rarely be in their best interests.[48]

[97] However, in both of its judgments in the case of *Riley Campbell v R*, the Court of Appeal pulled back from some of the comments it had made in R v Z.[49] For example:

(a) In relation to the Canadian approach of providing a brochure, it said that those comments did not go so far as to impose a positive obligation on a police officer to take that step.[50]

(b) It is not part of the statutory scheme that the role of a lawyer be explained to a young person, it is simply "…highly desirable this occur since the obligation under [the Act] is to explain the rights to the young person."[51]

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[46] At [87].
[47] At [92].
[48] At [93].
[49] *Campbell v R* [2014] NZCA 376 [first judgment]; and *Campbell v R* [2015] NZCA 452 [second judgment].
[50] At [27] of the first judgment.
[51] At [41] of the second judgment.

(c) Although it is good practice for a police officer to ask a suspect whether they wish to have a lawyer (after being given advice as to their right to have one) that is not prescribed practice.[52]

(d) Although the statutory duty on a nominated person is to take reasonable steps to ensure that the young person understands their rights, the Act does not require a best interests approach on the part of the support person.[53]

[98] In making those comments, the Court referred to comments in *R v S* that the legislature did not envisage a comprehensive judicial enquiry into the nature and quality of the support given by a nominated person.[54] The Court then went on to say:[55]

> Here Mrs S advised her son in effect to face up to the position he was in and to tell the truth. Is the Court to gainsay such a decision of the parent when understandably the Act places emphasis on the family?

[99] Miller J made comments in a similar vein in *A v R*, relied upon here by the police:[56]

> The role of a support person is to place the child or young person in a position where mature judgment can be brought to bear, and to provide support. It is not to act as a legal advisor. Parents head the list of those who may serve as nominated persons. The legislature must have recognised that parents may lack the ability to appreciate the nature of the legal risks faced by the child or young person…The cases show that parents may well advise a child to tell the truth in circumstances where a lawyer's advice, and the child's preference, would be to say nothing.
>
> …there is no presumption that police or the nominated person have failed a child or young person who elects not to take legal advice and chooses to make a statement…[the legislation] aims to place the child or young person in the position of an adult, who may choose to make a statement in circumstances where a lawyer would counsel against it.

[100] The Court in *Campbell* also made it clear that the question as to whether the explanation of rights given was adequate is, "an intensely fact specific inquiry."[57] The Court justified qualifying the comments it had made in *R v Z* in the ways set out above,

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[52] At [43] of the second judgment.
[53] At [25] of the first judgment and [51] of the second judgment.
[54] *R v S* (1997) 15 CRNZ 214.
[55] At 220.
[56] *A v R* HC Auckland CRI 2003-292-1224, 23 June 2004 at [40] and [41].
[57] At [18] of the first judgment.

on the basis that the young person in *R v Z* was aged 14 years, whereas the young person in *Campbell* was aged 16 years and four months.[58]

Rights and guarantees under the CRC and other UN instruments

[101] The Act requires that any person exercising powers under it must respect and uphold a young person's rights under the CRC.[59]

[102] Article 37 is relevant because [CB] had been arrested and was detained. Article 37 (d), which is concerned with procedural rights, provides that a young person deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance. All of the rights in article 37 are described as something every [young person] **shall** have. [Emphasis added].

[103] Article 40 is also relevant. It aims to uphold the rights and ensure the safety of all children in conflict with the law who come into contact with the Youth Justice system. Article 40(2)(b) sets out fundamental rights a young person accused of infringing the criminal law has, including the right to legal or other assistance. These are described as being "**guarantees**" that every young person has "**at least**". [Emphasis added].

[104] It is important to look carefully not only at the Articles of the CRC, but also at the guidance the UN provides from time to time on its interpretation and application.

UN General Comment No. 24 (2019)

[105] On 18 September 2019, the UN's latest General Comment on Child Justice ("the UNGC") was issued, providing States parties with guidance on steps that should be taken to uphold young person's rights under the CRC.[60]

[106] The introduction to the UNGC includes the following:

> 2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and

[58] At [18] of the first judgment.
[59] Section 5(1)(b)(i).
[60] Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system UN Doc CRC/C/GC/24 (18 September 2019).

for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.

3. The committee acknowledges that the preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in Article 40, every child alleged as, accused of or recognised as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

[107] Diversion of young people away from formal justice processes, and in particular criminal justice processes, is a strong theme in the UNGC. It says:

15. …Diversion involves referral of matters away from the formal criminal justice system, usually to programmes or activities. In addition to avoiding stigmatisation and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost effective.

16. Diversion should be the preferred manner of dealing with children in the majority of cases. States Parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate. Opportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process. Diversion should be an integral part of the Child Justice system, and, in accordance with art. 40(3)(b) of the Convention, children's human rights and legal safeguards are to be fully respected and protected in all diversion processes and programmes.

…

72. The decision to bring a child into the justice system does not mean the child must go through a formal court process. In line with the observations made above in section IV.B, the Committee emphasizes that the competent authorities – in most States the public prosecutor – should continuously explore the possibilities of avoiding a court process or conviction, through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings.

[108] In relation to art 40, the UNGC includes the following guidance:

D. Guarantees for a fair trial

38. **Article 40 (2)** of [the CRC] contains an important list of rights and guarantees aimed at ensuring that every child receives fair treatment and trial…**It should be noted these are minimum standards**. States parties can and should try to establish and observe higher standards.

39. The committee emphasises that **continuous and systematic training of professionals in the child justice system is crucial** to uphold those guarantees. Such professionals…should be well informed about the physical, psychological,

> mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.
>
> 41. States parties should enact legislation and **ensure practices that safeguard children's rights from the moment of contact with the system,** including the stopping, warning or arrest stage…
>
> **Legal and other appropriate assistance (art. 40 (2) (b) (ii))**
>
> 49. States should **ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings**, in the preparation of the defence, and until all appeals and/or reviews are exhausted.
>
> 60. The child must have access to legal or other appropriate assistance, **and** should be supported by a parent, legal guardian or other appropriate adult during questioning
>
> [Emphasis added].

Other UN instruments

[109] Other UN instruments that provide guidance on the application of the CRC include the Beijing Rules,[61] Havana Rules,[62] and Riyadh Guidelines.[63] These documents are not legally binding but they do provide helpful guidance in determining what is required to respect and uphold the rights of young people under the CRC.

[110] Part 7 of the Beijing Rules provides that various rights, including the right to silence, the right to counsel **and** the right to the presence of a parent or guardian, shall be guaranteed. [Emphasis added].

[111] Rule 15 states that throughout the proceedings a young person shall have the right to be represented by a legal advisor and also that parents or a guardian are entitled to participate unless denied that by a competent authority. The commentary to Rule 15 states that legal counsel and Legal Aid are **needed**, whereas the right of parents or guardians to participate **should be viewed as general psychological and emotional assistance. [**Emphasis added].

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[61] United Nations Standard Minimum Rules for the Administration of Juvenile Justice GA Res 40/33 (1985) [Beijing Rules].

[62] United Nations Rules for the Protection of Juveniles Deprived of their Liberty GA Res 45/113 (1990) [Havana Rules].

[63] United Nations Guidelines for the Prevention of Juvenile Delinquency GA Res 45/112 (1990) [The Riyadh Guidelines].

[112] Rule 18 of the Havana Rules states that young people should have the right to legal counsel and to be able to regularly communicate with them.

European Court of Human Rights cases

[113] Although not legally binding here, it is instructive to look at the approach taken by courts where rights under UN instruments, such as the CRC, have been considered. On 27 November 2008, the Grand Chamber of the European Court of Human Rights ("ECHR") in *Salduz v Turkey,* gave judgment on the issue of an accused person's right to legal representation at the investigation stage of proceedings and the fundamental importance of doing so if the accused is a minor. Amongst other important things, the Court said:[64]

> 54. …the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at trial….
>
> 55. …the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective"…access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict that right…The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.
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> …
>
> 60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age [17 in that case]. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody…the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

[114] That decision was followed by *Panovits v Cyprus,* where the ECHR expanded on the issue of a young person's right to a lawyer at the early stages of a police investigation:[65]

> 67. …when criminal charges are brought against a child, it is essential that he be dealt with in a manner that takes full account of his age, level of maturity and intellectual and emotional capacities…The right of an accused minor to effective participation in his or her criminal trial requires that he be dealt with due regard to

[64] *Salduz v Turkey* Grand Chamber, ECHR 36391/02, 27 November 2008.
[65] *Panovits v Cyprus* ECHR 4268/04, 11 March 2009 at [67].

> his vulnerability and capacities from the first stages of his involvement in a criminal investigation and, in particular, during any questioning by the police…
>
> 68. …The Court considers that given the vulnerability of an accused minor and the imbalance of power to which he is subjected by the very nature of criminal proceedings, a waiver by him or on his behalf of an important right…can only be accepted where it is expressed in an unequivocal manner after the authorities have taken all reasonable steps to ensure that he or she is fully aware of his rights of defence and can appreciate, as far as possible, the consequences of his conduct.

Reconciling the differences

[115] Clearly, there is a significant difference between the protections provided for a young person under the Act, and in the domestic cases, and those provided under the CRC, in relation to the right to legal representation at the very first point of contact with police (and in many other respects too). It is therefore necessary to reconcile those differences.

[116] Where a conflict between a statutory provision and a treaty provision is irreconcilable, the Courts will apply the domestic statutory provision:[66]

> "if the terms of the domestic legislation are clear and unambiguous, they must be given effect in our courts whether or not they carry out New Zealand's international obligations".

[117] However, there is increasing recognition of the need to develop the common law consistently with international treaties to which New Zealand is a party.[67] As JF Burrows puts it:

> …"if a statute touches on the subject-matter of the treaty, its interpretation can be influenced by the principle that the legislature is unlikely to have legislated in a manner contrary to its international obligations". Ratification can only enhance the importance of an international instrument for statutory interpretation purposes.[68]

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[66] See *Ashby v Minister of Immigration* [1981]1 NZLR 222 CA at 229, per Richardson J.

[67] See *Hosking v Runting* [2005] 1 NZLR 1; (2004) 7 HRNZ 301 (CA) at [6], where the New Zealand Court of Appeal referred to the development of the common law consistently with international obligations as "an international trend". It continued by stating that "the historical approach to the state's international obligations as having no part in the domestic law unless incorporated by statute is now recognised as too rigid. To ignore international obligations would be to exclude a vital source of relevant guidance".

[68] *Graeme Austin The UN Convention on the Rights of the Child – and the domestic law* (1994) 1 BFLJ 63.

[118] In *Ye v Minister of Immigration,* Glazebrook J stated:[69]

> "Although international instruments are not directly incorporated into domestic law it is assumed, as a matter of statutory interpretation, that insofar as their wording allows, statutes should be read in a way which is consistent with New Zealand's international law obligations…"

[119] In that case, the Supreme Court adopted the construction which,

> "[gave] effect to the principle that Parliament has legislated consistently with international obligations unless the contrary is clearly shown or unless the language used does not allow that outcome"[70] and preferred the reading which "more appropriately serv[ed] the statutory purpose."[71]

[120] Recently, in *TUV v Chief of New Zealand Defence Force* the Supreme Court said that it is well established that legislation should be read, so far as possible, consistently with New Zealand's international obligations.[72]

[121] Most recently, the Court of Appeal said the same thing in *Dickey v R,*[73] a case concerning the sentencing of a young person for murder.

[122] On numerous occasions over the years, the higher courts have endorsed using articles of the CRC and the other UN instruments referred to above as aids to interpret our domestic law. For example, in *TV3 v R*[74] Winkelmann J, then in the High Court, faced the issue of whether or not to suppress details in a trial where a young person was convicted of manslaughter. Against the need for open justice enunciated in *Lewis v Wilson & Horton Ltd,*[75] Winkelmann J noted:

> [11] However, against this must be balanced those matters I identified in my judgment of 30 June 2006 in relation to the State's particular obligations to young offenders, and in particular article 8 of [the Beijing Rules]…
>
> [12] Also relevant are the provisions of Article 40 of [the Convention]…

[123] Other examples of the higher courts using these instruments to help interpret and apply our domestic law in cases involving young people include *Derrick-Hardie*

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[69] *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104 at [84].
[70] At [32].
[71] At [38].
[72] *TUV v Chief of New Zealand Defence Force* [2022] NZSC 69 at [98].
[73] *Dickey v R* [2023] NZCA 2 at [112].
[74] *TV3 v R* HC Auckland CRI 2005-92-14652, 7 July 2006.
[75] *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 at 566.

v Police,[76] *R v K*,[77] and *R v Rawiri*[78] all of which pre-date the July 2019 amendments to the Act. Up to that point, the CRC was merely an aid to interpret and apply our domestic law.

[124] The requirement now that a young person's rights under the CRC must be respected and upheld means they must be given more weight than they were before 1 July 2019. The rights a young person has under the Act must now be read in a way that is consistent with our international obligations under the CRC. Those obligations include ensuring that a young person has the protection of rights guaranteed to them as minimum standards in the CRC and other UN instruments I have just referred to. The ECHR cases stress why a young person's right to legal representation during all police interrogations is of fundamental importance.

The BOR Act

[125] As mentioned above,[79] young people also have the benefit of protection under the BOR Act. The higher courts have recognised this is various contexts. For example, in *DP v R,* the Court of Appeal explained that a court must recognise the CRC and s 25(i) of the BOR Act in cases involving young people.[80]

> [10] … When dealing with a child charged with a criminal offence, a Court must recognise the United Nations Convention on the Rights of the Child (UNCROC) and s 25(i) of the New Zealand Bill of Rights Act 1990 (NZBORA). UNCROC reinforces the desirability of promoting a child's reformation and reintegration into society, based on the assumption that he or she is capable of fulfilling a constructive role as an adult. The guarantee in 25(i) of the NZBORA, that a child charged with an offence be dealt with in a manner that takes account of his or her age, is similarly justified by the desirability of promoting the child's rehabilitation. … As Ms Markham acknowledged, both UNCROC and NZBORA place children in a different category from adults by recognising that they require special protection when appearing before criminal courts.
>
> [11] … When interpreting the s 25(i) NZBORA right, UNCROC's articles should be adopted in a way which advances Parliament's purpose. As noted, that purpose is shared by both instruments. Courts can be expected to interpret legislation consistently with international treaties ratified by New Zealand. Moreover, Parliament is not to be assumed to have intentionally legislated contrary to New

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[76] *Derrick-Hardie v Police* HC Auckland, CRI 2011-404-000286 15 September 2011.
[77] *R v K* HC Whangarei, CRI 2008 027-2728, 27 January 2010.
[78] *R v Rawiri* HC Auckland T014047, 3 July 2002.
[79] At [86].
[80] *DP v R* [2015] NZCA 476.

> Zealand's international obligations. In our judgment s 200 of the CPA must thus be interpreted in a way consistent with discharging those obligations.

[126] Recently in *Dickey v R,* the Court of Appeal recognised that ss 9 and 25(i) of the BOR Act may be engaged when sentencing a young person for murder:[81]

[127] In this case, Ms Norrie relied upon s 23 of the BOR Act in support of her submissions regarding [CB]'s right to a lawyer. In particular, it was also relied upon in support of an argument that [CB] did not understand the potential jeopardy he faced before deciding whether to make a statement, because [Constable D] did not explain the situation to him.[82]

The Treaty of Waitangi

[128] [Constable D] said he was not aware of responsibilities and obligations police officers have under the Treaty of Waitangi ("the Treaty") when dealing with young people. Ms Norrie submitted that persons exercising decision making powers under the Act must provide a practical commitment to the principles of the Treaty.

[129] However, the Act does not expressly impose such an obligation. One way in which the s 4 purposes of the Act are to be met is by a practical commitment to the principles of the Treaty being demonstrated "in the way described in the Act."[83] That way is primarily by the duties imposed on the Chief Executive of Oranga Tamariki under s 7AA.

[130] There is no mention of the Treaty in s 5 which sets out those things that must guide persons exercising powers under the Act. By contrast, s 5 does expressly require that such persons must respect and uphold a young person's rights under the CRC.

[131] However, the recent comments of the Supreme Court regarding the place of tikanga in the law of Aotearoa/New Zealand are significant. The Court was unanimous that tikanga has been and will continue to be recognised in the development of the common law here in cases where it is relevant. It may be a relevant consideration in

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[81] *Dickey v R* [2023] NZCA 2 at [110].
[82] Above [35].
[83] Section 4(1)(f).

the exercise of discretions, and it is incorporated in the policies and processes of public bodies.[84]

[132] There may be scope to consider tikanga in a case of this nature, dependent on the particular circumstances of the case. However, there were no submissions made on that issue and so I have not addressed it here.

ANALYSIS and FINDINGS

[133] I am grateful to Mr Djurich and Ms Norrie for the excellent way the hearing was conducted and for the outstanding quality of their submissions. Instead of summarising those submissions separately, I have incorporated them in the following analysis.

[134] I accept Mr Djurich's submission that the events of 11 August 2022 should not be considered with the benefit of hindsight. It must also be acknowledged that the police needed to act quickly to manage a difficult, unfolding situation. The seriousness of the incident, the harm caused to [the victim] and the public concern about incidents involving firearms added another layer of pressure. Understandably, the police wanted to act decisively and provide reassurance to the community, as soon as possible, that they had the situation under control.

[135] For those same reasons, it was important that the police officers involved brought a high level of competence and compliance with the law to the way they carried out their duties. That was especially important when deciding whether to arrest [CB], when explaining his rights to him and when carrying out the DVD interview.

[136] However, in relation to all those processes, [Constable D]'s level of competence and compliance with the law was poor from beginning to end, including those things done after the DVD interview finished.[85] His lack of specialised training in relation to dealing with young people, and limited knowledge of the relevant law was a major factor in that regard. This situation highlights the need for continuous

[84] *Ellis v R* [2022] NZSC 114 at [19].
[85] Above at [58].

and systematic training of all professionals across the Youth Justice system as recommended in the UNGC.[86]

"I shot the lady"

[137] As suggested by Mr Djurich, I will deal with the issue of [Constable D] asking [CB] why he had come to the station, without first giving him his rights caution, as an admissibility issue. Although [Constable D] relied upon [CB]'s statement, "I shot the lady" to justify the arrest, the admissibility of the statement is not directly relevant to the inquiry under s 214 of the Act.

[138] The need to give [CB] advice of his rights before asking any question that might elicit an admission should have been obvious to [Constable D]. [Constable A] had immediately recognised the issue when [MA]'s mother had told him why they had all come into the station.[87] [Detective Sergeant B] accepted that the boys were suspects and told [Constables C and D] that they were suspects when he spoke to them at 10.00 am. Even if the word "suspects" was not used, it was known the boys were at the station to hand themselves in for the shooting. For that reason, there was discussion between [Detective Sergeant B] and [Constables C and D] about the possible grounds for an arrest. Amongst other things, [Detective Sergeant B] told [Constables C and D] to give both boys advice of their rights. He assumed that would be done before they began speaking to the boys.[88] When [Constable D] arrived at the station at 10.22 am, [Constable A] told him the boys had not been given their rights caution. Those facts make it difficult to understand why [Constable D] asked [CB] why he had come to the station before giving him the right's caution.

[139] I must first decide whether [CB]'s statement "I shot the lady" was a spontaneous statement within the meaning of s 223 of the Act before making an enquiry as to its admissibility. It is a question of fact whether an utterance is to be construed as spontaneous. This means it must arise entirely without external stimulus or constraint.[89]

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[86] Above at [108].
[87] Above [12].
[88] Above [15] to [20].
[89] *S v Police* (2005) 25 FRNZ 817 HC at [51].

[140] [CB]'s statement was made in direct response to [Constable D]'s question which was asked before giving him a caution and despite knowing that [CB] was a suspect in relation to the shooting. The statement was therefore not spontaneous. It was made in the presence of a police officer while detained in a room which in itself could have had some effect on his response. [Constable D] would or should have known his question could produce an inculpatory reply.

[141] This situation is different to the one described by Mr Djurich. He submitted that it would render s 223 otiose if police officers had to begin any conversation with a young person by giving them their rights when they do not know what the young person wants to say. [Constable D] had sufficient knowledge of [CB]'s reason for being at the station to require that he give him his rights caution before asking the question he did.

[142] As Ms Norrie points out in her submissions, [Constable D] considered [CB] to be detained once he and his father entered the room. Under s 23 of the BOR Act, he was therefore required to inform him why he was detained and give him advice of his rights. His failure to do so was a breach of [CB]'s right to silence under s 23 of the BOR Act, Art 37 of the CRC, paragraph 2 of the CJs Practice Note and Part 7 of the Beijing Rules.

[143] The statement "I shot the lady" is not saved by s 223. It was unfairly and improperly obtained and is therefore inadmissible.

The Arrest

[144] The grounds relied upon for arresting [CB] are those in s 214(2) of the Act.[90] At the time of the arrest, the air rifle had not been surrendered, so s 214(1)(a)(iii)[91] was a potential ground for arrest as well. However, that was included as a public interest issue under the s 214(2) grounds rather than relied upon separately. The report to the Police Commissioner only referred to the grounds in s 214(2), although at that stage the air rifle had been surrendered.[92]

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[90] Above [70].
[91] Above [69].
[92] Above [61] to [62].

[145] [Constable D] was the person who made the decision to arrest. [Detective Sergeant B] only gave him guidance on the issue. As he said, the decision was to be made by the person who was dealing with [CB] and his father and therefore able to make that assessment "in the moment".[93]

[146] At the time the arrest was made, there were reasonable grounds to suspect that [CB] had committed a category 3 offence carrying a maximum penalty of 14 years imprisonment. The information [Constable D] had, included [the victim] being in a critical condition in hospital as a result of being shot, and advice that [CB] and [MA] were at the station to hand themselves in for the shooting. At that time, [CB]'s explanation for the incident was unknown.[94] When [CB]'s explanation was taken into account later, the charge was amended to the one he currently faces which carries a maximum term of seven years imprisonment.[95]

[147] The contentious issue regarding the arrest is whether [Constable D] had reasonable grounds for believing an arrest was required in the public interest.

The public interest

[148] All the police officers who gave evidence had a narrow view of "the public interest". For them, the seriousness of the incident was the primary public interest issue. The outstanding firearm was said to be another public interest concern, including a risk of [CB] either interfering with the firearm or using it again. For [Constable D], the injuries to [the victim] elevated the public interest. Media attention given to the incident was also said to be a public interest issue because the community would be wanting to know how the investigation was progressing. This concern was heightened because of previous shooting incidents in the area.

[149] [Detective Senior Sergeant E]'s views about the public interest were focussed on the test for prosecution rather than arrest but were of the same nature. For him, charging both boys and opposing bail was in the public interest because the seriousness of the matter warranted a degree of control.

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[93] Above [20].
[94] Above [3].
[95] Above n 2.

[150] These concerns the police focussed on are, of course, issues the public are interested in. Serious offending is a matter of concern to the public especially when firearms are involved. So is other serious offending by young people. The media attention given to such issues heightens the interest the public has in such matters. For the police, it is important to respond quickly and decisively to such incidents to reassure the public they have made an arrest and are in control of the situation.

[151] However, these issues that the public have an interest in, form only part of the concept of "the public interest" referred to in the Act. The High Court has commented previously that the concept of the public interest is to be interpreted broadly[96] and it includes having regard to the principles in ss 4, 5 and 208 of the Act.[97] Those comments were made 16 years and six years ago respectively. Since then, the 1 July 2019 amendments to the Act have made the public interest considerations even broader.

[152] It is also necessary to read the comments of Mallon J regarding the seriousness of offending, and when criminal proceedings will be appropriate,[98] in light of the current scheme of the Act and the nature of the work being done in the Youth Court.[99]

[153] The seriousness of a charge is a relevant consideration in relation to the decision to arrest, but it cannot now be said that where there is reasonable cause to suspect a purely indictable offence has been committed, criminal proceedings will ordinarily be appropriate.[100] That does not conform with the first Youth Justice principle that criminal proceedings should not be instituted if there is an alternative means of dealing with the matter.[101] That provision is not qualified in any way, including on the basis of seriousness. Other important features of the current legislation must be considered too, without a presumption that seriousness alone makes arresting and charging a young person "ordinarily appropriate".

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[96] *YP v The Youth Court at Upper Hutt* at [77] above.
[97] *R v H* at [78] above.
[98] At [75] and [76] above.
[99] Above n 17.
[100] Although a large proportion of charges young people are facing in the Youth Court correspond with the definition of what was a purely indictable offence, there are also charges of that nature dealt with outside the Court.
[101] Above [67](a).

[154] The words "the public interest" are not defined in the Act but there are clear indications of how broadly it must now be interpreted. The first place those words appear in the Act is in s 4A, as one of the four primary Youth Justice considerations.[102] There it says, "the public interest…includes public safety." It is therefore wider than the public safety considerations that the police focus on and the issues that they consider the public to be most interested in.

[155] Importantly, s 4A requires that regard must be had to the general principles and Youth Justice principles when considering the public interest. How the purposes of the Act are to be met is relevant too. Therefore, the matters mentioned in paragraphs [64], [66] and [67] above must be included in deciding what is in the public interest. That includes adopting approaches centred on [CB]'s rights and promoting them. It requires having his well-being at the centre of decision making and respecting and upholding his rights under the CRC. It includes treating him with dignity and respect and protecting him from harm. That requires taking a holistic approach that takes into account both immediate and short-term considerations as well as medium to long-term ones such as developmental potential.

[156] Therefore, the perceived immediate and short-term benefits of making an arrest needed to be balanced against the medium and long-term risk of harm that an arrest might cause and the potential public safety implications of that. There is an obvious public interest in adopting approaches that reduce the prevalence of crime committed by young people and are congruent with public safety. That includes considering diversion away from formal court processes which the UNGC says should be the preferred manner of dealing with young people in the majority of cases, even for serious offences where appropriate. The UNGC acknowledges that the preservation of public safety is a legitimate aim of the Youth Justice system, but it says that should be served subject to obligations under the CRC.[103]

[157] [Constable D] did not take such matters into account when he considered the public interest because he was unaware of them. He believed the legislative basis for the arrest was s 315 of the Crimes Act rather than s 214 of the Act. He had no

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[102] Above [65].
[103] Above [106] to [107].

knowledge of [CB]'s rights under the CRC but, in making the arrest, he was exercising a power under the Act and was therefore required to respect and uphold those rights. He knew young people are vulnerable and not mentally mature and said their interests are paramount.[104] Apart from that and being entitled to a lawyer and/or nominated person, the only other thing [Constable D] could think of young people needing, was normal courtesy like having breaks.

[158] The incomplete range of public interest factors considered by [Constable D] is one thing that calls into question the reasonableness of his belief that the arrest was necessary in the public interest.

Reasonableness

[159] Another issue relied upon to justify the arrest was a risk of [CB] "walking around the station". This was raised primarily as a security issue because the firearm was outstanding. The concern was [CB] being able to get the firearm if he was free to move around.

[160] [Constable D] also thought that once [CB] was inside the separate room, and was thereby detained, it was best to arrest him at that point rather than doing so later if he tried to leave. Similarly, [Detective Sergeant B] had said he was concerned that [CB] could be detained unlawfully if he was kept at the station without being arrested when the police believed they had sufficient grounds to arrest him.

[161] Such concerns need to come within the criteria in s 214 to justify an arrest. In this case, where the grounds in s 214(2) are relied on, that would mean having enough information to decide on reasonable grounds that an arrest was required in the public interest in the broad sense I have referred to, not the limited view [Constable D] was taking. As [Detective Sergeant B] acknowledged, the initial information available was such that an arrest could be made rather than it should be made.[105] It was therefore prudent to get further relevant information to make a properly informed decision.

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[104] Although the well-being and best interests of young people are the first and paramount consideration in relation to care and protection, they are not in relation to Youth Justice where they are a primary consideration (s 4A).

[105] Above [20].

[162] There was nothing in [CB]'s behaviour at any stage to suggest he was going to try and leave or walk around the station. He was compliant throughout the entire process. He was with a parent who was also cooperative with the police throughout. [CB] was emotional in the sense that he was tearful at times. However, he was not being emotive or showing signs of behaving inappropriately or in a way that posed a risk to himself or others. If [Constable D] had checked, he would have known [CB] had not previously been to a police station, arrested, charged with an offence or appeared in court. These were factors to be weighed by [Constable D] when he was dealing with [CB] and his father and making the assessment "in the moment" before deciding an arrest was necessary in the public interest.

[163] Making a decision to arrest a young person on any of the grounds in s 214 requires an evaluation by the officer of the facts of the particular case. In this case, under s 214(1)(a)(iii), that would have meant [Constable D] being satisfied on reasonable grounds that arresting [CB] was necessary to prevent the loss or destruction of the air rifle. Some compelling nexus between the need to arrest and the probability of loss or destruction of the air rifle would have been necessary. There will be degrees of "imminence" when assessing whether an event is likely to occur; each case must be assessed on its own particular set of facts.[106] It seems the police accept that the facts of this case did not support arresting [CB] on these grounds and I find that to be so in any event.

[164] The need for a fact specific assessment is also required for an arrest under s 214(2). In this case that required taking into account the fact that [CB] and his father had voluntarily come to the station and were well behaved and cooperative. By the end of [Constable D]'s interview with [CB], the police had the air rifle, the identity of those involved, what clothes they were wearing and what car was used. That was all of the information [Detective Sergeant B] had said the police needed when an arrest was initially contemplated.

[165] In addition, they had [CB]'s version of events. That went some way to addressing another of the public interest concerns the police had; that this was a crime

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[106] *Police v SM* [2015] NZYC 666 at [129].

involving someone driving around [location 1] shooting people randomly. During the interview it becomes clear that [CB] had thought he was shooting at a man who was running towards the car with a machete. He was visibly distressed whenever the discussions turned to the topic of a woman having been shot.

[166] These findings are not judging the situation with the benefit of hindsight. They are to say firstly, that in a situation where [CB] and his father had voluntarily come to the station and were being cooperative, there was no imminent need to make an arrest immediately on the grounds in s 214(2). The public interest factors to be considered included [CB]'s rights, well-being and best interests as well as the limited range of issues that [Constable D] was focussing on. It was not treating [CB] with dignity and respect to not at least hear the explanation he was willing to offer before deciding an arrest was required in the public interest. If [CB] had stopped co-operating, tried to leave, or refused to provide relevant information, the option of arresting him remained available. It would have been within the ability of an experienced officer, with knowledge of the law, to manage that process.

[167] In terms of the four primary Youth Justice considerations,[107] I have now covered the issues of [CB]'s well-being and best interests and the public interest including public safety. The interests of [the victim] in this situation would have been best served by [Constable D] bringing an appropriate level of competence and compliance with the law so that the necessary evidence was properly obtained. Less weight must be assigned to the accountability consideration during the investigation of allegations against a young person than it is in relation to offending that is proven. It is therefore less important in this context than the other three considerations.

[168] For those reasons, I find the police have not discharged the onus on them to show that there were reasonable grounds for believing that arresting [CB] was required in the public interest.

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[107] Above [65].

Rights advice

Scheme of the Act

[169] When the purposes of the Act are read together with the general and Youth Justice principles,[108] it is clear that the law regarding young people who come to police attention differs significantly from the law that applies to adults. Unlike adults, young people are not to be viewed as completely autonomous and individually responsible for their actions. Their well-being, and that of their family, whānau, hapū and iwi is the overarching purpose of the Act. Endeavours must be made to involve and obtain the support of family, whānau, hapū and iwi in the proceedings. Measures for dealing with offending should strengthen the young person's family, whānau, hapū and iwi and foster their ability to deal with the offending. A parent of a young person under 16 years of age can be ordered to pay reparation.[109] Any measures taken by family to make reparation or apologise to any victim are matters to be taken into account at sentencing.[110] These features of the Act have existed since it came into force in 1989.

[170] Another important feature of the Act is that [CB] is the holder of rights guaranteed to him under the CRC which must be respected and upheld by everyone exercising powers under the Act. Approaches must be adopted that are centred on his rights and which promote them. The increased significance of a young person's rights under the CRC has been a feature of the Act since the amendments that came into force on 1 July 2019.

[171] How these important features of the Act sit together is especially relevant in relation to a young person's rights when questioned, charged or arrested and the role of the nominated person. A parent is the first of the people listed in s 222 of the Act that a young person can nominate to support them. In this case, as in many, it was a parent who performed that role. It is important to acknowledge the essential part that family, whānau, hapū and iwi play under the Act, but also to respect the autonomy of a young person to ensure they receive special protection during any investigation.

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[108] Above [64], [66] and [67].
[109] Section 283(f).
[110] Section 284(1)(e).

Special protection?

[172] Despite the requirement in the Act for young people to have special protection during the investigation stage of alleged offending, the protections currently provided under our domestic law are not special. With the notable exception of *R v Z*,[111] decisions of the Higher Courts significantly limit the protections provided for young people in relation to their legal rights.

[173] For example, in the two *Campbell* decisions,[112] the Court of Appeal said there is no positive obligation on the police to provide parents with a brochure encouraging them to obtain legal advice for a young person. They also said it is not part of the statutory scheme that the role of a lawyer be explained to a young person, that the police do not have to ask a young person if they want a lawyer and a nominated person is not required to take a best-interests approach in relation to the young person.[113]

[174] In *R v S*[114] and *A v R*[115] the Court of Appeal and High Court respectively refer to the emphasis that the Act places on family to justify a view that it is acceptable for parents, as nominated persons, to tell young people to talk to the police in circumstances where no lawyer would ever do so. In *A v R*, Miller J refers to the Act aiming to place a young person, "…in the position of an adult."[116] It does not suggest the protection being provided for a young person is special if it only puts them in the same position as an adult.

[175] Mr Djurich relies on these cases in his submissions and says:

> There is an inherent tension in ss215(1)(f) and s222(2)(c) of the OTA in that nominated persons and lawyers are considered on the same terms. It is trite, however, that nominated persons may not have any legal training whatsoever. Therefore, in many cases, a nominated person will not be as capable as a lawyer to identify, and advise on, a young person's legal risks.
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> This is, however, an inevitable consequence of the legislative scheme and the effect of ss 215 and 222. In particular, the importance placed on parents and members of a child or young person's whānau in the nominated persons' model. Consequently,

[111] Above n 36.
[112] Above n 49.
[113] Above [97].
[114] Above n 54.
[115] Above n 56.
[116] Above [99].

> the courts have been slow to inquire into the quality of the support given where the nominated person is a parent.

[176] Given this line of authority, young people are arguably worse off under our domestic law than adults who do not face the confusing option of having to choose a nominated person and/or a lawyer. Faced with that choice, many young people understandably opt for a parent to support them. Without knowing why they should ask for a lawyer, and with no requirement for the police to ask if they want one, most young people proceed without legal advice even when facing serious allegations as [CB] was.

[177] This is concerning given how few young people understand the rights caution. As has been pointed out previously,[117] findings from research carried out in New Zealand involving 104 participants recruited from two schools, included that:[118]

> The youth version of the Rights Caution does not assist young people with their understanding of their rights. The language in the youth version is too difficult and the additional information that it gives young people does not help them to understand. For the Rights Caution to be a comprehensible document that is accessible to young people, it needs to be revised.

[178] However, *R v S*[119] and *A v R*[120] pre-date the 1 July 2019 amendments to the Act. They are 26 years and 19 years old respectively. *R v Z* [121] and *Campbell* [122] also pre-date the amendments and are 15 years and 8 years old respectively. With the July 2019 amendments, the Act must be read in a way that is consistent with our obligations under the CRC. That includes a young person being guaranteed legal assistance from the outset of proceedings as well as having a parent or other support person.[123]

[179] In many respects, the guidance provided by the Court of Appeal in *R v Z* is still relevant. For example, it recognised the important role that family have in the process, as well as the need to respect a young person's autonomy.[124] The Court said the special

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[117] *NZ Police v FG* [2020] NZYC 328 at [142] to [143].
[118] Frances Gaston "Young People's Comprehension of the Rights Caution in New Zealand" (Master of Science in Forensic Psychology Thesis, Victoria University of Wellington, 2017).
[119] Above n 54.
[120] Above n 56.
[121] Above n 36.
[122] Above n 49.
[123] Above [108], [110], [111], [112], [113] and [114].
[124] Above [89].

protection (which is legal protection) **must** be given in a manner that respects a young person's autonomy, with the support of parents **if possible**. [Emphasis added]. Therefore, the young person's autonomy and the special protections they are entitled to, are not subject to the support of family.

[180] The July 2019 changes to the Act also mean that comments in *R v S*[125] and *A v R*[126], that suggest the family related features of the Act take priority over a young person's rights to legal representation, cannot apply. To do so would be to read the Act in a way that is inconsistent with our obligations under the CRC.

[181] Under the Act, the family-related features that qualify a young person's autonomy in one sense,[127] now exist alongside a requirement that a young person's autonomy in relation to their legal rights be respected and upheld. Both features co-exist and should be applied harmoniously. As his Honour Judge Davis said in *NZ Police v JH*:[128]

> [49] Te Tiriti o Waitangi (or the Treaty of Waitangi), the [Oranga Tamariki] Act and UNCROC are not identical in their terms, but in my view nor are they in conflict. What is clear is that each document sets minimum standards of conduct and benchmarks minimum standards that every young person is entitled to. These rights are not something that are optional, or something that may be aspired to as a best practice by police, Oranga Tamariki, or Judges for that matter—they are mandatory provisions, rights and protections afforded to every young person.
>
> [50] If these minimum standards are to be given weight by Parliament, the Courts must equally give the provisions weight.

[182] The Act does not mandate that a young person must have a lawyer present when interviewed by the police during the investigation stage. However, if the Act is read in a way that is consistent with obligations under the CRC, the importance of them at least talking to a lawyer before doing anything should be actively promoted. Arranging for a lawyer to attend in person to do that should be the preferred option. Failure to enable that to happen would prevent the Act from being applied in a way that is consistent with our obligations under the CRC. A best interest's approach on the part of the nominated person must be required now given the priority placed on

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[125] Above n 54.
[126] Above n 56.
[127] Above [168].
[128] *NZ Police v JH* [2020] NZYC 396

well-being and best interests as a primary consideration under the Act.[129] Providing a brochure to the nominated person, such as the Canadian example in *R v Z,* should be a minimum requirement in that respect.[130]

This case

[183] When [Constable D] gave [CB] his initial rights advice, he did not record anything that either he or [CB] said during the conversation and so there is no evidence to help assess [CB]'s understanding of what he was told. The lack of enquiry into [CB]'s level of comprehension and school attendance was also unsatisfactory given what is known about the prevalence of communication disorders amongst the young people who come to police attention.[131] Although there is no evidence of [CB] having such a disability, those prevalence figures are such that the enquiry should be routine.

[184] It was inappropriate to assume that [CB] would know what a lawyer is and the help one would provide especially given that he had not previously been arrested, faced charges or been to court. The Court in *R v Z* said that merely informing a young person of the right to a lawyer would not meet the requirements of s 218.[132]

[185] The rights advice given during the DVD interview was inadequate.[133] What [Constable D] said was closer to informing [CB] of the rights than explaining them to him. Two particular aspects are unsatisfactory.

(a) The first is [Constable D] telling [CB] that anything given in evidence may be retold to a Judge or jury, without any context to enable [CB] to make sense of that. For example, an explanation should be given that a Judge or jury can use such information to find allegations of offending proven and that there would be consequences of such a finding. Mr Djurich points out that the High Court in *S v Police*[134] rejected the need for the police to do that. However, two years later, in *R v Z*, the Court

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[129] Above [65].
[130] Above [96].
[131] See *NZ Police v FG* [2020] NZYC 328 at [134] to [136].
[132] Above [92].
[133] Above [49].
[134] Above n 89.

of Appeal emphasised the importance of ensuring that a young person understands the rights being explained to them and can make an informed decision to exercise them.[135]

(b) Secondly, [CB]'s right to a lawyer as well as his father was not explained properly. After the initial advice about a lawyer, [CB]'s reply indicates that he thinks he can talk to his father or his lawyer. When [CB] is then told of his right to talk to his lawyer or nominated person or both, he asks [Constable D] for the information to be repeated. When that is done, he says he does not know how to explain that. Arguably that triggers the requirement in s 215A for [Constable D] to explain that issue. Instead, [Constable D] simply repeats the information in response to which [CB] says "Yeah, yeah". That does not indicate understanding. He should have been asked again to explain it to establish whether he understood that right. The failure to do so leaves that issue as being one that [CB] does not know how to explain.

Nominated person

[186] [Constable D]'s failure to record and therefore remember clearly how he explained the duties of a nominated person to [CB]'s father is unsatisfactory. So too is the fact that he did so after securing [CB]'s agreement to make a statement. The five minutes [Constable D] spent discussing the nominated persons role with [CB]'s father was minimal given the issues that needed to be covered.

[187] There is no evidence to establish that [CB] received advice about his legal rights from his father who did not make any effort to arrange for [CB] to get such advice from anyone else. There was no specific time for [CB] and his father to consult about such things.[136] It was simply noted as being something that was available "at all times" if they asked for it. The evidence does not establish that they did so.

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[135] Above [93].
[136] Above [43] to [47].

[188] A motivation of [CB's father] for bringing [CB] to the station becomes clear at the end of the interview.[137] [Constable D] was challenged in cross-examination and in submissions for not enquiring about the motivation at the outset. Although there is a risk of judging the need to do that with the benefit of hindsight, I accept the submission that an enquiry about the motivation of a parent who has brought a young person to the station to confess, should be checked because of the likelihood it will call into question their ability to carry out the role of nominated person appropriately.

[189] [CB's father]'s conduct as the nominated person also had concerning features such as encouraging [CB] to speak in circumstances where a lawyer would not do so and offering up the firearm as evidence during the interview.[138] These issues serve to illustrate yet again why it is not sensible in many cases to expect a parent to adequately carry out the role of supporting their child as well as ensuring that they understand their rights. A parent's motivation for being there can be at odds with the need to ensure their child understands their rights and can make an informed choice to exercise them as it has been in this case.

[190] Her Honour Judge Otene in *Police v GW*[139] recognised the need to find ways to deal with situations where a nominated person is ill-disposed, for whatever reason, to the discharge of his or her obligations. I endorse her suggestions that in such situations a more assertive educative engagement with the nominated person be carried out, or a deferral of questioning, or arranging the attendance of a lawyer to make consultation an immediately accessible option for the young person and nominated person. No such options were considered in this case.

Jeopardy

[191] Ms Norrie submitted that [Constable D]'s failure to tell [CB] and his father adequately about the jeopardy [CB] was in[140] meant that he did not appreciate the seriousness of the situation he was in. That was therefore a factor contributing to his

[137] Above [56].
[138] Above [52] to [57].
[139] *Police v GW* [2020] NZYC 629
[140] Above [35].

decision to make a statement. It was also information [CB's father] needed to know, so as to carry out his role properly.[141]

[192] Although I agree that [Constable D] should have provided such information, [CB] and his father clearly realise the seriousness of the situation even if it was not to the extent that the case could become a homicide investigation and that the charge the police were considering carried a maximum penalty of 14 years imprisonment.

[193] During the DVD interview, [CB] becomes visibly upset when talking about the harm caused to [the victim]. His comments include, "I didn't know that the gun would actually do that much damage to someone." The situation here is slightly different to that in *Campbell v R,* where the police did not initially disclose allegations of sexual offending when interviewing Riley Campbell in relation to assault allegations.

[194] I find it unlikely that the failure to specifically mention [the victim]'s condition and the maximum penalty for the charge the police intended filing would have made a difference to [CB]'s decision to make a statement. Similarly, I do not find it would have made a difference to the way [CB]'s father carried out his role as nominated person.

[195] For reasons that will be apparent from the findings above, the police have not discharged the onus on them to show that [CB] understood his rights and was in a position to make an informed decision whether to exercise them or not. The DVD interview is therefore inadmissible as evidence against [CB]. [Constable D]'s non-compliance with the requirements of s 215 of the Act was of such a nature that it is not saved by the reasonable compliance provision in s 224.

[196] In both *R v Z* and *Elia v R*, the Court of Appeal assumed that s 30 of the Evidence Act 2006 did not apply to evidence ruled inadmissible under s 221 of the Act and counsel made no submissions regarding the application of s 30 of the Evidence Act. I have therefore proceeded on the basis that it does not apply.

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[141] Above [94] and n 6.

RESULT

[197] For the reasons set out above, I have found that the arrest of [CB] was unlawful, and the DVD interview is inadmissible as evidence against him. So is the statement, "I shot the lady" which was not a spontaneous statement.

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Judge AJ Fitzgerald
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 03/04/2023