PURSUANT TO S 203 OF THE CRIMINAL PROCEDURE ACT 2011, THE IDENTITY OF MS X AND OF THE APPLICANT ARE PERMANENTLY SUPPRESSED FROM PUBLICATION.

IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
KIRIKIRIROA ROHE

CIV-2019-419-329
[2021] NZHC 743

UNDER	The Judicial Review Procedure Act 2016 and under Part 30 of the High Court Rules
IN THE MATTER	of an application for judicial review of a decision to issue a pre-charge warning under the powers deleted to Sergeant under the Policing Act 2008
BETWEEN	S Applicant
AND	THE COMMISSIONER OF POLICE First Respondent
AND	D Second Respondent

Hearing: 9 November 2020

Appearances: W C Pyke for Applicant
K Laurenson for Respondents

Judgment: 1 April 2021

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 1 April 2021 at 3:30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Gallie Miles, Hamilton
Crown Law Office, Wellington

Introduction

[1] S (the applicant) seeks judicial review of a decision made by Detective Constable D (DC D) to issue him with a "formal written warning" in relation to an allegation that he engaged in sexually grooming a female student at the High School where he was employed as a teacher (the warning).

[2] The warning was issued to the applicant in a letter dated 20 February 2019 and was entered into the Police National Intelligence Application (NIA) database. The Police subsequently provided details of the warning to the Teaching Council of Aotearoa New Zealand, and to the educational institute which the applicant says made it impossible for him to continue working as a teacher.

[3] A formal warning such as was given to the applicant has no statutory basis and, other than for pre-charge warnings which are restricted to comparatively minor offences, there is no specific Police policy governing the issuing of formal warnings which are to be recorded by entry on the Police NIA database. In this judgment I find that the issuing of the warning engaged the New Zealand Bill of Rights Act 1990 rights, and specifically the right to natural justice. Such rights can only be limited by a public decision-maker if the limitation is both reasonable and prescribed by law. The absence of any statutory authority or common law authority for formal warnings, and the lack of any promulgated protocol prescribing the pre-requisite requirements for their use, means that they are not prescribed by law. Accordingly, for the reasons that follow I allow the application for judicial review, and make orders granting the applicant relief and setting aside the formal warning.

Background

[4] The applicant was a teacher and Assistant Dean at a High School. In this role he provided pastoral care to students. Ms X was a 15-year-old female student at the High School. The applicant had known her for several years prior to the events that led to the Police issuing him with the warning, through her friendship with his son, who was a contemporary of hers at the school. The applicant initially commenced providing pastoral care and counselling to Ms X after she came to his attention for truancy. As a result the applicant learned that Ms X was struggling with issues at home,

and suffering from anxiety and mental health issues including a risk of self-harming. Over the course of the applicant's involvement with Ms X ostensibly for the purposes of providing her with pastoral support and guidance they maintained regular contact by phone calls, meetings and text messages. However, the inappropriate nature of their interactions came to the attention of the applicant's supervisor who made a formal complaint about his behaviour to the deputy principal.

[5] At the beginning of 2018, the school principal directed the applicant that he was to cease text message contact with Ms X. However, contrary to that direction, the applicant continued to exchange text messages with Ms X. During the ten week period between 1 July and 11 September 2018 the applicant and Ms X exchanged 1861 text messages. The applicant's messages to Ms X included numerous heart emojis and some messages in which he said he loved her, and that she was the "highlight of every day" for him. He also gave her several gifts despite Ms X repeatedly telling him that she did not want them.

[6] Over the course of these communications Ms X told the applicant that she had been sexually abused by someone associated with a member of her family. The applicant encouraged her to report the abuse.

[7] On 10 September 2018, Ms X disclosed the sexual abuse she had suffered to a third party. The applicant was in contact with her and encouraged her through the process which resulted in the involvement of Oranga Tamariki and the Police. The following evening the applicant exchanged text messages with Ms X in which she said that she "just kinda want to cry and don't stop … I just want a hug." Although Ms X had told the applicant that he did not need to go and see her, later that evening around 8.30 pm he drove in his van to where Ms X was working in part-time employment. Ms X came out to meet him and sat with him on the back seat. He closed the door and hugged her. There is no suggestion of the applicant's conduct involving anything more than him briefly hugging Ms X.

[8] In the course of the Police investigating Ms X's allegation that she had suffered sexual abuse by a third party they discovered text messages that had been exchanged between the applicant and Ms X. The Police then commenced an investigation into

the applicant for suspected indecent communication with a young person. DC D led the investigation. He first spoke to Ms X on 21 November 2018, and again on 2 December 2018. When interviewed by the Police Ms X denied that anything untoward or inappropriate was taking place between her and the applicant, although she described the applicant's contacts with her as being "a bit weird" at times.

[9] On 7 December 2018, DC D met with the applicant and spoke to him about his relationship and text communications with Ms X. The applicant admitted having been in frequent text messaging contact with Ms X, and said that he had also spoken frequently to the school guidance counsellor about the contact he was maintaining with Ms X. The applicant confirmed that he had met Ms X at her workplace on 11 September 2018 and that he had given her a hug while they were sitting together in his van. He said he had been concerned for her as she was struggling with just having told her mother about the sexual abuse she had been suffering. The applicant acknowledged that his relationship and contacts with Ms X "probably overstepped boundaries" but he denied any indecent behaviour. He explained that he had been thinking of Ms X as if she was one of his own children.

[10] DC D ascertained from other staff at the school that day that the applicant's supervisor had had already made a formal complaint to the deputy principal of the school about the applicant's contacts with Ms X.

[11] DC D discussed the matter with his police supervisor, and they concluded that although the applicant's contacts with Ms X were clearly inappropriate between a teacher and a student, there was insufficient evidence to identify any criminal offending. The Police nevertheless decided to make further inquiries and shifted the focus of their investigation from indecent communication with a young person to a potential charge of meeting a young person following sexual grooming. On 17 December DC D obtained a production order to access text messages that had been exchanged between the applicant and Ms X. Pursuant to the production order DC D obtained the 1861 text messages passing between the applicant and Ms X between 1 July 2018 and 11 September 2018.[1]

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[1] Because Vodafone only retains text data for a limited period, the earliest text messages obtained by the Police were from 1 July 2018.

[12] On 18 December 2018 Ms X underwent a Specialist Child Witness Interview in which she reiterated her position that the applicant had been supportive of her and that no indecent conduct had taken place.

[13] During the course of the Police investigation the principal of the school notified the Teaching Council of the applicant's inappropriate text contacts with Ms X. As a result of the school having notified the Teaching Council, the applicant notified the Teaching Council that he was voluntarily surrendering his teaching certificate and he subsequently resigned his employment as a teacher at the school on 14 January 2019. He did so because he considered the issues raised in the school complaint to the Teaching Council had to be resolved before the Teaching Council before it would be appropriate for him to return to teaching again.

[14] On 22 January 2019, DC D conducted a formal recorded interview with the applicant. DC D explained that he wished to speak with him regarding police concerns that his relationship with Ms X was inappropriate and at times possibly indecent. Before proceeding with the interview DC D told the applicant of his rights under the New Zealand Bill of Rights Act 1990 including his right to speak to a lawyer before deciding whether or not to proceed to answer questions. The applicant waived his right to consult with a lawyer and agreed to proceed with the interview.

[15] In the course of the interview the applicant explained that Ms X had been distressed about what she had been experiencing at home, and would often contact him and come to see him to talk about what was happening. He said that he "blew it in terms of professional boundaries" because of the "rough time" she was experiencing at her home, and that he had gone into a "protective Dad mode" because she was a friend of his own son. The applicant acknowledged that he had hugged Ms X after she had asked him if she could give him a hug. He also acknowledged kissing her on the top of her head but denied engaging in any conduct amounting to indecency.

[16] Following the interview the Police decided that their investigation had established the elements of the crime of meeting a young person following sexual grooming (the grooming offence).[2] They considered that on the information they had

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[2] Crimes Act 1961, s 131B; maximum penalty seven years' imprisonment.

obtained, it appeared that the applicant had arranged to meet with Ms X with the intention of doing an indecent act, namely the hug that took place in his vehicle. DC D considered that having regard to the context in which it occurred, the hug satisfied the criteria for an indecent act. In an internal Police Report Form dated 25 January 2019, DC D said:[3]

> In respect of the meeting between [the appellant] and [Ms X] on the 11th of September 2018, it is unclear whether the act of [the appellant] hugging [Ms X] would be considered an indecent act, as per section 134(3) of the Crimes Act 1961, thus making it an offence under part 7 of the Crimes Act 1961.
>
> It is found that [Ms X] initiated the hug via text message and she admits to consenting to the hug at the time of meeting but as she was 15 years old (a fact which [the applicant] acknowledges) she is by law incapable of consenting to such an act.
>
> I believe the remaining elements of the offence have been proven in that [the applicant] previously communicated/met with [Ms X] and the fact he did travel with the intention to meet her.
>
> Consideration needs to be given whether the offence of sexual grooming has been met. I believe the offence has been met when considering [Ms X's] age at the time and her inability to provide consent. Although I hold doubt as to whether this could be proven beyond reasonable doubt as per the solicitor general [sic] guidelines.

[17] On 11 February 2019 DC D met with Detective Sergeant K (DS K) and Acting Detective Senior Sergeant C (ADSS C) to decide whether the Police would charge the applicant with the offence of sexual grooming. They concluded that the Police did have sufficient evidence to charge the applicant. However notwithstanding that conclusion the three police officers decided that a prosecution of the applicant would not be in Ms X's interests, as she herself did not support a prosecution of the applicant, and because the police considered that she was in a vulnerable position at the time by reason of being the victim of the sexual abuse she had recently complained to the Police about and because the police were concerned to not add further stress.

[18] The Police nevertheless considered that to do nothing would not be appropriate, and that the matter should be correctly recorded to assist Police investigating any similar behaviour by the applicant and to provide accurate information should the applicant be vetted for any future employment.[4]

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3 Affidavit of DC D, sworn 21 May 2020, pages 7-8.
4 Affidavit of DC D, sworn 21 May 2020, at [23] – [29].

[19] DC D accordingly wrote to the applicant by letter dated 20 February 2019 giving him a formal warning. The same day he took steps to have the warning entered into the Police NIA database. In his letter to the applicant he said:

> Dear Sir
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> **Reported Sexual Grooming Allegation – Police File:** [Number]
>
> As you are aware Police have investigated an allegation regarding the sexual grooming of [Ms X].
>
> You attended the [Redacted] Police Station on 22nd of January 2019 and were interviewed in regard to the allegation. During the interview you acknowledged that you travelled to meet [Ms X] on the 11th of September 2018 and hugged her.
>
> Since speaking with you, the investigation has been reviewed to determine whether or not you should be criminally prosecuted.
>
> Sexual grooming is an offence contained within the provisions of the Crimes Act 1961. Upon conviction for such an offence you are liable to imprisonment for a term not exceeding seven years.
>
> After taking all matters into consideration including the respective victim and the available evidence and other influencing factors it has been decided not to pursue the allegation through to a criminal prosecution.
>
> This decision has not been made lightly. In lieu of being prosecuted you will be warned. As such consider this a formal warning for the sexual grooming of [Ms X].
>
> Be aware that should Police receive any subsequent reports of you sexually grooming anyone, you will be prosecuted should the evidence support it.
>
> I hope that there will be no repeat of such behaviours again.
>
> Enclosed is an information leaflet regarding services offered by the Safe Network. Please make the most of the opportunity to utilise this service.
>
> The Police investigation file pertaining to this matter is now closed.
>
> Should you have any questions relating to aforementioned please do not hesitate to contact the writer.
>
> Kind regards,
>
> [D]
>
> Detective Constable
>
> [Redacted] Child Protection Team

[20] On 18 April 2019 the Police Vetting Service (PVS) wrote to the applicant advising that they were proposing to release information regarding the warning in DC D's letter of 20 February 2019 to the Teaching Council and to the educational institute where he was employed as a Homestay Host. The PVS advised the applicant that as it had previously provided vetting information regarding him to the Teaching Council and the educational institute in 2017, it was their intention to send them an updated vetting result which would include reference to the warning.[5] The PVS explained that it was writing to advise the applicant of its intention to release the updated vetting information and to thereby provide him with an opportunity to inform the Teaching Council and the educational institute of the warning himself, before the information was released to them, and the opportunity to contact the PVS to provide any relevant information for its consideration.

[21] In relation to his employment the applicant had previously provided his written consent to the Teaching Council and the educational institute to access information held by the Police.

[22] By letter dated 1 May 2019, the applicant's solicitor wrote to the Manager of the PVS advising that the applicant denied that any sexual grooming was intended or had taken place, and explaining that the attention the applicant paid to Ms X was primarily directed at providing support to a person who he considered to be at risk. On 6 May 2019 the Manager of the PVS responded to the applicant's solicitor advising that it was not his intention to seek any changes to the outcome from a vetting perspective, and saying that any challenge to the current status and request for relevant information would need to be made to the officer in charge of the case. The PVS Manager further advised that the applicant had the option of withdrawing his consent

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5 The letter advised that the information proposed to be released in the revised vetting result would be in the following terms:
"Police hold the following relevant information:
2018: The applicant received a Formal Written Warning for Meet Young Person Following Sex Grooming.
This is regarding an incident where the applicant admitted to being in frequent contact with a young female (then aged 15), while engaged in his role as a school teacher. When spoken to by Police, the applicant confirmed he had overstepped the boundaries as a teacher, but he was acting out of genuine concern for the female who was going through difficulties at the time.
Police have an expectation that you will treat this information confidentially and in accordance with the Privacy Act 1993. However you may disclose this information to the applicant."

to the release of the vetting information, in which case the vetting process would be put on hold for a limited period which would likely end on or before 17 May 2019. On 6 May 2019 the applicant's solicitor responded to the PVS Manager advising that the applicant withdrew his consent to the release of the vetting information to the Teaching Council and the educational institute.

[23] However having initially sought the applicant's consent before providing the new vetting information to the Teaching Council and the educational institute, the Police realised that as the information was an update to an existing vetting, and as the applicant had continued to be employed as a teacher, the new information should be disclosed irrespective of the applicant's views.

[24] The Police thereafter provided the updated vetting information to the Teaching Council on 21 May 2019. The updated information on the Police vetting record which was provided to the Teaching Council stated:[6]

> 2018: The applicant received a Formal Written Warning for Meet Young Person Following Sex Grooming.
>
> This is regarding an incident where the applicant admitted to being in frequent contact with a young female (then aged 15), while engaged in his role as a school teacher. When spoken to by Police, the applicant acknowledged he had overstepped the boundaries as a teacher, but stated he was acting out of genuine concern for the female who was going through difficulties at the time.

[25] On 24 May 2019 the applicant's solicitors wrote to the Commissioner of Police challenging the validity of the process by which the decision to issue the warning was made, as well as the actual issuing of the warning to the applicant.[7] The applicant's solicitor requested the Police to withdraw the formal warning and advise all third parties to whom it had been disclosed, including the Teachers Council, that the warning was withdrawn and to require the information held by those third parties to be destroyed.

[26] The Police responded by letter of 7 June 2019 from Legal Counsel at Police National Headquarters which said:[8]

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6 Letter Police to applicant's solicitors, Bluett Legal Limited, 7 June 2019 at [15].
7 Letter Bluett Legal Ltd to Commissioner of Police, 24 May 2019.
8 Letter Police to Bluett Legal Ltd, 7 June 2019 at [10] – [14].

…

10. I am advised that the formal warning issued to [the applicant] was not a pre-charge warning, which is based on an admission of guilt for minor offending.

11. I am advised that formal written or oral warnings may be issued for any offending where there is either admission of the offending actions or evidence to support the warning. Warnings are recorded in the Police database, the National Intelligence Application.

12. I note that the IPCA report you referred to supported the use of warnings as an alternative to prosecution. While clear policies were recommended by the IPCA, there was no suggestion that a statutory basis for warnings was necessary or desirable.

13. In respect of [the applicant], Police's prosecutorial discretion (supported by the Solicitor-General's guidelines) resulted in a decision not to prosecute, despite the tests for evidential sufficiency and public interest having been met. A warning summarising the outcome of the Police investigation was sent to him instead.

14. Whether or not a warning had been issued, all information relating to the investigation, including advice, opinions and recommendations, is retained in Police records relating to [the applicant] and may be used or disclosed for any legitimate purpose in the future, including vetting.

…

Police vetting

[27] Sections 25 and 26 of the Children's Act 2014 provide that a safety check must be made in relation to anyone whose work involves regular contact with children, and thereafter repeated every three years. Sections 31 and 32, in conjunction with regs 6 and 11 of the Children's (Requirements for Safety Checks of Children's Workers) Regulations 2015, require a Police vetting as part of this safety check. A Police vetting involves the Police providing any information held by the Police about a person. The Police NIA database which also accesses the Ministry of Justice's criminal history records, is the primary source of information used to inform vetting, although the Police vetting team also sources information held on Police hard copy investigation files. A person who is the subject of a Police vetting[9] must authorise the accessing of the Police Vetting Service for a safety check and consent to the release of information to the approved agency making the request. An applicant's written consent to the release of information by the Police expressly refers to and includes: conviction

[9] Referred to on the Police Vetting Service 'Request and Consent Form' as "the Applicant".

histories; active charges and warrants to arrest; charges that did not result in a conviction including those that were acquitted or discharged without conviction, diverted, or withdrawn; any interaction with the New Zealand Police, including family violence incidents, and investigations that did not result in a prosecution.[10] This can include conviction histories, active charges and warrants, charges that did not result in a conviction, as well as any interaction with Police, including investigations that did not result in prosecution. In many cases only the conviction history is released while non-conviction information is only released when the PVS considers that the relevance of the information to the role and the evidence substantiating the information outweighs the applicant's right to privacy.

Submissions

The applicant

[28] Mr Pyke for the applicant submits that there is no legal basis for the Police to give formal warnings. He submits that there is no statutory authority for formal warnings and no common law basis for a Police Constable to give a formal warning. Counsel notes that the procedure followed by DC D in giving the formal warning to the applicant failed to follow the procedures advised by the Independent Police Conduct Authority for the giving of pre-charge warnings for minor offences. He submits that where a formal warning is given in respect of more serious offending, the Police are required to afford the recipient of the warning at least the same protections as is required for the giving of pre-charge warnings for more minor offences.

[29] The applicant further submits that the issuing and recording of the formal warning constituted an arbitrary or unreasonable exercise of policing powers because it did not follow any statutory rules, policies or guideline, and was unreasonable and substantively unfair because it did not follow the policy for the giving of pre-charge warnings applicable for more minor offences.

[30] Mr Pyke notes the respondent's concession that there is no statutory authority for the issuing of a formal warning, and that the respondent asserts that the power to

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[10] Police Vetting Service 'Request and Consent Form', Section 3.

do so derives from common law powers and an implicit component of the discretion to prosecute. He submits that there is no legal basis of any kind conferring a power on Police to issue a formal warning. Moreover the power that the respondent submits the Police possess is functionally unlimited and free from any kind of independent control. Counsel submits that the Police action of issuing the warning was therefore in excess of the Constable's statutory or common law powers.

[31] Mr Pyke also emphasises that when interviewed by the Police the applicant did not admit to any sexual grooming, or indeed any crime. While the applicant acknowledged to Police that some of his text messages to Ms X were inappropriate, he had acted throughout in what he considered were her best interests having regard to the extreme circumstances in which: Ms X was clearly mentally distressed; he understood that she had attempted suicide in the past; and she lacked family support as the abuse she had disclosed to him involved a person associated with her immediate family.

[32] Mr Pyke submits that as a result of the way in which the Police handled the matter including the issuing of a formal warning and its entry in the NIA database without the applicant being informed that this was a possible outcome, meant that he had been given no opportunity to have the case against him tested and determined by a court.

[33] Mr Pyke does not say that the Police lack the power to give informal warnings, but he submits that specific legal authority is required for Police to issue a formal warning which is to be entered into the NIA national database, where it may have seriously adverse impacts on a person's life.

[34] Mr Pyke submits that any rules concerning state interference with people's rights should be published, accessible, and subject to effective independent control.[11] He observes that in the United Kingdom the authority to issue formal warnings is

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[11] *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [291]. Mr Pyke also cites Lord Sumption in *R, in the matter of an application by Lorraine Gallagher for Judicial Review (Northern Ireland) v Secretary of State for the Home Department* [2019] UKSC 3. The case deals with the European Convention on Human Rights, but Mr Pyke suggests that the standards of legality discussed are orthodox.

largely statutory, and involves judicial oversight. He notes that significantly the warnings can only be given where the prospective defendant has admitted the allegations. By contrast there is no independent effective control in New Zealand, and even if judicial review is accessible as conceded by the respondent, the relevant standard is very low. He submits that judicial review is not a review on the merits, and will only assist the applicant in rare circumstances.

[35] He submits that the process that was followed here, where any objection to the warning was to be referred back to DC D for his consideration, would not involve any independent oversight or control. Mr Pyke accordingly submits that the current system lacks either statutory or common law authority, is not publicly accessible, lacks any kind of defined guidelines, and lacks any effective independent oversight and control. He submits that in the applicant's case, the formal warning process treated the applicant as if he was guilty of a crime notwithstanding: the absence of any admission on his part; that he had not been found guilty at trial; and he was left without any right of appeal.

[36] Mr Pyke also notes that the applicant was not informed that a formal warning was a possible result of the voluntary interview process. He says that although the applicant was given the right to consult a lawyer, as he was never told that he was at risk of being issued with a formal warning which would be recorded in the NIA database, his decision to proceed with the interview and to waive his right to speak with a lawyer before proceeding, was not exercised in a fully informed manner. Mr Pyke says that the legal basis for issuing the formal warning was never explained to the applicant by the Police, and the applicant was only informed of the warning after it had already been entered onto the NIA.

[37] Mr Pyke contrasts the issuing of a formal warning to that applicable to pre-charge warnings for minor crimes. Pre-charge warnings require the potential defendant to: admit wrongdoing; be informed in advance of the intention to give a warning; be informed of the consequences of such a warning; and have the opportunity to decline a warning and instead proceed to prosecution. The pre-charge warning procedure prevents people being warned for alleged crimes, that they deny without the allegation being tested in court. Furthermore, the rules around pre-charge

warnings include possible name suppression, an independent court monitoring the situation, and a clear navigable legal pathway. Mr Pyke notes that pre-charge warnings operate for offences carrying a maximum penalty of less than six months imprisonment, and contends that given the more serious nature of the alleged offending here, and the more serious consequences of the warning, at least the same criteria and standards ought to apply.

[38] Mr Pyke says that since the introduction of pre-charge warnings, the Police Diversion Scheme is now generally used for offences with a maximum penalty of more than six months imprisonment. Before a prosecution will be withdrawn under the Diversion Scheme the defendant is required to enter into a written acknowledgement admitting the offending, together with an acceptance of conditions such as for the payment of reparation or undertaking a restorative justice programme. Mr Pyke also notes that the Police Diversion Scheme includes the possible protection of a court order being made for name suppression and is a process undertaken with the independent oversight of the court.

[39] Mr Pyke notes that the Police affidavits show that they were unsure about whether grooming offending could be proved. He submits therefore that it appears the Police may have adopted the formal warning process in order to avoid the risk of a prosecution of the applicant for the grooming charge being unsuccessful, while effectively achieving the practical consequences of a conviction as regards the applicant's employment as a teacher by entering the warning on the NIA database.

[40] Mr Pyke submits that s 27 of the New Zealand Bill of Rights Act 1990 applies to any public authority that makes a decision in respect of a person's rights, obligations, or interests.[12] He submits that the relevant decision must be adjudicative and directly impact the person's rights, and that the formal warning meets these criteria.[13] And where rights are at stake the court will apply a heightened standard of

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12 *Lumber Specialities Ltd v Hodgson* [2000] 2 NZLR 347 [163]-[185]. See also, Bill of Rights Act 1990, s 27.

13 The two requirements are drawn from *Chisholm v Auckland City Council* [2005] NZAR 661 (CA) at [32].

scrutiny.[14]

[41] He submits that the effect of the formal warning given to the applicant is to elevate what was an unproven allegation, to that of a statement of fact that the alleged offending had actually occurred. He submits that the relevant wording of the formal warning, stating that the applicant has been warned for the sexual grooming of Ms X and that DC D "hope[s] there will be no repeat of such behaviours again", implies that the applicant had accepted that he had engaged in sexual grooming of Ms X. Mr Pyke says that the Teaching Council and any other Police officers accessing the NIA entry recording the warning will inevitably interpret the information as recording that the alleged offending actually occurred, notwithstanding that it is and was denied by the applicant.

[42] Mr Pyke submits that the manner in which the formal warning was issued and entered on the NIA database has the effect of sidestepping the presumption of innocence. He says that one of the consequences of a conviction: that of stopping an alleged offender from working with children in the future, has been achieved by the formal warning without the allegations ever being proven in court, and without the Police risking a prosecution resulting in a not guilty verdict. Mr Pyke submits that by proceeding as they did, the Police in effect acted as both prosecutor and judge, without any actual judicial oversight, and leaving the applicant without an available remedy.

[43] The applicant says that the existence of the formal warning and the Police reference to it when providing vetting information regarding the applicant, will make it impossible for him to get any future employment as a teacher. The applicant says that the warning and vetting information may also cause him difficulties when travelling internationally and could exclude him from participating in activities such as sports where contact with children is involved and where police vetting information will be required and obtained.

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[14] See, for example, *Thompson v Treaty of Waitangi Fisheries Commission* [2005] 2 NZLR 9 (CA) at [212]; *Ye v Minister of Immigration* [2008] NZCA 291, [2009] 2 NZLR 596 (CA) at [303]. *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA) at 403; *Kim v Minister of Justice* [2016] NZHC 1490, [2016] 3 NZLR 425 at [7].

[44] The applicant accordingly seeks declarations that the giving of the warning was unlawful, and that his right to the observance of the principles of natural justice was breached by the Police. He also seeks orders: quashing the warning and an order directing its removal from the Police NIA database and from all Police files; directing the Police to retrieve and destroy all copies of the warning previously sent or provided to any other party; directing the Police not to disclose the warning and its contents; and an order permanently suppressing the identity of the applicant and Ms X.

The respondents

[45] The respondents accept that the decision to issue a formal warning is justiciable and subject to judicial review.[15]

[46] They say that the decision to issue a formal warning is not the exercise of a statutory power but a common law power. They acknowledge however, that like the exercise of any public power it is amenable to judicial review.[16] The respondents submit that the common law power to issue a formal warning is an adjunct of the power to commence a prosecution by laying a charge, and is an aspect of their prosecutorial discretion in accordance with the constable's oath[17] and part of the law enforcement function of Police.[18]

[47] They say that if the Police have the power to choose to prosecute, they must also and necessarily have the power to decide not to. They say that if they have the power to decide not to prosecute, they must also have the power to indicate that they likely would prosecute in the future and therefore have the power to issue a formal warning. They say that in this case the power was used fairly and properly.

[48] The respondents submit that where the Police investigate a suspected offence and decide not to prosecute, they may decide to issue either a formal warning or a verbal warning, or in cases involving less serious charges, a pre-charge warning. They say that the warning itself is just a way of formally recording the Police view of the

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15 As in *Fielding v Police* [2020] NZHC 2728, and analogously to the position in *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.

16 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [216]-[220].

17 Policing Act 2008, s 22.

18 Policing Act 2008, s 9(c).

matter. The respondents say that when the Police are exercising their discretion to warn, they will consider the nature and seriousness of the alleged offence, the evidence available to support a prosecution of the alleged offence, the criminal history of the person allegedly involved, victim considerations and the test for prosecution. They submit that a formal warning does not by itself have any further consequences, and there is no requirement for the discretion to be codified in any way. They say that the discretion is simply bounded by the usual judicial review principles.

[49] The respondents note that pre-charge warnings for less serious offending are given pursuant to a Police policy and only apply as specifically provided for in the policy. They say that while verbal or formal warnings are generally used for offending that falls outside the guidelines applicable for pre-charge warnings, they can also be used in relation to offending that falls within pre-charge warning criteria. They submit that there is in effect no difference between verbal and written warnings other than the different manner in which they are communicated to the person concerned.

[50] The respondents say that it is expected that all warnings will be recorded as an occurrence in the Police NIA database to ensure that should the person come to Police attention in the future, the previously issued warning will be taken into account.

[51] They submit that while the decision to issue the formal warning is reviewable, the intensity of the Court's review will be constrained by reason of the importance of observing the constitutional boundaries between the executive and the judiciary, and the high content of judgment and discretion involved in decisions as to whether a prosecution will be pursued or not.[19] They submit that in the applicant's case the power was exercised fairly and properly, and well removed from being the kind of exceptional case where the Court's intervention is required. Furthermore they say that this is not an instance where the exercise of discretion to prosecute was abdicated, or where there was a failure to consider relevant considerations or where irrelevant considerations were taken into account, or was unreasonable.

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[19] *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513 at [34]-[35] cited in *Fielding v Police* [2020] NZHC 2728 at [11] and [12].

[52] The respondents say that after the interviews of Ms X and the applicant were completed, they considered there to be sufficient evidence on which to charge the applicant with the grooming offence. However, the circumstances in which Ms X was already the complainant in a separate matter under police investigation, and was considered to be emotionally vulnerable, led them to conclude that a prosecution of the applicant was not in the public interest. They say that as the school already knew about what it considered to be inappropriate text messaging between the applicant and Ms X and had already informed the Teaching Council about it, the Council also already knew about the relevant information, and consequently the issuing of the warning would only have a very limited impact. Having decided that there was sufficient evidence for a charge alleging a sexual offence by a teacher against a student, the Police decided that it was not appropriate to let the matter drop entirely, and by giving the applicant a warning they would provide a clear record for future Police vetting or if any further complaints of criminal offending by the applicant were made in future.

[53] The respondents further say that even if they had not given the applicant a formal warning, the fact that they had conducted an investigation into alleged offending involving the applicant and a student at the school where he was working may nevertheless have been information Police would have provided to the Teaching Council. The respondents note that the Children's Act 2014 and Regulations require a Police vetting to be obtained in relation to anyone whose work involves regular or overnight contact with children[20]. The respondents submit that a notation that the applicant had been investigated for sexual grooming of a child, and had admitted inappropriate behaviour but was not charged, would likely be of concern to the Teaching Council. They say that as the school had already notified the Teaching Council about what it considered to be inappropriate text messaging between the applicant and Ms X prior to the Police investigation being completed and before the written warning was issued, the information contained in the warning was always going to be before the Teaching Council.

[54] The respondents also note that the PVS Request and Consent Form on which an approved agency makes a vetting request includes a section completed and signed

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[20] Children's (Requirements for Safety Checks of Children's Workers) Regulations 2015 and Children's Act 2014, ss 23(1), 26, and 27.

by the applicant in which they authorise the Police to release any information they hold if relevant to the purpose of the vetting request, including:

> Charges that did not result in a conviction including those that were acquitted, discharged without conviction, diverted or withdrawn.
>
> Any interaction I have had with the New Zealand Police, including family violence incidents, and investigations that did not result in prosecution.

[55] The respondents further submit that the breaches of natural justice that the applicant alleges, namely that he was not informed of the possibility of a formal warning being issued, and the displacement of the presumption of innocence, are rights affirmed under ss 24 and 25 of the New Zealand Bill of Rights Act 1990, not s 27. They submit that as the applicant was not charged with an offence, those rights are not engaged. The respondents also note that the applicant has not faced any criminal sanctions or penalty, and say that the warning given to the applicant does not say that an offence was committed or suggest that the applicant admitted offending. They accordingly submit that s 27 of NZ BORA and the right to natural justice is not engaged.

[56] Alternatively, the respondents submit that if the s 27 right was engaged, the applicant's right to be heard in accordance with the principles of natural justice was satisfied by means of the Police interview of the applicant in which he denied the alleged offending. The respondents submit that the applicant's participation in the Police interview means that he was heard, and that having taken his explanations into account the Police decided that a formal warning rather than a prosecution was appropriate. The respondents submit that the situation here is analogous to that in *M v Commissioner of Police,* in which Dunningham J found that being aware of the allegations and able to respond to them in the original interaction with police was sufficient to discharge the right to respond.[21] The respondents further say that the applicant was also given an opportunity to comment on the information that would be released in the course of the Police vetting process. The applicant objected to the warning being referred to in the vetting information to be provided and a Police Senior Sergeant thereafter reviewed the matter and decided to proceed. The respondents

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21 *M v Commissioner of Police* [2018] NZHC 615, (2018) 11 HRNZ 499 at [90]-[92].

submit that that process satisfies the applicant's s 27 right to observance of the principles of natural justice and the right to be heard.

[57] The respondents also submit that the actual harm to the applicant was not caused by the issuing of the warning. They say that the harm was caused by the Teaching Council's decision which was made on the basis of the vetting information it received referring to the warning. The respondents cite *Owen v District Court*, in which Williams J held that a "final warning" given by a District Court Judge to a lawyer did not affect the lawyer's rights.[22] Rather, it was the decision of the Legal Services Commissioner which followed the warning that affected his rights, and hence the proper remedy, if one existed, would lie against the Commissioner and not the District Court.

[58] The respondents also submit that the presumption of innocence does not prevent the Police releasing information about a Police investigation that did not lead to prosecution and conviction. They say that nowhere in the formal warning or in the vetting notification provided to the Teaching Council, do the Police say that an offence was committed, and it therefore remains open to the applicant to advise the Teaching Council that he denies the alleged offending. They say that whether the Teaching Council should be cautious about the continued registration of teachers who have admitted overstepping professional boundaries with their students is a matter for the Teaching Council and not the Police.

[59] Finally, the respondents submit that while the warning itself could be deleted from the NIA database, the fact of it having been given cannot be removed entirely from Police files and consequently that part of the remedy sought by the applicant in which he is seeking removal of the warning from all Police records and files, is in practical terms impossible. The respondents say that a note could be added to the NIA database stating that the Court has prohibited its release, but nevertheless, the fact of the investigation having taken place would remain on the NIA database, and could in some circumstances be included in information provided in a Police vetting.

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22 *Owen v District Court at Invercargill* [2017] NZHC 1105, [2018] NZAR 525.

[60] The respondents note that while the applicant had admitted inappropriate behaviour the vetting notation does not state that criminal conduct had been proven, and that it also refers to the applicant's exculpatory explanation of his conduct. They accordingly submit that the vetting notification was balanced, and falls well short of saying that actual criminal offending had occurred.

Analysis

The Formal Warning and NIA record of the warning.

[61] The wording of the warning as set out in DC Ds letter of 20 February 2019 informs the applicant that having considered the available evidence and other "influencing factors" the Police had made a decision not to pursue the allegation by means of a prosecution. The letter explains that instead of being prosecuted the applicant would be given "a formal warning for the sexual grooming of [Ms X]". DC D goes on to say that he hopes that "there will be no repeat of such behaviours again."

[62] Without expressly saying so, and consistently with the conclusion reached by the Police, the letter clearly implies that the Police had decided that there was sufficient evidence on which to prosecute the applicant for the offence of meeting a young person following sexual grooming pursuant to s 131B(1) of the Crimes Act 1961. The communication was described as being a "formal warning for the sexual grooming of [Ms X]". That is an expression of a conclusion reached by the Police that sexual grooming had in fact taken place. That interpretation is reinforced by the statements advising that instead of being prosecuted the applicant would be warned, and that in the event of "any subsequent reports of you sexually grooming anyone, you will be prosecuted should the evidence support it." Furthermore, the sentence: "I hope that there will be no repeat of such behaviours again", is yet another statement indicating that the Police investigation had established that the applicant had committed the alleged offence.

[63] The terms of the Police vetting information provided to the Teaching Council and educational institute is to the same effect. By the statement "2018: The applicant received a Formal Written Warning for Meet Young Person Following Sex Grooming",

the recipient of the Police vetting information was informed that the applicant had received a formal warning for meeting a young person following sexual grooming. While the information provided correctly notes that the applicant had acknowledged to Police that he had overstepped the boundaries of his role as a teacher, it significantly fails to also explain that the applicant had denied any criminal offending and denied having any intention of indecent offending against Ms X, or that it was she who had suggested that she needed a hug before the applicant had gone to meet her.

Does the Formal Warning and it entry in the Police NIA database affect the applicant's rights?

[64] The New Zealand Bill of Rights Act 1990 provides that the rights it affirms may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[23] The New Zealand Bill of Rights Act 1990 is a "bill of reasonable rights",[24] meaning that the rights affirmed are not absolute, and they must accommodate the reasonable rights and interests of others. There are accordingly two elements to the test to determine whether or not a state action not authorised by statute is lawful: the action must be *both* prescribed by law and a reasonable limitation on rights.[25] Following the decision of the Court in *Borrowdale*, a third gateway element can be discerned: that justified government action prescribed by law may also limit New Zealand Bill of Rights Act 1990 rights.[26]

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23 New Zealand Bill of Rights Act 1990, s 5. Section 4 provides that other enactments will supersede as necessary: as neither party suggests that Formal Warnings are permitted by an enactment, the jurisprudence relevant to the interpretation of other legislation need not concern us here.

24 Paul Rishworth "Interpreting and Invalidating Enactments Under a Bill of Rights: Three Enquiries in Comparative Perspective" in Rick Bigwood (ed) *The Statute: Making and Meaning* (LexisNexis, Wellington, 2004) at 277; and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [186] per McGrath J.

25 The test has been employed recently in *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [193]-[226], with regard to the executive's orders around the COVID-19 lockdown; *Siemer v Solicitor-General* [2013] NZSC 68, [2013] 3 NZLR 441, dealing with the common law rule with regard to suppression orders; *Hosking v Runting* [2005] 1 NZLR 1 (CA), dealing with the innovation of the tort of privacy; *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA), dealing with an administrative decision to classify a publication as objectionable. The Court observed that powers derived from the third source (if it exists in New Zealand) would face the same test in *Ngan v R* [2007] NZSC 105, [2008] 2 NZLR 48 at [97] and *Minister for Canterbury Earthquake Recovery v Fowler Developments Ltd* [2013] NZCA 588, [2014] 2 NZLR 587 at [78]. See also Glazebrook J's observation in *Quake Outcasts v Minister for Canterbury Earthquake Recovery* [2015] NZSC 27, [2016] 1 NZLR 1 at [90]: "Even assuming the existence of "third source" authority, this only provides authority for ancillary or incidental administrative actions necessary for the day to day business of government." I also note Hannah Wilberg "Administrative Law" (2016) NZ L Rev 571 at 586 and 587: "Third source powers by definition cease at the point where decisions affect legal rights or liabilities".

26 *Borrowdale v Director-General of Health* [2020] NZHC 2090 at [193].

[65] I shall therefore first determine whether formal warnings entered on the NIA database impinge on the rights affirmed in NZ BORA, and then proceed to address the question of whether formal warnings are lawful according to common law, and a reasonable limitation on the rights affirmed in NZ BORA.

Was the issuing of a formal warning an unlawful limit on the applicant's rights as affirmed by the NZ BORA?

[66] To briefly summarise the respective positions of the parties: Mr Pyke submits that the warning breached the appellant's right to natural justice, as affirmed by s 27 of NZ BORA. The respondents submit that the "bite" of the warning would only occur if the Teaching Council independently decided not to register the applicant by reason of the existence of the warning, and so the warning itself did not affect his rights.[27] The respondents further submit that the harm the applicant claims to have suffered is properly considered as falling within the scope of ss 24 and 25 of the New Zealand Bill of Rights Act 1990, which are only engaged when a person is charged with an offence, and as the applicant was not charged with an offence, those rights are not engaged.

[67] In the alternative the respondents submit that if the Court finds that the applicant's NZ BORA rights were engaged, he was nevertheless given an opportunity to be heard when he was interviewed by the Police, and by the explanations he gave during the interview he exercised his right to be heard. Accordingly, his right to the observance of the principles of natural justice affirmed by s 27 was satisfied.

[68] Section 27 of NZ BORA relevantly provides:

> **Right to justice**
>
> (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that persons rights, obligations, or interests protected or recognised by law.
>
> (2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

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[27] Analogously to the position in *Owen v District Court at Invercargill* [2017] NZHC 1105, [2018] NZAR 525.

[69] The applicant says that the issuing of the formal warning and its entry on the NIA database where it will be referred to in any Police vetting report regarding him, makes him effectively unemployable as a teacher. I agree. The action of the Police in issuing the applicant with a "formal warning" is a statement which effectively says that the person warned was responsible for conduct that warranted the Police issuing a formal warning in those terms thereby indicating that the conduct was considered serious enough to warrant that formal process being adopted and being recorded on the NIA database. The entry of the warning in the Police NIA database where it will be accessed and disclosed to those parties entitled to obtain Police vetting information means that the fact of the warning having been given, will adversely affect the applicant's ability to retain or obtain employment as a teacher, or any position that would involve him in having responsibility for or close contact with children and young people. The terms of the police vetting information advising that the applicant had "received a Formal Written Warning for Meet Young Person Following Sex Grooming" which was provided by the Police to the Teaching Council also implies that the applicant had acted in a manner which the Police considered amounted to sexual grooming offending.

[70] In *Owen v District Court* it was clear that the Legal Services Commissioner would make its own independent decision regarding Mr Owen's failure to file a case management memorandum in advance of a case review hearing, and would determine for itself the affect it might have on his status as a legal aid provider. Unless or until a decision adverse to Mr Owen was made by the Legal Services Commissioner there were no grounds on which he could challenge the District Court Judge's "final warning" decision by way of judicial review. Williams J said:[28]

> [24] To be reviewable, a statutory power of decision must affect a person's rights or interests. The Judge's decision does not itself affect Mr Owen in the relevant sense in the absence of any further action against him. Rather, it is the potential effect of any notice the Legal Services Commissioner may take of what the Judge said that *may* affect his interests. That is where the applicant needs to set his sights. The Judge's decision will only become prejudicial to Mr Owen's interests if the Commissioner acts on it to make it so.
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> [25] … There is no dodging the fact that such a view could well have a real impact on the view the Commissioner may ultimately take. Judges, it may be

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[28] *Owen v District Court at Invercargill* [2017] NZHC 1105, [2018] NZAR 525 at [24], [25] and [29].

> presumed, do not lightly give a final warning and then direct its conveyance to the Legal Services Commissioner. But in the end it is what the Legal Services Commissioner thinks, and the action he or she takes as a result, that will determine any impact on Mr Owen's interests.
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> …
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> [29] If, when the Commissioner's decision is to hand, it becomes clear that the Judge's final warning was decisive, the applicant ought properly to be able to challenge not just the Commissioner's decision itself but the judicial pronouncement upon which it was decisively based. …

[71] However in the circumstances here, it would be quite unrealistic to characterise the warning as only having the potential to effect the applicant's ability to secure future employment as a school teacher. Although the actual decisions regarding the applicant's future employment as a teacher will be made by the school at which he seeks employment, in circumstances where a formal warning has been issued by the Police in respect of a criminal charge of grooming of a young person, there can be little doubt that the very existence of the warning will operate as an insuperable obstacle to the applicant obtaining employment as a school teacher. Recognising that reality, the applicant voluntarily surrendered his teaching certificate, and faces ongoing prejudice due to the formal warning that effectively bars his future employment as a schoolteacher.

Did the consequences of the applicant being given a formal warning, engage s 27?

[72] The term "public authority" is to be given wide meaning. It includes immigration officials[29] and Law Societies.[30] The respondents accept that a Police officer making a decision to issue a formal warning falls within the scope of the term "public authority" as it appears in s 27(1), and like the exercise of any public power it is amenable to judicial review.[31]

[73] The right to the observance of natural justice includes the right to be heard and the right to be given reasonable notice of the case a person is to meet.[32] Where a person is not informed of the case they are to meet, and the decision is of great

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29 *Attorney-General v Udompun* [2005] 3 NZLR 204 at [87].
30 *Singh v Auckland District Law Society* [2000] 2 NZLR 604 (HC) at [56].
31 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [209].
32 *Ali v Deportation Review Tribunal* [1997] NZAR 208 (HC) at 220, per Elias J.

significance to them, absence of specific prejudice will not be readily inferred.[33] The requirements of natural justice in this context required the applicant to be given adequate prior notice of the possibility of being issued by Police with a formal warning which would be entered on the Police NIA database, and an opportunity to be heard regarding that possibility and whether it was lawful.[34]

[74] In *Udompun v Minister of Immigration,* Heath J wrote that:[35]

> Both the terminology employed in s 27(1) of the Bill of Rights and the general purpose of the provision suggest that the object is to ensure those who exercise public authorities (whether acting judicially or administratively) exercise their functions in a manner which can be assessed, objectively, as "fair" to those who may be affected by their decisions.

[75] The "right to justice" and the observance of the principles of natural justice recognised by s 27, also includes the right for persons charged to have allegations of criminal offending determined in accordance with due process by an independent and impartial court and observance of the minimum standards of criminal procedure as recognised and affirmed in ss 24 and 25 of NZ BORA. Here the challenged decision effectively amounted to a conclusive determination of criminal offending by the applicant which circumvented due process and the applicant's rights as affirmed by NZ BORA to have allegations of criminal offending determined by a court in accordance with those minimum standards of criminal procedure.

[76] The effect of the formal warning issued to the applicant by DC D and entered on the Police NIA database resulted in the applicant being subjected to effectively the same legal and professional consequences as would be the case if he had been convicted of the grooming offence, without the applicant ever having had any opportunity of defending the allegations and notwithstanding that his responsibility for the alleged offending had not been either admitted or determined by a court. Had the applicant been charged and convicted of the alleged grooming offence, a conviction for that type of offending would most certainly have meant the end of his teaching career, and a conviction on his criminal record would have made it impossible

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33 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [25.2.7].

34 *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 (CA) at 141.

35 *Udompun v Minister of Immigration* (2003) 7 HRNZ 238 (HC) at [143].

for him to continue working as a teacher. The formal warning and its placement on the NIA has had the same effect.

[77] Here, where the applicant was not told by the Police before being interviewed that there was a possibility that he could be given a formal warning and that any formal warning he was given would be entered on the NIA database and be accessible for the purposes of police vetting, his right to justice and the observance of the principles of natural justice as affirmed by s 27 of NZ BORA was engaged, and breached.

[78] The right to be presumed innocent applies to the process of the prosecution of an alleged offender, and it requires the prosecution to bear the onus of proving the charge or charges it brings against any citizen. As the applicant had not been charged with a criminal offence when the respondents decided to issue the formal warning, his right to be presumed innocent as affirmed in s 25(c) of NZ BORA was not engaged. Nevertheless as I have said, the decision to issue him with a formal warning that would be entered on the NIA database was clearly one which affected his rights and interests and thereby engaged his right to the observance of the principles of natural justice as affirmed in s 27.

Was the applicant's right to be heard adequately met?

[79] I consider that the applicant's right to be heard in respect of the possibility of being given a formal warning that would be entered on the NIA database was not satisfied by the opportunity he was given in the course of being interviewed by the police, to respond to the allegation that he had committed the grooming offence. At the time when the opportunity to respond to the allegation of offending against Ms X was given to the applicant during the police interview, the police had not yet decided whether to prosecute, or issue him with a formal warning. When, following the interview of the applicant, the Police decided that he should be given a formal warning, the applicant was not told about that possibility or that a formal warning would be recorded in the NIA database before that decision was made and carried into effect. He therefore had no notice of the possibility of such a decision being made, and no opportunity to be heard as to whether such a decision and the issuing of a formal warning to him was lawful and within the power of the Police to do.

Are Formal Warnings prescribed by law?

[80] Elias CJ in *Hamed v R* referring to decision making by public officials explained:[36]

> [24] Public officials do not have freedom to act in any way they choose unless prohibited by law, as individual citizens do. The common law position in New Zealand and in the United Kingdom is that, except in matters within the prerogative or as purely incidental to the exercise of statutory or prerogative powers, the executive and its servants must point to lawful authority for all actions undertaken. The constitutional principle of legality applies to the police surveillance here.
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> …
>
> [27] In New Zealand the general principle that public authorities, unlike citizens (who may do whatever is not prohibited), may do only what they are authorised to do by some rule of law or statute was applied by Smith J in *Herbert v Allsopp* and Woodhouse J in Transport *Ministry v Payn*. The principle they applied is not of recent origin. It may be traced to the *Proclamations Case*. It is part of the rule of law expounded by Dicey. The principle is, as successive editions of *Halsbury's Laws of England* recognised, a necessary condition for the liberties of the subject. Thus, the third and fourth editions of Halsbury referred to the liberties of the subject being derived from two principles: that the subject is free to anything not prohibited by law or which infringes the legal rights of others; "whereas public authorities (including the Crown) may do nothing but what they are authorised to do by some rule of common law (including the royal prerogative) or statute".

[81] And in *R v Hansen* McGrath J observed:[37]

> To be prescribed by law, limits must be identifiable and expressed with sufficient precision in an Act of Parliament, subordinate legislation or the common law. The limits must be neither ad hoc nor arbitrary and their nature and consequences must be clear, although the consequences need not be foreseeable with absolute certainty.

[82] McGrath J referred to the White Paper that preceded the enactment of the New Zealand Bill of Rights Act 1990.[38] In which the scope of phrase "prescribed by law" was explained:[39]

> The phrase "prescribed by law" will encompass four types of restrictive directives emanating from the organs of the state: statutes, regulations, decisions of administrative tribunals, guidelines of administrative tribunals and rules of the common law.

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36 *Hamed v R* [2011] NZSC 101 at [24] and [27].
37 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [180] per McGrath J (footnotes omitted).
38 At [180] citing: *A Bill of Rights for New Zealand: A White Paper* (1985), para [10.28].
39 At 91.

[83] The White Paper also referred to the European Court of Human Rights' decision in the *Sunday Times* case[40] in which the Court explained the term "prescribed by law" as follows:

> The court observes that the word "law" and the expression "prescribed by law" covers not only statutes but also [un]written law.[41] In the courts opinion, the following are two of the requirements that flow from the expression "prescribed by law". Firstly, that a law must be adequately assessable: the citizen must be able to have an indication that it is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

[84] That phrasing is echoed in McGrath J's statements in *Hansen* cited above.[42] For something to be prescribed by law in the sense of the New Zealand Bill of Rights Act 1990, it needs to be both adequately accessible and formulated with sufficient precision as enables a person to be informed of the possible consequences of the proposed action that will affect them and their rights, and regulate their conduct accordingly.

[85] Here the parties agree that there is no statutory authority for the issuing of formal warnings. Nonetheless, formal warnings are commonly employed by Police and routinely entered on the NIA database. Over the last ten years 20,019 formal warnings have been issued in respect of a wide range of offences including 1,071 in relation to sexual assault and related offences.[43]

[86] The respondents contend that the police have a common law power to issue a formal warning derived from the prosecutorial discretion. While *Fielding v Police,*[44] provides some support for the respondents' proposition, it appears that the lawfulness of the issuing of a pre-charge warning was not challenged in that case, and apart from

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40 *The Sunday Times v United Kingdom* (1979) 2 EHRR 245 (ECHR) at [47] and [49].
41 The White Paper has misquoted the ECHR case. "but also written law…" reads as "but also unwritten law".
42 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1, at [180] per McGrath J.
43 Letter Police to Mr Pyke 13 August 2020.
44 *Fielding v Police* [2020] NZHC 2728.

noting the position taken by the Police that the decision to issue a pre-charge warning is an exercise of the prosecutorial discretion, Edwards J did not address the issue.[45]

[87] The respondents similarly submit here, that the power to give a formal warning is a common law power derived from, and an adjunct to, the police prosecutorial discretion. The respondents say that if the Police have the power to decide to prosecute, they also have the power to decide not to. Where the Police decide not to prosecute they have the power to issue a verbal warning, a pre-charge warning in less serious cases, or a formal warning. The respondents say that a formal warning is just a way of formally recording Police views, and that it is expected that all warnings given by Police will be recorded in the NIA database to be available should the person come to the attention of the Police in the future.

[88] A verbal warning given by police without any permanent record being made of it by means of an entry in the NIA database would not have any significant or enduring consequences for the recipient. Where however the giving of a warning is to be permanently recorded in the NIA database it has the potential to adversely affect the person to whom it relates. Indeed, the very reason for recording the warning is to enable the information to be accessed so that it can, where relevant, be taken into account by police dealing with that person and also be provided to parties entitled to receive Police vetting reports to inform their decisions regarding the person to whom the warning was given. The very fact that a warning has been given by Police in relation to criminal offending indicates that the Police considered the conduct sufficiently serious to warrant the issuing of a warning. Moreover, the fact that the warning has been recorded by a permanent record in the Police database not only serves to reinforce the inference that the offending to which the warning refers was sufficiently serious to warrant a permanent record of it being put in the database, but also implies that the offending in respect of which the warning was issued had in fact occurred, and that Police and other parties who are given access to information held on the NIA database can proceed on that basis.

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45 At [11].

[89] The potential for formal warnings recorded in the NIA database to have a significant and adverse effect on the interests of anyone receiving a warning is recognised by the promulgation of procedures stipulating that formal warnings cannot be issued and entered on the NIA database unless the offending to which they relate has first been admitted. The prerequisite of a formal admission by the offender before a formal warning can be issued, removes the risk of injustice that may arise as a result of the recording of a formal warning in the absence of a determination of the person's responsibility for criminal offending by a court.

[90] The same rationale also underpins the giving of formal warnings by the Police in the United Kingdom. [46] Chapter 7 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK) provides for Youth Cautions to be given to a child or young person where a constable decides that there is sufficient evidence to charge the young person with an offence and the young person admits to the constable that they committed the offence. A constable deciding whether or not to give a youth caution is also required to consider that the young person should not be prosecuted or given a youth conditional caution in respect of the offence.[47] The statute stipulates that youth cautions are to be given in the presence of an appropriate adult, with an explanation of the effect of the caution and how it is to be recorded. The statute also provides that a youth caution given to a person may be cited in criminal proceedings "in the same circumstances as a conviction of the person may be cited."[48]

[91] Cautions for adult offenders in the United Kingdom are provided for in written Ministry of Justice Guidance for police officers and Crown Prosecutors in England and Wales, entitled " Simple Cautions for Adult Offenders". The Guidance states that as well as providing guidance for police officers and Crown Prosecutors, it also

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46 *R v Commissioner of Police of the Metropolis, ex parte Thompson* [1997] 1 WLR 1519 (QB) at 1523, per Schiemann LJ; the relevant statutory authority for young persons is now in s 135(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (UK). Adult warnings are regulated by the *Ministry of Justice Guidance Simple Cautions for Adult Offenders* effective from 14 November 2013. [75] and [76] of the Guidance notes that warnings can only be given if the prospective defendant admits the allegations, and stipulates that by reason of the importance of the admission, a prospective defendant should not be pressed to decide quickly or without advice. Furthermore, a superior officer not involved in the investigation is required to make the final decision on whether to issue the warning.

47 Legal Aid, Sentencing and Punishment of Offenders Act (UK) 2012, s 135 and s 66ZA of the Crime and Disorder Act 1998 (UK).

48 Legal Aid, Sentencing and Punishment of Offenders Act (UK) 2012, s 135 and s 66ZB (7). Of the Crime and Disorder Act 1998 (UK).

provides guidance to the public as to how cautions should be administered, and what factors should be taken into account by relevant authorities in relation to cautions. The Guidance states that simple cautions[49] cannot be offered to an offender who has not admitted that they are guilty of the offence for which the caution is being given, or who has raised a defence, and cannot be given to an offender who does not agree to accept the caution.[50] Simple cautions form part of an offender's criminal record and they may be used in future proceedings in certain circumstances.[51] All information relating to simple cautions is entered and retained on the Police National Computer and may be made available to an employer as part of a criminal record check.[52] Offenders must be made aware of those consequences before agreeing to accept a simple caution. [53] The Guideline further explains that although simple cautions are available for any offence, they are primarily intended for low level, mainly first time offending.

[92] The Guideline includes specific instructions regarding an offender giving their consent to receiving a simple caution.

> [75] A simple caution can only be given when the offender agrees to accept it. He or she should not be induced to accept a simple caution in any way and must not be pressed to make an instant decision on whether to accept a simple caution. They should be allowed to consider the matter and if need be, take independent legal advice.
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> [76] Before administering the simple caution the police officer should ensure that the offender has had the opportunity to receive free and independent legal advice in relation to the criminal offence. The offender's right to legal advice is set out under PACE and must be adhered to. The police officer must inform the offender of the evidence against them and the decision to offer a simple caution. Offenders and their legal representatives are entitled to seek to have disclosure of the evidence before the offender agrees to accept a simple caution.

[93] Here in New Zealand an admission of the offending is a pre-requisite for the issuing of a pre-charge warning under the provisions contained in the Police Manual.

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49 Simple cautions are to be distinguished from 'conditional cautions' which are provided for by the Criminal Justice Act 2003 and which are the subject of guidance contained in The Code of Practice on Adult Conditional Cautions, and the Directors Guidance on Adult Conditional Cautions, Commencement date 14 November 2013, at [7].

50 At [9] and [59]–[61].

51 At [11] and [65].

52 At [66] and [67].

53 At [11].

There is however no statutory basis for the pre-charge warnings regime established by the provisions contained in the Police Manual and which stipulates that they may only be given by Police when a person is formally arrested for an offence which carries a maximum penalty of six months imprisonment or less. The written instructions explain:

> **What is a pre-charge warning?**
>
> A pre-charge warning is a lawful alternative to prosecution for some minor offenders. A pre-charge warning is issued in writing at the Police station after a person has been arrested for a qualifying offence and meets the criteria for a pre-charge warning. The ability to warn is derived from the Police common law power of discretion and there is no impediment to releasing them with a warning from the Police station as long as due process is followed.
>
> …
>
> **What is the purpose of a pre-charge warning?**
>
> A pre-charge warning is an effective tool for resolving some qualifying offences that require Police intervention and arrest but, based on public interest, do not warrant prosecution.
>
> A pre-charge warning is intended to hold the offender to account and to deter them from further offending behaviour. The issuing of a pre-charge warning informs the offender that the offence(s) committed by them has been treated seriously and has been recorded in the National Intelligence Application (NIA).
>
> …
>
> **Principles**
>
> The principles guiding operational good practice for the issuing of a pre-charge are:
>
> **Consistency** – adhering to the processes and criteria outlined in this chapter to ensure consistency around the issuing of pre-charge warnings; and the 'National Pre-charge Warnings: NIA Entry & Auditing' technical specifications to ensure consistency around the entering of pre-charge warnings into the National Intelligence Application (NIA).
>
> **Transparency** – The pre-charge warnings process must be communicated to the prisoner receiving the warning in a language and manner they understand, and the prisoner must sign and receive a copy of the "Pre-charge Warning & Release Notice".
>
> …

[94] The Police Manual also prescribes a nine step process detailing the actions and responsibilities Police officers are required to follow when issuing a pre-charge warning. Step 7 entitled "Issuing pre-charge warnings" provides:

> The arresting constable or watchhouse keeper complete the 'Pre-charge Warning & Release Notice' in triplicate and have it signed by the prisoner and the Custody Supervisor. A copy is given to the prisoner on release.
>
> …
>
> **Important:** If the prisoner refuses to sign the document or does not admit their involvement in the alleged offending, the pre-charge warning cannot be issued and prosecution action under step 9 below must continue as normal.
>
> (underlining added)

[95] The Police Pre-charge Warning and Release Notice, which is required to be signed by the prisoner and a copy given to them prior to their release provides:

> **PRE-CHARGE WARNING & RELEASE NOTICE**
>
> To …….. ……/……/…….
> (full name) (d.o.b)
>
> You have been arrested without warrant for …….
> (Offence)
>
> ……..……..
> (Act and section)
>
> You are being released with a warning and will not be charged.
>
> You are not required to attend Court.
>
> This warning will not result in a criminal conviction. A record of this warning will be held by Police and may be used to determine your eligibility for any subsequent warnings, and may also be presented to the court during any future court proceedings.
>
> Signed: ……..
>
> QID: _____ Date:…/…./….
>
> Custody Sergeant
>
> I acknowledge receipt of this warning.
>
> Signed: …… Date:…/…../……
>
> *1. Copy to prisoner at time of release*
> *2. Copy to charge sheet*
> *3. Original to file*
>
> (underlining added)

[96] Significantly, a pre-charge warning cannot be issued unless the person has admitted their involvement in the alleged offending, and where a pre-charge warning is issued, the recipient of the warning is advised that a record of the warning will be retained by Police and may be used in relation to any future court proceedings or if a further warning is considered. The recipient of the pre-charge warning is required to acknowledge receipt of the warning and the advice contained in the notice by signing it. While there is no statutory basis for pre-charge warnings, the process governing the criteria and procedure required to be followed by police is ascertainable by reference to the detailed provisions of the Police Manual.

[97] Adherence to the promulgated pre-charge warning procedure contained in the Police Manual ensures that only offending which has been admitted is made the subject of a warning and consequently, only pre-charge warnings given following an admission of responsibility by the offender are entered on the Police NIA database.

[98] There are however no equivalent promulgated procedures regarding the issuing of formal warnings where they are used in respect of more serious offending than falls within the scope of the Police pre-charge warning procedure. Thus it appears that while a pre-charge warning can only be issued in accordance with the promulgated procedures set out in the Police Manual only after an offender has admitted the offending and has been advised that the pre-charge warning will be recorded on the Police NIA, no such provisions and safeguards designed to prevent an injustice occurring, are presently required in relation to formal warnings for more serious offending.

[99] It is also relevant to note that the Police Adult Diversion Scheme which is described in a detailed document[54] setting out the principles and procedures to be followed where the Police Diversion process is adopted, similarly requires a person charged with an offence to accept full responsibility for the offence and show remorse before the process can be followed resulting in withdrawal of the charge or charges laid against the defendant. It also provides for details of all diversions to be entered

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[54] New Zealand Police "About the Adult Diversion Scheme" (1 June 2013) New Zealand Police Programmes and Initiatives Adult Diversion Scheme <www. https://www.police.govt.nz/about-us/programmes-and-initiatives/adult-diversion-scheme/about-adult-diversion-scheme>.

in the Police NIA. Therefore in cases where the Diversion Scheme has been followed resulting in charges being withdrawn, the formal consequences of that process including the entry of details of the diversion decision on the Police NIA, are founded on an admission by the offender.

[100] An example of a statutory regime which provides for the giving of a formal caution to a child or young person as an alternative to prosecution is contained in the Oranga Tamariki Act 1989 (the OT Act).[55] Section 211 of the OT Act provides:

> **Formal Police caution**
>
> (1) Where, in respect of any offence *admitted or proved to have been committed* by a child or young person, a family group conference recommends that a formal Police caution be given to the child or young person, a constable may caution the child or young person.
>
> (2) The following provisions shall apply in respect of a formal Police caution given to a child or young person:
>
> (a) where practicable, the caution shall be given at a Police station:
>
> (b) the caution shall be given by a constable who is of or above the level of position of sergeant, or if no such constable is available, by the most senior constable available:
>
> (c) the caution shall be given in the presence of—
>
> (i) a parent or guardian or other person having the care of the child or young person; or
>
> (ii) an adult person nominated by the child or young person.

[101] It is accordingly clear that the issuing of a formal warning and its entry on the NIA database in circumstances where the 'offender' has not made an admission of the offending, and which is therefore based solely on the subjective view of the police officers involved in the investigation of the offending, effectively places the police officers responsible for issuing the formal warning in the position of being investigator, prosecutor, and judge, and operates without any of the safeguards against an injustice which are a fundamental requirement in relation to the less serious offences falling within the Police pre-charge warning regime. Where a formal warning

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55 Oranga Tamariki Act 1989, s 211 (emphasis added).

is given in the absence of an admission and then entered onto the NIA database the effect of that warning and NIA record on the person to whom it relates is closely akin to that of an actual conviction entered following a prosecution process conducted in a court and overseen by a Judge. For many, if not most people accessing the NIA records, and especially those members of the public who are entitled to obtain Police vetting information concerning current and prospective employees, the record of the formal warning will be taken as conclusively indicating that the offending to which the warning related had actually occurred.

[102] Thus the giving of a formal warning in the absence of an admission, and its entry onto the NIA database with those significant consequences, effectively circumvents the warned person's rights as affirmed by NZ BORA, as he or she is subjected to effectively the same consequences of having been convicted of the offending, notwithstanding any denial of that offending, and notwithstanding them being denied the opportunity to defend the allegations in a court in accordance with due process.

[103] Although the Police have the common law power to issue warnings in respect of offending which has been unequivocally admitted, this does not mean that they have the power to give a formal warning to someone who denies that alleged offending and where the formal warning affects the person's rights in much the same manner as a conviction for the offence, without ever presenting the prosecution case before a court or giving the defendant a chance to defend themselves.

[104] The respondents also submit that there is no need to codify the power in relation to the issuing of warnings beyond the bounds of judicial review. This must be incorrect. Citizens cannot be expected to simply bring judicial review claims repeatedly to delineate the boundaries of this Police power. Nor can they be expected to know and properly understand what rules are to be followed by constables without any kind of underpinning regulations or guidelines for the Police. The absence of any such authority for the issuing of formal warnings is precisely the kind of ad hoc power that McGrath J considered would not be prescribed by law.

[105] Because the pre-charge warning regime provided for in the Police Manual is ascertainable and accessible, should there be any challenge to the process adopted in any case, and because the provisions requiring an offender's admission of the alleged offending before a warning can be issued are consistent with the offender's rights as affirmed by NZ BORA, the provisions are a reasonable limit of the applicant's NZ BORA rights prescribed by law.

[106] In my view the scope and extent of the common law power of the Police to issue formal warnings is ultimately informed by reference to the basis upon which warnings are given and the consequences of the warning. I have found that there is no common law power for the Police to issue a formal warning in the absence of an unequivocal admission of the offending by the offender. Here the applicant's acknowledgement that he had "overstepped the boundaries as a teacher" fell well short of amounting to an admission of having committed the offence of meeting a young person following sexual grooming. The entering of such formal warning on the NIA database serves to both illustrate and compound the illegality of the formal warning by causing the person warned the significant and enduring prejudice of being effectively treated as having committed a criminal offence when that has not been determined in accordance with due process through the court, or accepted by way of an offender's admission.

[107] Accordingly, for the reasons I have set out above I consider that the power to give formal warnings in the absence of an unequivocal admission by an offender is not prescribed by law. This finding is sufficient to resolve the central question posed by this judicial review. However, for completeness, I will briefly address the second element of the test.

Are the limitations reasonable and demonstrably justified in a free and democratic society?

[108] I am however cautious of addressing the question of whether the limitations on New Zealand Bill of Rights Act 1990 rights posed by the current Police practice of issuing formal warnings are reasonable and demonstrably justified in a free and democratic society. That is fundamentally a policy question, and hence not one that

the courts are well-equipped to answer. I nevertheless observe that it would require the court to be satisfied that:[56]

(a) The regime serves a sufficiently important purpose to justify the limitation of s 27; and

(b) there is a rational connection between the regime and its purpose; and

(c) the regime abridges the right no more than reasonably necessary to achieve its purpose; and

(d) the regime is a proportionate response to the importance of the objective.

[109] The purpose of deterring potential offenders is clearly important enough to justify some limitation of s 27. Some limitation of natural justice rights is unavoidable in any policing and justice regime. Furthermore, there is a rational connection between issuing warnings (or cautions) and deterrence of future crime, as recognised by Parliament in the youth caution programme.[57] However, it is not apparent that the regime as it stands abridges the right no more than is reasonably necessary. It is significant that the statutory regime of cautions directed at children and young people includes a requirement that the offence be proved or admitted.[58] The current regime raises very serious natural justice concerns. Such concerns would require a careful examination and weighing of the value of the rights engaged with the social purpose to be accomplished, most appropriately by Parliament.

[110] On balance, therefore, I consider that the limitation of rights would not be reasonable and demonstrably justified in a free and democratic society.

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56 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [101] per Tipping J.
57 As laid out in the Oranga Tamariki Act 1989, s 211(1).
58 Oranga Tamariki Act 1989, s 211(1).

Result

[111] The granting of relief for judicial review is discretionary.[59] Here the respondents' decision to give the applicant a formal warning which was to be entered on the Police NIA was a fundamental error which had significant adverse consequences for the applicant by causing an erroneous official record to be made which informed members of the Police and other parties entitled to obtain information held by the Police regarding the applicant pursuant to the Police vetting process, that the applicant had committed and admitted having committed the offence of sexual grooming of a young person. Having regard to the significant and enduring adverse consequences to the applicant of the formal warning and its entry on the Police NIA database, I consider that it is in the interests of justice that the applicant be granted relief by way of an order setting aside the decision to issue him with a formal warning.

[112] I consider that an order setting aside the decision made by the respondents to issue the formal warning, as well as consequential orders requiring the removal of references to the formal warning from the Police NIA database, and the notification of the orders to those parties to whom the formal warning has been communicated, will be an effective remedy. While the fact of the Police investigation of the applicant in connection with his relationship and dealings with Ms X is a matter that can be recorded on the NIA database, reference to the applicant having received a formal warning for the offence of sexual grooming of Ms X is to be removed.

[113] The application for judicial review is accordingly allowed.

Relief

[114] I make the following orders:

(a) A declaration that the decision made by the respondents on or about 11 February 2019 to issue the applicant with the formal warning in respect of the offence of sexual grooming of Ms X is unlawful.

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[59] Judicial Review Procedure Act 2016, s 16(1).

(b) An order setting aside the decision made by the respondents on or about 11 February 2019 to issue the applicant with the formal warning in respect of the offence of sexual grooming of Ms X.

(c) An order directing the first respondent to forthwith remove all reference to the formal warning having been given to the applicant from the Police NIA database.

(d) An order directing the first respondent to forthwith inform all parties to whom information regarding the formal warning has been provided in Police vetting reports, that the formal warning given to the applicant for the offence of sexual grooming of Ms X has been declared to be unlawful and has been set aside by order of this Court.

Costs

[115] The applicant having succeeded is entitled to an award of costs.

[116] The parties are directed to file costs memoranda not exceeding three pages in length excluding the intituling page and any annexures. The applicant is to file and serve his costs memorandum by 5.00 pm on Tuesday 20 April 2021. The respondents are to file and serve their costs memorandum by 5.00 pm on Tuesday 27 April 2021. Following receipt by the Registrar of the costs memorandum, I shall determine costs on the papers.

Suppression

[117] Pursuant to s 203 of the Criminal Procedure Act 2011, the identity of Ms X and of the applicant are permanently suppressed from publication. By consent I make the orders sought in the joint memorandum of counsel dated 30 November 2020.

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Paul Davison J