IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA661/2017
[2020] NZCA 245

	BETWEEN	ZANE CHRISTOPHER KERR Appellant
	AND	NEW ZEALAND POLICE Respondent

Hearing:	31 July 2019
Court:	Clifford, Gilbert and Wild JJ
Counsel:	J D Lucas and S J Jamieson for Appellant A M Powell and V McCall for Respondent B M McKenna and M R G van Alphen Fyfe for Minister of Justice as Intervener R S Reed QC and H M Z Ford for New Zealand Law Society as Intervener L A Andersen and S J Zindel for Criminal Bar Association of New Zealand Incorporated as Intervener
Judgment:	23 June 2020 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The conviction is quashed.

C A judgment of acquittal is entered.

REASONS OF THE COURT

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Introduction

[1] Mr Kerr was convicted in the District Court at Christchurch in October 2016 of refusing to permit a blood specimen to be taken.[1] He had defended the charge on the basis that he had not been able to exercise his right to consult and instruct a lawyer before being required to give that specimen. Accordingly, evidence of his refusal had been improperly obtained and was inadmissible. The District Court rejected that submission and convicted Mr Kerr. Mr Kerr's subsequent appeal to the High Court was dismissed.[2] Mr Kerr brings this second appeal with leave.[3]

[2] The right to consult and instruct a lawyer is affirmed by s 23(1)(b) of the New Zealand Bill of Rights Act 1990 (NZBORA) which provides:

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1 *Police v Kerr* [2016] NZDC 26952 [Verdict judgment]; and *Police v Kerr* [2017] NZDC 6513 [Sentencing notes].
2 *Kerr v Police* [2017] NZHC 2595 [High Court judgment].
3 *Kerr v Police* [2018] NZCA 326 [Leave judgment].

> **23 Rights of persons arrested or detained**
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> (1) Everyone who is arrested or who is detained under any enactment—
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> …
>
> (b) shall have the right to consult and instruct a lawyer without delay and to be informed of that right; and
>
> …

[3] In the leading 1992 case *Ministry of Transport v Noort*, this Court held that recognition of the s 23(1)(b) right is not inconsistent with the drink-driving scheme.[4] However, the operational requirements of the scheme constrain exercise of the s 23(1)(b) right to a limited, but reasonable, opportunity to consult a lawyer by telephone.

[4] This Court granted Mr Kerr leave for this second appeal on two questions:[5]

(a) whether the right in s 23(1)(b) of NZBORA implies an obligation on the state to facilitate the availability of legal advisers to enable the envisaged legal consultation to occur; and

(b) whether there was a breach of Mr Kerr's right under s 23(1)(b) in the circumstances where calls were placed unsuccessfully to 13 lawyers.

[5] Those two questions raise the difficult issue of striking the appropriate balance between the coercive provisions of the drink-driving scheme and the need to give what Richardson J in *Noort* termed "a generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms referred to".[6]

[6] When *Noort* was decided there was no state-funded legal advice scheme for detained motorists. There now is: the Police Detention Legal Assistance scheme (the PDLA). The critical point in this appeal is whether the failure of that scheme to

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4 *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA).
5 Leave judgment, above n 3, at [11].
6 *Ministry of Transport v Noort*, above n 4, at 277; quoting *Minister of Home Affairs v Fisher* [1980] AC 319 (PC) at 328.

enable Mr Kerr to obtain legal advice resulted in a breach of Mr Kerr's s 23(1)(b) right.

Facts

[7] Mr Kerr was stopped by the police whilst driving in Marshland, Christchurch, at 9.45 pm on 8 July 2016. Section 114 of the Land Transport Act 1998 empowers the police to stop any driver in order to obtain their particulars and exercise enforcement powers under that Act. Though no particular suspicion is required on the part of the police, in this case Mr Kerr attracted their attention for a variety of reasons. He was driving his car very slowly on the far left of the road with its hazard lights on. The police could see that there was considerable damage to the tyres of the vehicle: it was driving on its rims. Mr Kerr was also using his cellphone.

[8] When stopped Mr Kerr told the police he was a disqualified driver. In response to a police inquiry he confirmed he had been drinking. Mr Kerr refused the police's request to undergo a breath screening test.[7] The police consequently told Mr Kerr he was required to accompany the police to Christchurch central police station, which he agreed to do.[8] At that point, the police advised Mr Kerr of his rights and asked whether he understood them.[9] Mr Kerr replied "no", but refused to elaborate.

[9] At the police station a constable continued the procedures called for by the drink-driving scheme as recorded in the police's standard breath and alcohol procedure sheet. The officer again told Mr Kerr he had the right to speak to a lawyer and that there was a list of lawyers available to whom he could speak for free. Mr Kerr was asked whether he wished to speak to a lawyer. He replied that he wanted to speak to a Mr Allen. The constable called Mr Allen, who did not answer the phone. Mr Kerr was then referred to a print-out of the PDLA list of some 20 to 30 lawyers.

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7 An enforcement officer may require any driver to undergo a breath screening test without delay: Land Transport Act 1998, s 68(1)(a).

8 An enforcement officer may require a person who has refused to undergo a breath screening test to undergo an evidential breath test, and to accompany the officer to any place where they can undergo the test: s 69(1)(c).

9 These included the right to remain silent and not to make a statement; the right to consult and instruct a lawyer without delay, and the fact the police have a list of lawyers to whom the detainee may speak for free; and the caution that anything said will be recorded and may be given in evidence. This caution is a simplified version of the Chief Justice's Practice Note: see [50]–[52] below.

[10] From the list, Mr Kerr picked three lawyers whom the constable then called. None answered. Mr Kerr stopped the constable at that point, and suggested he simply leave a message on Mr Allen's voicemail. The constable duly did so.

[11] The constable carried on working through the procedure sheet and told Mr Kerr that he was required to undergo an evidential breath test. He again asked Mr Kerr whether he would like to speak with a lawyer and Mr Kerr again said yes. The constable rang Mr Allen again, and a further four lawyers from the list. Still no-one answered.

[12] At 10.38 pm, the constable prepared the evidential breath test by starting the testing sequence on the device and attaching a mouthpiece. Mr Kerr refused to undergo the test. The constable told him he was therefore required to provide a blood test.[10] At this stage, Mr Kerr was at the sharp end of the drink-driving scheme. Up to this point, whilst the legislation requires compliance, and a person who refuses to accompany the police when required to do so may be arrested,[11] no offences are provided for. Refusing to provide a blood specimen is, however, an offence with a maximum period of imprisonment of two years.[12] The constable once more cautioned Mr Kerr and asked whether he wished to speak to a lawyer. Mr Kerr said he did. Mr Kerr indicated that the constable should continue to work his way down the list, and a further five lawyers were tried without success.

[13] At that point, the constable decided to continue with the procedure and once again told Mr Kerr he needed to provide a blood specimen. He asked Mr Kerr whether he consented to the taking of a blood specimen. Mr Kerr said he did not as he did not like needles. The constable warned him that refusal to provide a specimen was an offence and then arrested him. He recorded the time as 10.50 pm and asked Mr Kerr whether he understood his rights. Mr Kerr replied: "no, because you said I could speak to a lawyer, but none will answer, and I have been delayed".

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10 An enforcement officer may require a person who has refused to undergo an evidential breath test to undergo a blood test: s 72(1)(a).

11 Section 69(6).

12 Section 60.

[14] Thus, over the one hour and five minute period of his detention before arrest, Mr Kerr's own lawyer was telephoned three times and phone calls were also made to 12 of the 20 or 30 lawyers on the PDLA list.

Judgments below

[15] In the District Court, the police acknowledged there were issues with the efficacy of the PDLA, but contended that was not the police's responsibility.[13] The constable had done all he could to facilitate the right. The Judge accepted the police submission and concluded the reasonableness of the constable's actions was demonstrated by the number of calls he had made.[14]

[16] Mr Kerr's appeal to the High Court was dismissed by Davidson J. The Judge noted that, following *Noort*, the courts had consistently held the obligation was to facilitate rather than to provide.[15] The Judge said the issue for him was whether s 23(1)(b) imposed an obligation on the executive to ensure, or do more to try to ensure, that detainees who elect to consult a lawyer are able to do so. He concluded, although with some misgivings, the answer to that question was "no". First, the obligation recognised was only to facilitate and not to create obligations at any high policy level.[16] Secondly, s 24(f) of NZBORA guaranteed free legal assistance, but only to impecunious persons after they have been charged with an offence. It would therefore be inappropriate for the Courts to rely on s 23(1)(b) to bring forward the point at which legal aid entitlements begin.[17] Thirdly, the PDLA appeared to work adequately during the day and it was only drink-driving suspects detained at night who experienced its shortcomings.[18]

[17] The Judge, however, emphasised his conclusion the executive was responsible for facilitating the exercise of the right. If Mr Kerr's difficulties with the PDLA were

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13 Verdict judgment, above n 1, at [7]–[8].
14 At [10].
15 High Court judgment, above n 2, at [17]–[18].
16 At [36].
17 At [37]–[38], referring to Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis NZ, Wellington, 2015) at [20.7.25]–[20.7.27].
18 At [39].

experienced by other motorists in the future, that might well constitute a breach of the right.[19]

Arguments on appeal

Mr Kerr and the New Zealand Law Society

[18] Mr Kerr argued that the answer to the first leave question was yes: there was a duty to facilitate "the availability of legal advisors". But that was part of a broader duty to ensure lawyers would be available when phoned. Recognition of that required reconsideration of *Noort*. For Mr Kerr, Mr Lucas and Ms Jamieson expressed that point in the following manner:

> It is submitted that the executive branch must *facilitate* access to a lawyer if requested by a person who has been detained by the State. That puts a positive obligation on the State to ensure that the PDLA scheme operates in a manner that will ensure legal assistance is available to detained persons at any time of day or night. …
>
> A system that does not work cannot be said to be one that facilitates anything.

Based on the difficulties Mr Kerr experienced, the PDLA scheme had not sufficiently facilitated his s 23(1)(b) right.

[19] As Ms Reed QC and Ms Ford for the New Zealand Law Society (NZLS) as intervener similarly put it, facilitation which did not guarantee access to legal advice, as had occurred in Mr Kerr's case, was not sufficient. NZBORA is a "living instrument" and it was now appropriate to revisit *Noort*. It was not unreasonable, particularly in the context of the drink-driving scheme, to expect the executive to provide a toll-free phone number for persons requiring access to a lawyer whilst in detention, and to ensure that number would be staffed on a 24-hour basis.

The Police

[20] For the police, Mr Powell and Ms McCall argued the Crown's obligation was limited to facilitation. It would be unconstitutional for the courts to require

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19 At [40]–[42].

the executive to establish a particular scheme providing access to lawyers in pursuit of an obligation under s 23.

[21] That the terms of the PDLA went beyond the scope of the executive's NZBORA obligations did not alter the nature of the right afforded by s 23(1)(b). Accordingly, any perceived failings in the PDLA could not, of themselves, constitute breaches of that obligation. If the right to a reasonable opportunity to consult and instruct a lawyer was unjustifiably abridged, the Court would vindicate the right and provide the detainee with an effective remedy. That might include excluding evidence thus obtained or recognising a defence to a criminal charge based upon actions when the right was denied. Such decisions by the courts would, over time, influence future executive conduct, as had occurred following *Noort*.

[22] The obligation to facilitate had been fulfilled in Mr Kerr's case, and the evidence of his refusal should be admitted accordingly.

The Minister of Justice

[23] Appearing for the Minister of Justice as intervener, Ms McKenna and Ms van Alphen Fyfe assisted the Court by describing the history and evolution of the PDLA scheme, and the operation of that scheme currently. We are grateful to adopt that explanation, as did all the parties in arguing the appeal, when we consider the questions raised.

The Criminal Bar Association

[24] Mr Andersen and Mr Zindel for the Criminal Bar Association (CBA) took a different approach. As the executive had promised free legal advice under the PDLA, a legitimate expectation arose that it would in fact be provided.[20] That expectation meant it would not be a reasonable limitation of Mr Kerr's right, in terms of s 5 of NZBORA, for the advice not to be provided. As a result of the PDLA, the development of the s 23(1)(b) right had moved from facilitation of access to a lawyer to the provision of advice free of charge.

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[20] See *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629 (PC); and *New Zealand Assoc for Migration and Investments Inc v Attorney-General* [2006] NZAR 45 (HC).

Analysis

[25] We are asked to depart from *Noort* and find that the right to "consult and instruct" means the executive has an obligation to ensure detainees receive legal advice if they wish to do so. Of necessity that obligation would require advice to be given for free, at least to impecunious detainees. The context for our decision whether to recognise such an obligation is provided principally by:

(a) the significance of the affirmation of the right in s 23(1)(b), as considered by the Court in *Noort* and subsequently;

(b) the implications of the establishment of the PDLA (1994);

(c) the cautions police are required to administer pursuant to this Court's decision in *R v Alo* and, subsequently, the promulgation of the Chief Justice's Practice Note on Police Questioning (2007);[21] and

(d) Canadian jurisprudence, as relied on by New Zealand courts over time and by the parties to this appeal.

We address each in turn.

Section 23(1)(b) and the drink-driving scheme

[26] Prior to the enactment of NZBORA, the right of a person arrested and charged to consult a lawyer was well recognised. The position was not so clear as regards detained persons, before arrest and charge.

[27] Two 1973 decisions of the (then) Supreme Court had, however, provided clear acknowledgement of the unfairness generated when a request by a detainee to consult a lawyer was declined.[22] The issue then came before this Court in the 1989 decision

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[21] *R v Alo* [2007] NZCA 172, [2008] 1 NZLR 168; and *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297 [Practice Note].

[22] *Nazer v Ministry of Transport* [1973] New Zealand Recent Law 117 (SC); and *R v Puhipuhi* [1973] New Zealand Recent Law 139 (SC).

of *R v Webster*.[23] Again the significance of the denial was assessed in the context of Judges' broad discretion to exclude unfairly obtained evidence.

[28] *Noort* (which was heard with a companion appeal, *Police v Curran*) was the first substantive consideration of the NZBORA right by this Court. Mr Noort had been convicted of having a breath alcohol reading above the legal limit, and Mr Curran for refusing to allow a blood specimen to be taken. They had both separately challenged their convictions on the basis their right under s 23(1)(b) had been breached. In both their cases the High Court found, as the Crown had argued, that the drink-driving scheme excluded the exercise of the right. In another decision the High Court had reached the opposite view.[24] The principal question for this Court in *Noort* was which of those two approaches was correct.

[29] A number of important general principles guided the Court's approach in answering that question. In particular, the need to give the civil and political rights found in pt 2 a generous interpretation, as noted above at [5], had to be reconciled with the observation that those rights are not absolute. Sections 4, 5 and 6 of NZBORA, together with general principles of statutory interpretation, guide the recognition and application of rights affirmed by NZBORA in the balanced way that was, therefore, called for.

[30] The Judges approached that task in different ways.[25] Underpinning the approach each of them took, however, was acceptance that recognition of an unqualified and unlimited right — in which every arrested or detained person could, for instance, wait for their lawyer to attend their place of detention in person and then consult for as long as desired[26] — would not be consistent with the requirements of the drink-driving scheme. But, whether or not recognition of the right *at all* was inconsistent with the drink-driving scheme, as the Crown had argued, was a different question.

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23 *R v Webster* [1989] 2 NZLR 129 (CA).

24 *Littlejohn v Ministry of Transport* [1990–92] 1 NZBORR 285 (HC).

25 Cooke P emphasised the importance of the interpretational mandate provided by s 6. Both Richardson and Hardie Boys JJ saw s 5 as playing a greater role in that analysis.

26 See Andrew Butler and Petra Butler, above n 17, at [20.7.7].

[31] To answer that question three of the Judges considered the significance of the right itself. Whilst not a fundamental or inalienable right, it had become widely recognised. It had great strategic value as a safeguard against violations of undoubtedly fundamental rights such as the right not to be arbitrarily arrested or detained.[27] The right was part of New Zealand's basic constitutional inheritance and a central feature of contemporary international statements of human rights. It was pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. Access to counsel was a means of reducing the imbalance between the state and detained or arrested persons and of ensuring fair treatment in the criminal process.[28] The right was as important as any other; indeed it was a necessary concomitant of those other rights which maintain the freedom and the dignity of the individual against the power and the authority of the state.[29]

[32] The Court was satisfied that providing an opportunity to exercise that important right was not inconsistent with the requirements of the drink-driving scheme.[30] In reaching that conclusion, the Judges expressed themselves similarly. It suffices to cite Cooke P and Richardson J. Cooke P spoke of:[31]

> … a limited opportunity of making telephone contact with a lawyer and taking advice. … The opportunity is to be limited but reasonable. It is not necessarily limited to one call, but there must be no unreasonable delay. A driver who cannot immediately contact his or her own lawyer should normally be allowed to try one or two others. … Rosters of lawyers, available to undertake this work at an appropriate fee, may be prepared by the law society, the police or the ministry, but that is outside the control of the Court.

Richardson J said:[32]

> A motorist detained and required to accompany the enforcement officer to a testing station should be informed without delay of his or her right to consult and instruct a lawyer. The right can only have meaning to an arrested or detained person if it is taken as raising a correlative obligation on the enforcement officer to facilitate contact with a lawyer … The exercise of that right should be facilitated by making available a telephone — whether a cell phone in the officer's car or a telephone on arrival at the testing station will depend on the circumstances. And for the effective enjoyment of the right

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27 *Ministry of Transport v Noort*, above n 4, at 270 per Cooke P.
28 At 279 per Richardson J.
29 At 286 per Hardie Boys J.
30 The Court did not extend the application of the right to the initial breach screening stage: see also *Temese v Police* (1992) 9 CRNZ 425 (CA).
31 *Ministry of Transport v Noort*, above n 4, at 274.
32 At 284.

> motorists to whom the breath/blood-alcohol regime applies will have to be afforded access to lists of lawyers, including outside ordinary office hours …

[33] Implicit in those conclusions is that it is not sufficient for the police simply to pause in their administration of the scheme, and advise the detainee they have a right at that point to consult a lawyer. Clearly, something more is required. But, equally, the statutory process could not be unduly hindered. It might not always be possible for the motorist to contact a lawyer within a reasonable time or, having done so, to consult and instruct that lawyer to the extent the motorist might wish. Whether curtailment of the right in a particular case was justified in terms of s 5 had to depend on an assessment of the operational requirements of the legislation and of the acts of the particular enforcement officer in the performance of the powers conferred under the legislation. As Cooke P put it:[33]

> Hard-and-fast rules cannot be laid down for all circumstances. Ultimately it must always be a question of fact and common sense whether a reasonable opportunity has been given.

[34] Subsequent decisions of this Court and the High Court confirmed and explained that approach.[34] In a passage later endorsed on a number of occasions, Neazor J formulated the proper inquiry as:[35]

> The question is always whether there has been reasonable action by the police to afford the motorist the facility to exercise the right in a real and practicable way once there has been an indication that he or she wishes to do so.

The PDLA

[35] Following *Noort* the Department of Justice identified a need to establish a scheme to ensure arrested and detained persons had ready access to legal advice. To meet the immediate need, informal arrangements were made between district law societies and the police to develop lists of lawyers who would provide advice to detainees on a voluntary basis. The understanding was that a permanent legislative

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33 At 274.

34 See, for instance, *R v Mallinson* [1993] 1 NZLR 528 (CA); *Bennett v Ministry of Transport* (1992) 9 CRNZ 365 (HC); *Danks v Ministry of Transport* HC Christchurch AP199/92, 16 September 1992; *R v Barber* (1993) 10 CRNZ 301 (HC); and *Steel v Police* (1994) 11 CRNZ 383 (HC).

35 *Steel v Police*, above n 34, at 390–391; followed in *Rae v Police* [2000] 3 NZLR 452 (CA) at [57]; *Brown v Police* HC Hamilton CRI-419-87-04, 22 October 2004; and *Helms v Police* [2004] DCR 200 (HC).

system would be developed. By 1994 that had not happened. Lawyers were withdrawing from the voluntary scheme in large numbers. Concerned that a total collapse of the system would place criminal proceedings in jeopardy by breaching the principles in *Noort*, the Department secured funding for an interim scheme that remunerated participating lawyers for both phone calls and attendances in person.

[36] Later that year, the Legal Services Amendment Act 1994 was passed to provide a legislative basis for a permanent scheme. The Act made it a function of the Legal Services Board to operate the PDLA. The newly inserted s 158C(2) provided:

> (2) The object of the Police detention legal assistance scheme shall be to ensure that there is available, in each district, a sufficient number of legal assistance practitioners to provide, in accordance with this Act, advice or assistance, or both, to unrepresented persons who—
>
> (a) Either—
>
> (i) Are detained persons who are being detained by the Police; or
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> (ii) Are cautioned persons who are being questioned by the Police or whom the Police wish to question; and
>
> (b) Wish to consult and, where appropriate, instruct a practitioner about any matter relating to their arrest or, as the case may be, their detention or that questioning.

[37] In its written briefing on the bill to the Justice and Law Reform Committee in September 1994 the Department explained that district legal services committees would obtain, from district law societies, lists of lawyers qualified and willing to act. Those lists would be available to local police or other authorities. A detained person would contact a lawyer from the list for free. The person could, of course, choose to contact their own lawyer, in which case payment would be their own responsibility.

[38] The legal basis of the PDLA changed under the Legal Services Act 2000. Section 49 continued the existence of the PDLA. Section 50 provided the object of the scheme was "to ensure that there is available a sufficient number of lawyers to provide legal advice" to those persons being questioned or detained who wished to consult a lawyer. Section 51(2) stated that such persons were "entitled" to the services of such a lawyer.

[39] The 2009 review of the legal aid system, commonly known as the Bazley report, resulted in the enactment of the Legal Services Act 2011.[36] That Act contains no specific provision for the PDLA. Rather, the Secretary for Justice has a generic power to create "specified legal services",[37] which are then subject to general quality assurance and approval provisions.[38] The Secretary duly continued the PDLA by notice in the *Gazette*.[39] That notice described the PDLA as follows:

> The PDLA Service provides legal advice, or legal assistance, or both, to any person:
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> (a) who has been detained by Police; and
>
> (b) who wishes to consult or instruct a lawyer about any matter relating to the person's questioning or detention.

[40] The PDLA now operates on two distinct bases: that of "rosters" of lawyers and that of "lists" of lawyers. The two schemes are remunerated on the same attendance basis, but are organised differently.

[41] Under the roster approach every three months the Ministry of Justice prepares lists of appropriately qualified lawyers who have expressed an interest to participate. As it now operates in Christchurch, the roster system comprises four teams of seven, with each team rostered for a full seven day week commencing at 7 pm on Monday and every fourth week thereafter. Participating lawyers must advise the Ministry as soon as possible if they are unable to attend a session they are rostered for.

[42] Under the list approach the Ministry asks appropriately qualified lawyers every three months to confirm their interest and availability. Those who are unavailable for a period of over one week in the entire three month period are excluded. The remaining lawyers are placed on the list for the full three months. There is no allocation of responsibility by a roster. Continuous availability is not expected.

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36 Margaret Bazley *Transforming the Legal Aid System: Final Report and Recommendations* (Ministry of Justice, Wellington, November 2009).

37 Legal Services Act 2011, s 68(2)(b).

38 See generally pt 3, sub-pt 2.

39 "Establishment of the Police Detention Legal Assistance Service as a Specified Legal Service" (23 June 2011) 86 *New Zealand Gazette* 2108 at 2108–2109.

[43] In July 2016, when Mr Kerr was detained, the PDLA in Canterbury operated on the list basis. In 2019, and after a national review, the roster approach was adopted. We return to the circumstances that led to that change of approach below at [73] when we consider the second leave question.

[44] As can be seen, the PDLA as established went beyond what *Noort* said s 23(1)(b) required. In particular lawyers were organised by the Department to provide advice, and their advice was to be free. The establishment of the PDLA has also resulted in there being little further consideration of the requirements of the s 23(1)(b) right. As Butler and Butler observe:[40]

> Because Parliament has enacted a particular scheme no consideration has been given in the case law to the prior question of whether such a scheme (or a similar one) is necessary to fulfil the requirements of s 23(1)(b). That said, to the extent that the current scheme only covers police detention (and not detention by other state officials) that may be an issue worth considering.

[45] Since the establishment of the PDLA, appeals on the question of the extent of facilitation repeatedly returned to Neazor J's touchstones of reasonableness and practicability in determining whether the appropriate level of facilitation had been provided.[41] Taken overall, the cases established the following general guidance as to what adequate facilitation will require:

(a) Making a cellphone or telephone available to the detainee (if needed) in circumstances of reasonable privacy.[42]

(b) Enabling the detainee to ring his/her own lawyer if requested,[43] and helping them by obtaining the telephone number from the internet or the New Zealand Law Society website, if required.[44]

(c) If the detainee cannot immediately contact his/her own lawyer, or does not have one, allowing the detainee to ring "one or two others".[45]

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40 Andrew Butler and Petra Butler, above n 17, at [20.7.25].
41 See above at [34].
42 *Ministry of Transport v Noort*, above n 4, at 274 per Cooke P and 284 per Richardson J; and *Rae v Police*, above n 35, at [58].
43 *Ministry of Transport v Noort*, above n 4, at 274 per Cooke P.
44 *Ahuja v Police* [2019] NZCA 643 at [21].
45 *Ministry of Transport v Noort*, above n 4, at 274 per Cooke P. See also *Danks v Ministry of Transport*, above n 34, at 4; and *Bennett v Ministry of Transport*, above n 34, at 366–367.

That will require the officer to have available "a telephone book or a list of lawyers willing to give advice to detained motorists".[46]

(d) Fulfilling these obligations throughout the drink-driving procedures.[47]

R v Alo

[46] Before assessing the significance of the Practice Note we turn to the 2007 decision of this Court in *R v Alo*.[48] Mr Alo was arrested on suspicion of assault. Mr Alo asked to speak to his lawyer, a Mr Bradley. When called by the constable, Mr Bradley's phone went to voicemail. Mr Alo told the constable he knew no other lawyers. The interview proceeded, with Mr Alo making various incriminating statements. The constable was not sure whether he told Mr Alo about the existence of the PDLA after Mr Bradley proved unreachable.

[47] On appeal, the primary argument for Mr Alo was that the constable should have told him of the existence of the PDLA and that it provided for free legal advice. It was accepted at the time that the obligation to facilitate required police to advise of the existence of the PDLA if an arrested person wanted legal advice but said they could not afford it.[49] The relatively confined point in *Alo* was thus whether that obligation also existed where the arrested person remained silent as to why they did not want to contact a lawyer.

[48] The majority, William Young P and Arnold J, concluded that no such obligation existed. Because s 23(1)(b) "plainly" did not confer a substantive right to free legal advice for those arrested,[50] it followed that there could not be an entitlement under that section to be told of a right to free legal advice:[51]

> As a matter of interpretation of s 23(1)(b), the "right" of which the detainee must be informed is necessarily the substantive right which is provided for, namely the "right to consult and instruct a lawyer without delay". Since that

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46 *Rae v Police*, above n 35, at [58]. See also *Ministry of Transport v Noort*, above n 4, at 284 per Richardson J; and *Takarangi v Ministry of Transport* (1992) 9 CRNZ 234 (HC).
47 *Rae v Police*, above n 35, at [57]; and *Ahuja v Police*, above n 44, at [18]–[22].
48 *R v Alo*, above n 21.
49 *R v Barber*, above n 34.
50 *R v Alo*, above n 21, at [31].
51 At [66(a)].

> substantive right does not extend to free legal advice, logic suggests that there is thus no "constitutional" entitlement to be told of a right to free legal advice.

[49] Chambers J dissented. In his opinion, the fact that s 23(1)(b) did not articulate a right to be provided with legal advice (or to be informed of the existence of the same) was no barrier to an obligation arising, and the majority's conclusion left a critical component of the right to speak with a lawyer to chance.[52]

The Practice Note

[50] The practical effect of *Alo* was short-lived, however, as Elias CJ's 2007 Practice Note provided further guidance to the police on questioning suspects.[53] Compliance with the Practice Note is a matter which must be taken into account under s 30(6) of the Evidence Act 2006 when considering whether a statement has been obtained by police unfairly. The Practice Note provides, in relevant part:[54]

> (2) Whenever a member of the police has sufficient evidence to charge a person with an offence, or whenever a member of the police seeks to question a person in custody, the person must be cautioned before being invited to make a statement or answer questions. The caution to be given is:
>
> (a) that the person has the right to refrain from making any statement and to remain silent;
>
> (b) that the person has the right to consult and instruct a lawyer without delay and in private before deciding whether to answer questions and that such right may be exercised without charge under the Police Detention Legal Assistance Scheme;
>
> (c) that anything said by the person will be recorded and may be given in evidence.

[51] As the Chief Justice explained in an introductory section of the Practice Note:[55]

> The obligation to advise that legal advice may be available without charge under the Police Detention Legal Assistance Scheme is new. As well the advice requirements under s 23 of the New Zealand Bill of Rights Act 1990 are brought into the required caution. Giving such advice prior to a suspect being arrested or detained does not obviate the necessity to repeat the advice upon arrest or detention.

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52 At [80], [84] and [87].
53 Andrew Butler and Petra Butler, above n 17, at [20.7.41].
54 Practice Note, above n 21, at 297.
55 At 297.

[52] The Practice Note provides that it does not "affect the rights and obligations under the New Zealand Bill of Rights Act", and consequently cannot be determinative when interpreting s 23(1)(b).[56] We accordingly do not accept the CBA's submission that the Practice Note can effectively achieve that outcome by creating a legitimate expectation relevant to the interpretation of the right.

Canadian jurisprudence

[53] We turn finally to the Canadian jurisprudence relied on by all the parties. Particular attention was drawn to the case of *Prosper v R*, an appeal heard by the Supreme Court of Canada two years after this Court released its decision in *Noort*.[57]

[54] That Court had, several years earlier, confirmed in *R v Therens* that motorists detained pursuant to Canadian drink-driving schemes had the right to retain and instruct counsel, as guaranteed by s 10(b) of the Charter.[58] The Court had further found, in *R v Brydges*, that when detainees say they are unable to afford a lawyer, police must inform them of local legal aid or duty counsel schemes (if any).[59] The Court had been careful, however, not to create a substantive entitlement to such schemes or place any requirement on provinces to enact them. Notwithstanding, following *Brydges* many provinces established systems of duty counsel, including staffed toll-free lines, which subsequently became termed "*Brydges* duty counsel".

[55] In *Prosper*, the Supreme Court faced the issue the appellant raises here. That is, despite the clear line of previous authority, did the Charter place a substantive obligation on the executive to guarantee the availability of lawyers?

[56] The Court unanimously agreed that it did not.[60] The reason for that conclusion was, as the Crown urges here, the significance of the basic constitutional principle that it is not for the courts to add to the substantive content of the obligation created by s 10(b). Moreover, the possibility of doing so had been expressly considered in the

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56 At 297.
57 *Prosper v R* [1994] 3 SCR 236.
58 *R v Therens* [1985] 1 SCR 613.
59 *R v Brydges* [1990] 1 SCR 190.
60 *Prosper v R*, above n 57, in particular at 266 per Lamer CJ, Sopinka, Cory and Iacobucci JJ; at 286 per L'Heureux-Dubé J; and at 298 per McLachlin J.

course of the preparation of the Charter, and had been rejected. However, in the leading majority judgment, Lamer CJ considered that in the absence of *Brydges* duty counsel, the authorities would be required to grant detainees a greater opportunity to reach counsel, perhaps until a local legal aid office opened or until a private lawyer willing to provide free summary advice could be reached.[61] Thus, although it was not legally required for provincial governments to establish *Brydges* duty counsel, there was a substantial incentive for each to do so.[62]

[57] Against that background we turn to the leave questions.

The first question: Is there an obligation to facilitate the availability of legal advisers to enable the envisaged legal consultation to occur?

[58] The first leave question asks whether what is currently recognised as acceptable facilitation, the provision of a list of lawyers and their after-hours contact details, implies a need for the executive to have made some (or better) arrangements for the lawyers listed to respond when telephoned. Before addressing that question, we consider Mr Kerr's more extensive proposition, that there is an obligation to guarantee that when advice is requested it is made available.

[59] New Zealand courts have consistently emphasised that NZBORA rights are, generally speaking, not absolute. At the same time, they have also consistently acknowledged the unusual status of the drink-driving scheme, and rejected challenges based on assertions that all of the scheme's many complicated requirements must be strictly complied with. In *Aylwin v Police* the Supreme Court confirmed the latter consideration when it said:[63]

> [17] Every driver of a motor vehicle on the roads of this country should by now be aware that driving after consuming more than a small amount of alcohol is dangerous, illegal and socially unacceptable. The great majority of drivers comply with their obligations in this respect. A small minority do not. Parliament has legislated to ensure that these drivers do not escape responsibility through technical and unmeritorious defences. The courts must give full effect to that clear Parliamentary indication.

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61 At 269–270.
62 At 275.
63 *Aylwin v Police* [2008] NZSC 113, [2009] 2 NZLR 1.

[60] Those considerations, and the alarming social costs of drink-driving, have led to the enactment of a scheme which, in some respects, departs from the usual expectations and standards of criminal justice. Drivers are required to submit to the procedures called for by the scheme at random, without reasonable suspicion by the police. Although a stopped driver is told that they may exercise the right to silence, they are nonetheless obliged to provide breath or blood samples on demand. Determined failure to co-operate is an offence, punished as if the substantive blood alcohol offence had been proved.

[61] As we have seen the courts have, whilst accepting the justification for those aspects of the drink-driving scheme, and the need to maintain the integrity of that scheme, nevertheless sought to give the right to legal advice practical effect. In that context, Mr Kerr's proposition that s 23(1)(b) requires the executive to guarantee the availability of advice from a lawyer faces considerable difficulties.

[62] First, that is not what s 23(1)(b) requires on its face. To recognise such an obligation would represent a considerable addition to the words of the section. As we have noted, were that proposition to be upheld, of necessity there would be an obligation to provide legal advice for free: if not, impecunious motorists would not be guaranteed the receipt of legal advice. As Davidson J noted in the High Court,[64] the inclusion of a right to free legal advice for impecunious persons charged with an offence in s 24(f), and the omission of any comparable right for detained persons in s 23, is a strong indicator that such an obligation cannot be taken as implicit.

[63] Second, and relatedly, recognising such an obligation would require us to enlarge the right to counsel for detained individuals *beyond* the right for individuals actually charged and facing trial. In *R v Condon* the Supreme Court distinguished between the absolute right to a fair trial, as affirmed by s 25(a) of BORA, and the subsidiary right of persons charged with an offence to consult and instruct a lawyer, as affirmed by s 24(c).[65] Section 24(c), the Court observed, did not require the executive to "guarantee to provide the lawyer's services", except to the extent

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64 High Court judgment, above n 2, at [37]–[38].
65 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.

s 24(f) might be engaged.[66] Considering those charged and facing trial are generally in greater need of a lawyer, this too undercuts the proposition we are invited to adopt.

[64] Third, it would require us to depart from *Noort* and *Mallinson*, both decisions of the Full Court, and a number of related Permanent Court decisions, including *R v Alo*, where it was assumed that the right could not extend to a substantive entitlement.[67]

[65] Fourth, to do so would require us to go further than Canadian authority, in particular that in *R v Prosper*, which since *Noort* has been found by the New Zealand courts to be highly persuasive.

[66] We therefore conclude that there is no obligation under s 23(1)(b) to guarantee the availability of legal advisers.

[67] We turn, then, to the first leave question as framed: that is, and as we have put it: does the obligation to facilitate extend to making, or making better, arrangements for lawyers to respond when telephoned than existed in Mr Kerr's case? We say at once we accept Mr Powell's submission that it is not for this Court to tell the executive how to go about upholding the s 23(1)(b) right. To that extent, the answer to the leave question as framed must be "no".

[68] It remains incumbent on the executive to afford a detained motorist the facility to exercise the s 23(1)(b) right "in a real and practicable way".[68] If the executive does that through the PDLA, then it must ensure that the scheme fulfils its purpose of providing contact details of lawyers "capable of and willing to provide legal advice to detained persons".[69]

[69] It does not follow that every detained motorist will be able to speak to a lawyer. In limited circumstances, practical limitations may circumscribe what can reasonably be provided by police: an unexpected cellphone outage is one example. Such

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66 At [76].
67 *R v Alo*, above n 21, at [31].
68 *Steel v Police*, above n 34, at 390.
69 *Barrie v R* [2012] NZCA 485, [2013] 1 NZLR 55 at [15].

situations cannot always be guarded against. As has been recognised since *Noort*, it would be unreasonable, and undercut policework to an unacceptable degree, to require motorists detained under the drink-driving scheme to enjoy the right in every situation.

[70] We have referred in [68] to "the executive". That is because we agree with Davidson J that the obligation to facilitate exercise of the s 23(1)(b) right is appropriately imposed on the broader executive government.[70] Thus it is no answer to a challenge under s 23(1)(b) for the police to contend the police officer involved did everything in his or her power to facilitate exercise of the right.

[71] Finally, we make clear that we do not consider the position of detainees who cannot afford their own lawyer. The issue for Mr Kerr was not that he was impecunious: he had initially intended to talk to his own lawyer. Rather, the issue raised is the extent of the recognised obligation to do more than pause in the administration of the scheme to give the detained motorist an opportunity to contact a lawyer and to in fact facilitate the motorist's ability to do so.

The second question: Was there a breach of Mr Kerr's right under s 23(1)(b) in the circumstances?

[72] The evidence in the District Court showed, in our view, that in this case the executive fell short of what was required. At the relevant time in Canterbury, the PDLA scheme operated on a list rather than a roster scheme.[71] The constable dealing with Mr Kerr subsequently acknowledged in cross-examination that this system worked very poorly:

> Q. So [is lawyers on the PDLA list not answering calls] a common problem of when you go — you commonly go through this type of procedure with other motorists?
>
> A. If people request a lawyer I do what I can to get a lawyer. Sometimes it can't happen but for reasons they're not answering, yes.
>
> Q. And does it normally happen in the evenings or can it happen during the day as well?
>
> A. It can happen at any time. It's almost 50/50 on whether you get through or not.

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70 High Court judgment, above n 2, at [21]–[23].
71 See above at [40]–[43].

Q. Another police constable, Constable Buck, he gave evidence I think last week in Court where he said it was about seven [times] out of 10 no-one answered. Would that be accurate?

A. I guess it would be different for everyone but it's reasonable for that to be, yes.

Q. Would you go so far as to say is it more often than not they don't answer?

A. That's correct, yes.

[73] Affidavit evidence filed in this appeal by the Ministry and the NZLS confirmed those problems. An official from the Ministry explained that in February 2017, as a result of a number of concerns raised by police regarding PDLA providers in Christchurch not answering their phones, an investigation into the operation of the PDLA in that area was undertaken. That investigation was given additional impetus following comments by a local District Court Judge in dismissing a charge of drink-driving in circumstances where eight unsuccessful attempts were made to contact different lawyers on the PDLA list.[72] As that investigation progressed, it became clear the issues were not limited to Christchurch. It also became clear there were too few providers in Canterbury available to implement an effective roster. The Christchurch investigation was, accordingly, paused in late March 2017, and a nationwide review began. A survey of providers showed that 71 per cent of calls made pursuant to the PDLA were received between 10 pm and 4 am. All of the instances which had caused the police concern fell within that time period. The providers surveyed raised a range of other issues, principally as to remuneration and the police's attitude and processes. Discussions were then held to consider potential changes to the PDLA.

[74] Following the review, a roster system was established in Canterbury, based on 28 lawyers. The unchallenged evidence was that since the establishment of that roster in Christchurch, no complaints have been received regarding the operation of the PDLA.

[75] Whilst the names and contact details of lawyers on the list provided to Mr Kerr were apparently accurate, those lawyers were not, in reality, willing to provide legal

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[72] *Police v Fraser* [2017] NZDC 7387, [2018] DCR 185.

services to Mr Kerr or indeed any detained person at the relevant times. It is clear, therefore, that as the police recognised in the District Court, it was in fact more likely than not that — at such times — no lawyer on the PDLA list would be able to be reached, however many attempts were made. Thus the act of providing the list of names and telephone therefore provided little or no facilitation.

[76] We acknowledge that Mr Kerr asked, on several occasions, for his own lawyer to be contacted. In our view, however, that does not mean that the facilitation provided by the list was of less significance. The list addresses the reality that, in the time the drink-driving scheme allows for access to lawyers, and at the times a detainee under the scheme is most likely to seek to do so, contacting and getting advice from a detainee's own lawyer (where they have one) may simply not be practicable. Nor does the individual constable's commendable willingness in Mr Kerr's case to ring 12 of the lawyers on the list demonstrate reasonable facilitation. Rather, and due to no fault of the constable, it points to the opposite conclusion. It does so by demonstrating the inadequacies of the list at that time in Canterbury.

[77] It follows that the answer to the second leave question is "yes" because there was a breach of Mr Kerr's right under s 23(1)(b).

Section 30(3) — admissibility

[78] Having thus answered the two questions on which leave is reserved, the question becomes one of relief. We turn to the balancing exercise called for by s 30(2)(b) of the Evidence Act and the non-exclusive list of relevant factors found in s 30(3). In our view, the following are the relevant factors here:

(a) the right is one of acknowledged importance;

(b) although not occasioned by deliberate carelessness or bad faith, the breach of the right resulted from known inadequacies in the PDLA scheme operated in Canterbury at the time;

(c) the evidence in question of Mr Kerr's refusal to permit a blood specimen to be taken is critical to the prosecution case;

(d) Mr Kerr was charged with a serious offence; and

(e) the ability for the police to efficiently and fairly administer the drink-driving scheme is an important one, particularly given the risks drink-driving poses to the population at large. By the same token, however, facilitation of the right is not difficult, particularly given the ease and speed of modern telecommunication methods. Nor need its exercise unduly impede the relevant processes.

[79] Having regard to those factors, in our view exclusion of the evidence is the proportionate response. That being the case, there is no evidence upon which Mr Kerr could be convicted of refusing to provide a blood specimen and a judgment of acquittal must be entered.

Result

[80] Mr Kerr's appeal is allowed.

[81] The conviction on the charge of failing to provide a blood specimen is quashed.

[82] A judgment of acquittal is entered.

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