IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2021-409-000404
[2022] NZHC 2366

BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE PRISON DIRECTOR AT ROLLESTON PRISON Respondent

Hearing: 6 April 2022

Appearances: The Applicant in person
P J Gunn & H P Graham for the Respondent

Judgment: 15 September 2022

JUDGMENT OF NATION J

Introduction

[1] The applicant (Mr Smith) is a prisoner at Rimutaka Prison. In August 2021, when he filed these proceedings, he was a prisoner at Rolleston Prison, detained in the Kia Marama Unit. The Kia Marama and Totara units at Rolleston Prison are special treatment units for child sex offenders. The only other unit offering similar treatment is the Te Piriti Unit associated with the Auckland Regional Prison.

[2] Pursuant to s 33(1) of the Corrections Act 2004 (the Act), in 2019 and 2021 the respondent (the Director) made a rule forbidding any sexual activities between prisoners within the Kia Marama and Totara Special Treatment Units for child sex offenders at Rolleston Prison.

[3] Through these judicial review proceedings, Mr Smith claims the rules were unlawful. First, because the rule is in breach of the Homosexual Law Reform Act 1986 which he said makes participation in consensual homosexual acts lawful and, second, because a rule forbidding consensual participation in a homosexual act breaches ss 19(1) and 23(5) of the New Zealand Bill of Rights Act 1990 (NZBORA). Mr Smith seeks declarations to that effect, an order in the nature of certiorari quashing the rule, and an order the respondent pay his disbursements in relation to the proceeding.

The Rule

[4] Rolleston Prison, near Christchurch, is a low security prison for general prisoners but includes prisoners who are serving their sentence in the Kia Marama or Totara Special Treatment Units for child sex offenders. On 6 March 2017, the director of the prison made a rule forbidding prisoners in the units from engaging in sexual activity with another prisoner. This was replaced by new rules on 4 March 2019 and 27 September 2021.

[5] In an affidavit of 13 December 2021, Alexandra Green, the Manager of Psychological Services at the Kia Marama and Totara Units said the rule states:

> All prisoners in Kia Marama or Totara Special Treatment Units for child sex offenders are forbidden from participating in or encouraging, pressuring or threatening any other prisoner to be involved in any sexual activity with any other prisoner.
>
> …
>
> Any prisoner breaching this rule commits an offence against discipline pursuant to s 128(1A) of [the Act] and may on conviction of such a breach be subject to any penalty imposed pursuant to s 133 or s 137 of [the Act].

Ms Green was referring to the 2019 rule.

[6] In an affidavit of the same date, the Director, Michael Howson, said that on 29 September 2021 he replaced the 2019 rule with a further revised rule forbidding any sexual activity between prisoners within the Kia Marama or Totara Units for child sex offenders at Rolleston Prison.

[7] In his initial statement of claim filed on 19 August 2021, Mr Smith's pleadings referred to the 4 March 2019 rule.

[8] In a statement of defence dated 26 October 2021, the Director admitted the 2019 rule was as pleaded but claimed it had been revoked and replaced by a new rule dated 29 September 2021. The Director admitted both the 2019 rule and 2021 rule forbade prisoners in the Kia Marama or Totara Special Treatment Units for child sex offenders participating in any sexual activity with another prisoner.

[9] A copy of the 2021 rule, as pleaded, was annexed to the statement of defence. It stated:

> **Southern Region**
> **Rolleston Prison**
> **PRISON RULE**
>
> Reference: PR / 004 Date: *29.9.21*
>
> ---
>
> **Sexual Activity**
>
> For the management of the prison and for the conduct and safe custody of the prisoners, I make the following rule pursuant to section 33(1) of the Corrections Act 2004:
>
> Prisoners in Kia Marama or Totara Special Treatment Units must not participate in sexual activity, or encourage, pressure or threaten other prisoners to participate in sexual activity.
>
> Any prisoner breaching this rule commits an offence against discipline pursuant to section 128(1)(a) of the Corrections Act 2004 and may on conviction of such a breach be subject to any penalty imposed pursuant to section 133 or section 137 of the Corrections Act 2004.
>
> Michael Howson
> **Prison Director**
> Rolleston Prison

[10] On 4 March 2022, Mr Smith filed a first amended statement of claim. There he pleaded, on 27 September 2021, the Manager of Rolleston Prison made a rule for Rolleston Prison forbidding participating in homosexual activity between prisoners within that prison. In making that pleading, Mr Smith referred to another document dated 29 September 2021 in which the Prison Director recorded he had made three rules for the conduct and safe custody of prisoners:

(a) sparring and types of physical activity (PR/001);

(b) tampering (PR/002); and

(c) sexual activity (PR/004).

Below the reference to those rules was the statement that prisoners who breach these rules would commit an offence against discipline with reference to s 128(1)(a) of the Act and, on conviction, could be subject to any penalty imposed under ss 133 or 137 of the Act.

[11] In his statement of defence to that amended statement of claim, the Director pleaded the 2021 rule forbade any sexual activities between prisoners within the Kia Marama or Totara Special Treatment Units and referred to a copy of the 2021 rule as had been attached to the statement of defence of 26 October 2021.

[12] The documents attached to that statement of defence included, first, the document referring to the three new rules just mentioned, one of which as to sexual activity was PR/004. The other document was the rule in PR/004 itself.

[13] The evidence from the Director was, in 2021, he replaced the 2019 rule with a further revised rule forbidding any sexual activity between prisoners within the Kia Marama or Totara Special Treatment Units. The evidence of Ms Green was that the rule refers to prisoners in the Kia Marama or Totara Special Treatment Units. Ms Green's evidence as to the 2021 rule was not clear because, in her affidavit, she said a copy of the 2021 rule had been annexed to an affidavit sworn by Mr Smith on 30 November 2021 in support of his first statement of claim. The rule annexed to Mr Smith's affidavit of that date was the 2019 rule.

[14] I am satisfied on the evidence the 2021 rule is as set out in the document PR/004 dated 29 September 2021. The wording of the 2021 rule is somewhat simpler than the 2019 rule but there is no material difference. I refer to both as "the rule". The rule says prisoners in the Kia Marama or Totara Special Treatment Units must not participate in sexual activity, or encourage, pressure or threaten other prisoners to participate in sexual activity.

Mr Smith's case

[15] In an affidavit supporting his statement of claim, Mr Smith said, when he was transferred from Rimutaka Prison to the Kia Marama Unit in June 2020 to complete the treatment programme, he became aware of the rule that he said made consensual homosexual activity between prisoners a punishable disciplinary offence at the Kia Marama and Totara Special Treatment Units at Rolleston Prison. He said he brought these proceedings through a desire to stand up against discrimination as to sexual identity.

[16] Mr Smith expressed his belief that there could be unintended safety risks, namely unprotected sex by prisoners who chose not to comply with the rule, secretive behaviour paralleling behaviour associated with child sexual offending through fear of removal from the treatment programme and a disciplinary charge for breaching the rule, and removal from a treatment programme needed to reduce the risk of further offending;

[17] In his submissions, Mr Smith referred to the rule and:

(a) the Director's admission that the rule applied only to the Kia Marama and Totara Special Treatment Units for child sex offenders and not to other units across the prison estate or to the Te Piriti Unit which the Director had admitted provided the same treatment for the same class and risk of offenders as the Kia Marama Unit;

(b) the Director's admission that one prisoner, who Mr Smith says was aged 21 at the time, had been sentenced to five days' solitary confinement and 21 days forfeiture of privilege after pleading guilty to a breach of the rule; and

(c) the rights recognised by s 19 of NZBORA, s 21 of the Human Rights Act 1993 (HRA) and the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

[18] Mr Smith submitted:

(a) the power to make subordinate legislation and the validity of the legislation made under it must be interpreted and determined consistent with the requirements of NZBORA;[1]

(b) absent express words to the contrary or by necessary implication, Parliament is presumed not to have intended to legislate contrary to fundamental human rights, or have intended delegated lawmakers to have the power to make subordinate legislation in conflict with such rights;[2]

(c) the intention of Parliament in legislation should begin with a presumption of statutory interpretation that, so far as that wording allows, legislation should be read in a way which is consistent with New Zealand's international obligations;[3]

(d) the intention of Parliament should reflect changes in social attitudes and values in the legislative context, including the Homosexual Law Reform Act 1986, the Civil Union Act 2004, the Relationship (Statutory References) Act 2005, the Marriage (Definition of Marriage) Amendment Act 2013, the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018, and the Conversion Practices Prohibition Legislation Act 2022;

(e) if the ordinary meaning of an empowering provision or the subordinate legislation itself is prima facie inconsistent with a right or freedom under NZBORA, then the court must determine whether that inconsistency can demonstrably be justified under s 5 of NZBORA;

(f) subordinate legislation affecting the right or freedom will be invalid when the empowering provision, read in accordance with s 6 of NZBORA, does not authorise its making;[4] and

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1 *Crop v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [6].
2 At [9] and [26]–[27].
3 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 674–675.
4 *Crop v Judicial Committee*, above n 1, at [25].

(g) this required Mr Smith to prove he has been treated differently from others (a comparison group) on one of the grounds of discrimination listed in s 21(1) of the HRA and that the different treatment resulted in material disadvantage. The Director, on the other hand, had to prove that the different treatment was justified under s 5 of NZBORA.[5]

[19] Mr Smith accepted it was inherent in the notion of discrimination that one group of persons (or an individual) had been treated differently from another group (or individual as the case may be), so there has to be a comparison between the treatment of the individual or group which is making the complaint and the treatment to which some other person or group has been or is threatened to be subjected.[6]

[20] Mr Smith argued an appropriate comparison group in this instance was those in the Te Piriti Unit. He said this unit was not subject to an equivalent rule and submitted "[t]o the contrary, abstinence from consensual sexual activity at Te Piriti is voluntary, as a part of the retention criteria for participation in the treatment programme". Mr Smith submitted the circumstances prima facie prove indirect discrimination. He said the material disadvantage that arose from the rule was that prisoners involved in consensual homosexual activity at the units were subject to a disciplinary process prescribed under sch 7 of the regulations and, if convicted, could be subject to sanctions under either ss 133(3) or 137(3) of the Act, including solitary confinement and/or forfeiture of privileges. Mr Smith referred also to the fact that a prisoner convicted of breaching the rule might be removed from the treatment programme but acknowledged this was consistent with the Te Piriti programme.

[21] Mr Smith incorrectly submitted the 2021 rule was not confined to just the Kia Marama and Totara Special Treatment Units but instead applied to all units within Rolleston Prison, including non-treatment units. On that basis, he asserted the comparison group was the remainder of the prison estate, including the Christchurch Men's Prison. He said this was a further basis on which the Court should hold prima facie the rule involved indirect discrimination in breach of NZBORA.

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5 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

6 Andrew Butler and Peter Butler *New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015).

[22] Following that, Mr Smith submitted the onus shifted to the respondent to demonstrate the discrimination was justified in terms of s 5 of NZBORA. Section 5 says that the rights and freedoms contained in NZBORA may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[23] As to this issue, Mr Smith acknowledged the Court would have a high level of deference to the specialist competence of prison authorities as to issues of safety and security.[7] Mr Smith referred to the statement from the Court of Appeal that, where human rights are involved, prison authorities tend to be supervised intensively because they do not have special expertise or authority on rights and there are important individual interests at stake.[8] He also referred to the way Judges have recognised the importance of the High Court's significant review role under s 5 of NZBORA.[9]

[24] Mr Smith then addressed the various limbs of the proportionality test set out by the Supreme Court in *Hansen v R*.[10]

[25] Mr Smith accepted that rules made under s 33 of the Act had to be for the conduct and safe custody of prisoners. Considered in light of the purpose and principles of the Act as set out in ss 5 and 6, he acknowledged such a rule could be made for the purpose of assisting with rehabilitation and reintegration,[11] and to mitigate the risk of further offending both within the prison environment and within the community upon release. Mr Smith accepted that, on the evidence in the Director's affidavit, the aim of the rule was to serve a sufficiently important purpose to satisfy this limb of the proportionality assessment.

[26] Mr Smith then considered whether the rule, insofar as he contended limited prisoners' rights, was rationally connected with the purposes just referred to. Mr Smith

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7 Consistent with *Smith v Attorney-General* [2017] NZHC 136, [2017] NZAR 331 at [127]; *Taylor v Chief Executive of the Department of Correction*s [2015] NZCA 477, [2015] NZAR 1648 at [88]–[90].

8 *Taylor v Chief Executive of the Department of Correction*s, above n 7, at [88]–[90].

9 *Ministry of Health v Atkinson*, above n 5, at [172]–[173].

10 *Hansen v R* [2007] NZSC 7, [2017] 3 NZLR 1 at [64].

11 As referred to in the Corrections Act 2004, s 6(1)(a).

submitted the evidence presented for Corrections did not adequately describe how a rule prohibiting consensual sexual relationships would achieve the purposes.

[27] He submitted consensual age-appropriate (lawful) sexual activity must be inferred to be the objective of a successful outcome from participation in the Kia Marama and Totara Special Treatment Units programmes. Conduct within the units that could be inferred to be safe, consistent with such rehabilitation and reintegration, would thus be conduct that mitigated the risk of further sexual offending against children. He submitted, with the rule imposing a blanket prohibition against sexual activity between prisoners, the rule was not rationally connected with the purpose for which the rule was made.

[28] Mr Smith addressed the issue of whether the rule impaired the right or freedom no more than was reasonably necessary for the sufficient achievement of the purpose or purposes for which the rule had been enacted. Mr Smith submitted a blanket restriction that did not allow for consideration of individual circumstances could not fall within a reasonable range of alternatives. He submitted a less intrusive means for Corrections to achieve its objective would be a rule requiring disclosure of sexual activity between prisoners in the units so individualised assessments could be made about whether those individual relationships fall within the consensual category or whether factors identified as being of potential concern in any such relationship could be non-consensual. Effectively, Mr Smith submitted, given the purposes for which such a rule could be justified, the rule should have been in terms that only non-consensual sexual activity, as identified on an individual assessment, would be an offence. Mr Smith submitted a rule of this nature would promote transparency by prisoners rather than secretiveness out of fear of consequences and would mitigate the risk of unprotected sex by prisoners for the same reason.

[29] Next, Mr Smith submitted the rule was not in due proportion to the importance of the objective of the rules. As to that, he said a breach of the rules for consensual sexual activity could initiate a disciplinary process which, in the event of conviction, could lead to the penalty of solitary confinement. It had done so in the one instance of which there was evidence of a disciplinary charge. He referred to criticisms that

had been made as to the use of solitary confinement in the maintenance of prison security.[12]

[30] Mr Smith then made various submissions as to how the *Hansen* issues should be addressed with regard to the 2021 rule. Those submissions were made on the basis there was a material difference to the 2019 rule because the 2021 rule was not confined to the Kia Marama and Totara Special Treatment Units. For reasons discussed at the outset of this judgment, that premise for those submissions had not been established. I accordingly need not address those submissions further.

[31] Mr Smith made submissions as to how the scope of s 33 of the Act should be determined and whether it empowered the Director to make the rule. In doing so, he again said he was considering the issues step-by-step, consistent with the appropriate course adopted by Tipping J in the Supreme Court in *R v Hansen*.[13]

[32] It was in this context Mr Smith submitted s 33 had to be interpreted on the basis Parliament would have intended that the Corrections system be operated consistently with fundamental rights under NZBORA, including s 19(1) and, through that, s 21(1)(m) of the HRA. He also submitted the legislation had to be interpreted in accordance with its purpose. In terms of s 5(1)(b) of NZBORA, Mr Smith argued the purpose of the Corrections system, through the words "among other matters", included compliance with international human rights instruments.

[33] Mr Smith submitted the interpretation of s 33 of the Act had to recognise principle 2 of the Yogyakarta Principles and principle 33 of the Principles Plus 10, and what he said was the contemporary societal attitude, as apparent from the Homosexual Law Reform Act 1986 and other legislation highlighted earlier.[14]

[34] Mr Smith submitted, on that basis, the empowering provision in s 33 could not be used to allow prison directors to make "discriminatory rules that impose sanctions on prisoners for consensual physical expressions of their sexual

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12 Sharon Shalev *Thinking Outside the Box? a review of seclusion and restraint practices in New Zealand* (Human Rights Commission, April 2017) at 17–18.

13 *Hansen v R*, above n 10, at [89], [90] and [92].

14 See para [18](d) above.

orientation". On that basis, Mr Smith argued the rule was ultra vires of s 33 of the Act and would have to be declared invalid.

[35] Mr Smith argued, if this was not accepted, the Court should have regard to his previous submissions on rights and consistency and find that what he said was a limitation on s 19(1) of NZBORA rights was not a justifiable limitation for the purposes of s 5 of the Act. Mr Smith sought support for this interpretation in s 6 of NZBORA:

> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning

[36] Mr Smith acknowledged, if unlawfulness has been established, the granting of relief in judicial review proceedings is discretionary. He referred to statements made by the High Court that Corrections should be held accountable for procedural shortcomings and there is public interest in the Court addressing allegations prisoners have been subjected to unlawful regulation, even when a particular issue of concern was moot by the time the issue was considered by the Court.[15] He argued the Court should make declarations that the 2017, 2019 and 2021 rules were unlawful. He submitted this would be of utility in providing some guidance as to what might be required in the future.

[37] The submissions of Mr Gunn and Mr Graham for the Director are reflected in the analysis that follows.

Analysis

[38] Relevantly, s 5 of the Act states:

> **5 Purpose of corrections system**
>
> (1) The purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by—

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15 *Smith v Attorney-General*, above n 7, at [151]–[152] and [163]; *Taylor v Attorney-General* [2013] NZHC 1659 at [13]; *Smith v Attorney-General* [2019] NZHC 835, [2019] NZAR 767 at [91]–[93].

(a) ensuring that […] custodial sentences […] that are imposed by the courts and the New Zealand Parole Board are administered in a safe, secure, humane, and effective manner; and

(b) providing for corrections facilities to be operated in accordance with rules set out in this Act and regulations made under this Act that are based, amongst other matters, on the United Nations Standard Minimum Rules for the Treatment of Prisoners; and

(c) assisting in the rehabilitation of offenders and their reintegration into the community, where appropriate, and so far as is reasonable and practicable in the circumstances and within the resources available, through the provision of programmes and other interventions; […]

[39] Section 6 of the Act states:

6 Principles guiding corrections system

(1) The principles that guide the operation of the corrections system are that—

(a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:

[…]

(f) the corrections system must ensure the fair treatment of persons under control or supervision by—

(i) providing those persons with information about the rules, obligations, and entitlements that affect them; and

[…]

(g) sentences and orders must not be administered more restrictively than is reasonably necessary to ensure the maintenance of the law and the safety of the public, corrections staff, and persons under control or supervision:

(h) offenders must, so far as is reasonable and practicable in the circumstances within the resources available, be given access to activities that may contribute to their rehabilitation and reintegration into the community:

[…]

[40] Section 33 of the Act states:

33 Manager may make rules for prison

(1) The chief executive may, subject to subsection (6), authorise the manager of a corrections prison to make rules that the manager considers

appropriate for the management of the prison and for the conduct and safe custody of the prisoners.

[41] Section 19 of NZBORA states:

> **19 Freedom from discrimination**
>
> (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

[42] Section 20I of the HRA states:

> **20I Purpose of this Part**
>
> The purpose of this Part is to provide that, in general, an act or omission that is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990 is in breach of this Part if the act or omission is that of a person or body referred to in section 3 of the New Zealand Bill of Rights Act 1990.

[43] Section 21 of the HRA states:

> **21 Prohibited grounds of discrimination**
>
> (1) For the purposes of this Act, the prohibited grounds of discrimination are—
>
> …
>
> (m) sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation.

[44] Section 3 of NZBORA states that the Bill of Rights applies to acts done by the legislative, executive, or judicial branches of the Government of New Zealand. The rule was made as an act of the Executive Branch.

[45] Section 4 of NZBORA states:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—

> by reason only that the provision is inconsistent with any provision of this Bill of Rights.

[46] I accept this provision cannot be utilised to hold valid a rule made pursuant to the power delegated to the Director by the Chief Executive under s 33.[16]

[47] I accept that New Zealand is a signatory to the Yogyakarta Principles and the Yogyakarta Principle Plus 10, which relevantly state:

> **Principle 2**
>
> **The Rights to Equality and Non-Discrimination**
>
> …
>
> States shall:
>
> …
>
> (b) Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;
>
> …
>
> **Principle 33 (YP+10)**
>
> **The Right to Freedom from Criminalisation and Sanction**
>
> Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.
>
> STATES SHALL:
>
> …
>
> B) Repeat other forms of criminalisation and sanction impacting on rights and freedoms on the basis of sexual orientation, gender identity, gender expression or sex characteristics, including the criminalisation of sex work, abortion, unintentional transmission of HIV, adultery, nuisance, loitering and begging[.]

[48] I accept that, pursuant to s 21(1)(m) of the HRA, discrimination on the basis of sexual orientation, including homosexual orientation, is a prohibited ground of discrimination.

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16 *Drew v Attorney-General* [2002] 1 NZLR 58 (CA) at [68].

[49] Section 19 of NZBORA thus recognises everyone has the right to freedom from discrimination on the grounds of sexual orientation.

[50] I do not accept that, through s 19 of NZBORA and ss 20I and 21(m) of the HRA, NZBORA recognises prisoners have a right and freedom to participate in consensual sexual activity whether heterosexual, homosexual, lesbian or bisexual.

[51] The Yogyakarta Principles and Yogyakarta Principles Plus 10, in particular principle 2(b) as referred to, might appear to require recognition of such a right. Principle 2(b) requires States to repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent.

[52] I am satisfied however that this statement is to be interpreted and applied in accordance with its purpose. That purpose is to require States to repeal legislation and legal provisions that discriminate against sexual activity based on sexual orientation. That is apparent from the heading to principle 2 and the reference in (b) to "ensure that an equal age of consent applies to both same-sex and different-sex sexual activity". That interpretation is reinforced by the heading of principle 33 and the express reference to sexual orientation in both the heading and words following. Also consistent with that interpretation is the statement in the preamble that the principles arose out of a concern for the way people suffer discrimination "because of their sexual orientation".

[53] The Yogyakarta Principles do not recognise that prisoners have a right to engage in consensual sexual activity with another person. Principle 9 states:

> **The Right to Treatment with Humanity while in Detention**
>
> Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.
>
> States shall:
>
> …

> e) Ensure that conjugal visits, where permitted, are granted on an equal basis to all prisoners and detainees, regardless of the gender of their partner.

[54] Nowhere, with reference to the Principles, is it said prisoners have a right to be engaged in sexual activity with another prisoner, whatever their sexual orientation. Principle 9(e) recognises that they may not be permitted to participate in sexual activity even with visitors who might be entitled to conjugal visits.

[55] Neither the absence of a rule for other prisons similar to the rule here, s 19 of NZBORA nor s 21(m) of the HRA mean that prisoners in other prisons have the right to engage in consensual sexual activity with another person.

[56] That is also consistent with the Court's consideration of similar human rights legislation in other jurisdictions.

[57] European courts have, on a number of occasions, been required to consider whether decisions made by prison authorities as to the management of prisons have been in breach of the European Convention on Human Rights (ECHR). In *R v Secretary of State for the Home Department*, Lord Bingham, in a speech with which other members of the committee agreed, said:[17]

> Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens …

[58] Article 8 of the ECHR says:

> **ARTICLE 8**
>
> **Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

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[17] *R v Secretary of State for the Home Department*, *ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 at [5].

> economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[59] In *Secretary of State of the Home Department, ex parte Mellor*, Lord Phillips for the United Kingdom Court of Appeal referred to five decisions of the Strasbourg Commission concerning prisoner rights.[18] He summarised the conclusions he had derived from the five decisions as follows:

> i) The qualifications on the right to respect for family life that are recognised by art 8(2) apply equally to the art 12 rights.
>
> ii) Imprisonment is incompatible with the exercise of conjugal rights and consequently involves an interference with the right to respect for family life under art 8 and with the right to found a family under art 12.
>
> iii) This restriction is ordinarily justifiable under the provisions of art 8(2).
>
> iv) In exceptional circumstances it may be necessary to relax the imposition of detention in order to avoid a disproportionate interference with a human right.
>
> v) There is no case which indicates that a prisoner is entitled to assert the right to found a family by the provision of semen for the purpose of artificially inseminating his wife.

[60] He then referred to domestic authorities and said:[19]

> The approach under the Strasbourg jurisprudence and under English domestic law is the same. The consequences that the punishment of imprisonment has on the exercise of human rights are justifiable provided that they are not disproportionate to the aim of maintaining a penal system designed both to punish and to deter. When the consequences are disproportionate, special arrangements may be called for to mitigate the normal effect of deprivation of liberty.

[61] In *X & Y v Switzerland*, the Commission was concerned with Article 8 and also Article 12 which recognises:[20]

> Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

[62] The Commission said:[21]

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18 *Secretary of State of the Home Department, ex parte Mellor* [2001] EWCA Civ 472, at [39].
19 At [58].
20 *X & Y v Switzerland* (1978) 13 DR 105 at 243.
21 At 243.

> The Commission notes that it is generally considered to be justified for the prevention of disorder in prison not to allow sexual relations of married couples in prison. The Commission accepts that in fact the security and good order in prison would be seriously endangered if all married prisoners were allowed to keep up their conjugal life in the prison. In this case the respect for privacy would require that the prison authorities renounce their right of constant supervision. Uncontrolled visits or contacts could, inter alia, facilitate the exchange of secret messages, the smuggling in of goods such as drugs or even of arms. Especially with regard to prisoners on remand, who may be detained if there is danger that they might abscond and/or destroy evidence if they were released, the purpose of their detention requires a strict supervision of their contacts with visitors or co-accused.
>
> The fact that the applicants were kept in the same prison cannot be seen as changing the general situation. Other prisoners would consider the position of the applicants as privileged if this fact were to give them additional rights. The arguments which are valid for prisoners in general do, therefore, apply to the applicants as well.

[63] The Commission further said:[22]

> An interference with family life which is justified under Article 8 (2) cannot at the same time constitute a violation of Article 12.

[64] In *Diaz v R*, Goddard J in the Court of Appeal commented on the extent to which a sentence of imprisonment curtails rights protected by NZBORA.[23]

[65] I accordingly reject Mr Smith's submission that s 33 of the Act must be interpreted so as to not permit the Chief Executive to allow prison directors to make rules that prohibit consensual sexual activity between prisoners.

[66] I have considered carefully the evidence from the Manager of Psychological Services at the two units, the Director and the Residential Manager of Rolleston Prison. Each of these witnesses have been in their senior positions at the prison for more than 10 years and are committed to the particular treatment programmes offered there.

[67] The programmes in both units provide intensive group-based intervention treatment programmes for men who have sexually offended against children. Those

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22 At 244.

23 *Diaz v R* [2021] NZCA 426 at [66] and footnote 52.

in the units are segregated from other prisoners and must agree to this segregation to be in the programmes.

[68] There are 60 beds available in each unit. The Kia Marama programme begins with an assessment phase and then a programme delivered in two phases comprising a total of eight modules. The first phase of the programme involves the development of insight into offence-related patterns of thinking and behaviour that contributed to the offending, while the second phase focuses on skill development in order to manage future risk of offending. The duration of the Kia Marama group programme is approximately 84 sessions (32 weeks) at 2.5 hours per day, three to four days per week plus other therapeutic community activities. A minimum of one year is usually required to complete the core treatment including the preparation phase and pre and post treatment assessment requirements.

[69] The Totara Unit predominantly provides a short intervention programme for child sex offenders for lower risk men who have offended against children. An adapted programme is available for people whose cognitive functioning and responsivity issues indicate they would benefit from a more experiential learning environment with reduced literary demands. The pre-treatment phase lasts four weeks and is followed by a group treatment phase of four weeks, at two and a half hours per day, three days per week. Completing the programme usually takes between six and 12 months.

[70] Prisoners on the programmes (referred to in the booklets as "paihere") are obviously there with the expectation and hope they will benefit from the programmes to reduce the risk of further offending, for the benefit of themselves and the community. Information booklets for both units inform there are five main principles guiding the programmes. Those principles are:

> Respect – Manaakitanga
>
> Openness – Mahi Purotu
>
> Support – Tautoko
>
> Responsibility – Takohanga
>
> Collaboration – Mahi Ngatahi

[71] The information booklets further inform prisoners of important aspects of the programme. The booklets emphasise:

(a) the importance of confidentiality of information obtained within treatment groups where men are expected to speak openly and honestly about themselves, their background and their offending history;

(b) the importance of honesty from those on the programme in speaking about their history in therapy and the need for them to understand the limits to confidentiality relating to that;

(c) the importance of the therapeutic nature of the unit and thus the seriousness of any behaviour, such as threats or stand over attempts, that could prejudice that;

(d) the importance of the commitment to participate in the entire programme; and

(e) the availability of the potential for paihere to raise any concerns about the treatment programme with prison managers, staff or their therapist.

[72] The information booklet for the Kia Marama Unit contains the following section:

> **Sexual Involvement between Residents:**
>
> Individuals who enter treatment here almost always have problems surrounding their sexuality and/or how they manage sexual feelings and urges. Your main purpose in being here is, among others, to gain control over your sexual behaviour and to learn ways of appropriately meeting your needs. Any sexual related behaviour between residents is viewed as problematic because it reflects actions similar to offending related behaviour and serves to avoid directly dealing with treatment issues, and is unacceptable. **Residents who pressure or "pester" other residents to engage in sexual activity may be dismissed from the programme**. Because the STU treatment and community of change environment aims to help those who come to Kia Marama to develop better judgement about the differences between affectionate and sexual behaviours, it is unacceptable to use expressions of physical affection that are outside of what would be considered socially acceptable. It is also unacceptable for residents to lie on each others beds, or to shut cell doors and/or close cell curtains when others are in your cell. When having another person to visit, your curtain must be left open and ideally the door (although this may be weather dependant).

[73] In the information booklet for the Totara Unit, there is this section:

> **SEXUAL INVOLVEMENT BETWEEN RESIDENTS**
>
> People who enter treatment here often have difficulties surrounding their sexual behaviour and how they handle sexual feelings and urges. Your main purpose in being here is to gain control over your sexual behaviour and to learn ways of appropriately meeting your sexual needs. Sexual "acting out" between residents is viewed as a failure to manage one's urges, and is unacceptable.

[74] Ms Green provided further detail as to the programmes in the two units in her affidavit. It was her evidence that the Totara Unit housed a relatively high number of men who have a degree of cognitive impairment, some of whom meet the diagnostic criteria for intellectual disability. She said, by virtue of their functioning, this population of prisoners are vulnerable to manipulation and exploitation, and "we have an additional duty of care to them". She said:

> A clear prison rule which highlights that men in the units are not permitted to engage in sexual behaviour is viewed as supportive of men with cognitive impairment as it supports their adherence to the retention criteria of the treatment programme (which include not engaging in sexual activity with other prisoners)".

[75] Ms Green said:

> All prisoners in the Kia Marama and Totara therapeutic communities are clients or people to whom psychologists have ethical responsibilities. In such an environment where all participants have engaged in a sexually abusive manner towards children under the age of 16 years, in addition to which some may also have engaged in offending against adults, there is at times, real concern that younger and/or more vulnerable men can be vulnerable to grooming or predation by others. In the absence of access to children and adolescents, men in this environment sometime substitute their sexual interest, or express their sexual preoccupation toward other men in the unit, typically those they perceive as more vulnerable and who possess characteristics reflective of their preferred victim type. Other patterns of sexual coercion towards adults may also exist for some programme participants. Some men (typically those with a history of childhood trauma), in turn, do not always have the ability to recognise the abusive elements of this behaviour due to their own vulnerabilities. In order to assist keeping all members of the Therapeutic Community safe, the Kia Marama Special Treatment Unit Information Booklet for New Paihere (people in our care) clearly sets out what is considered important and helpful information for new residents to know.

[76] It was Ms Green's evidence that the rule was first put in place in March 2017 following consultation with the special treatment unit psychology team. She said the

aim of the rule was to ensure visibility of the retention criteria of the Kia Marama and Totara Units so that paihere understanding of the situation was not reliant on them having read and understood what was in the booklets. Ms Green said they were cognisant of the number of men who arrived at the treatment units who had shared their experiences of previous engagement in sexual behaviour in prison. In some situations, the persons involved were considered to be consensual but in other situations the men involved had felt unable to decline sexual contact because of elements of coercion, pressure and a clear power dynamic. Ms Green said engagement in such a dynamic often undermined their treatment. She said, in introducing the rule, they had also been mindful that the units brought together a diverse group of men who, by nature of their offences, had taken advantage of others. Under the Health and Safety at Work Act 2015, those managing the units had to take reasonable steps to ensure the safety of men engaged in treatment who might be more vulnerable to sexual coercion.

[77] Ms Green said research had shown there is an increased recidivism risk associated with men who have difficulty managing their high sexual preoccupation or who have poor sexual boundaries whereby they either have an abusive sexual template which governs their sexual behaviour or make poor partner choice, to mention but a few factors. This risk is exacerbated when individuals lack insight into the problematic and offence-related nature of their behaviour. She said the explicit expectations about behaviour, as set out in the rules and information booklets and in the consent form which prisoners sign before entering the units, are designed to ensure that the units are safe environments where prisoners can receive the therapeutic interventions they need. She said the units are primarily focused on assisting men to change their problematic pattern of engagement in sexual behaviour, help them learn to gain control over their sexual behaviour and learn more appropriate ways of getting their needs met. She said:

> To that end any sexually related behaviour between participants in the programme is viewed as problematic as it reflects actions similar to offence related behaviour and serves to avoid directly dealing with treatment issues.

[78] Ms Green indicated one of the therapeutic aims of the units is to teach prisoners how to control sexual urges and, in line with that aim, all sexual interactions between

residents in the unit are viewed as problematic. She said the programme relies on participants being able to provide feedback to each other in an unbiased and impartial manner. She said this would be compromised by allowing men to engage in sexual relationships due to the inevitable dynamics that could result and which would ultimately serve to undermine the effectiveness of the community and men's individual treatment journeys.

[79] Ms Green said the addition of a prison rule provides another option in terms of behavioural consequences for any sexual engagement. The rule provides potential ways of maintaining the integrity of the programme if and when there is problematic engagement in sexual behaviour between prisoners without having to necessarily remove paihere from the programme.

[80] Ms Green pointed out paihere's involvement in the programme is voluntary.

[81] In his evidence, the Director said, to the best of his recollection, the rule was introduced in 2017 and was based on some then recent relationships within the unit ending in less than amicable circumstances. He said this is particularly problematic in a prison unit because of the friction it can create which has a flow-on effect to others and impacts progress within the group. He said the rule he made, as authorised by s 33, was intended to manage the risk of individuals within the treatment units further offending and to support their rehabilitation in light of the predatory nature of sexual offending. He said it was designed to manage the risk these individuals pose to themselves and to others. He said the rule was based around adding to the safe environment they endeavour to provide to the men who came to the units to receive specialised psychological treatment and turn their lives around, and to support them to go on and live an offence-free life. It was his view that sexual relationships between prisoners create a distraction from the focus on treatment and rehabilitation. A particular concern was the potential for a breakdown in relationships. He said what started as a consensual relationship might quickly turn into an alleged assault which he said could be extremely damaging, not only to the dynamic of the unit and various treatment groups but also to the overall therapeutic community and friendships within the prison. He said this could impact on successful completion of the programme.

[82] It is to the significant credit of the management, psychologists, therapists and Corrections' staff working in the Kia Marama and Totara Units, and those paihere who have committed to the programmes, that the programmes have been shown to be successful in significantly reducing rates of sexual recidivism.

[83] The evidence referred to satisfies me that the rule was made for the conduct and safe custody of the prisoners. The rule was also consistent with the purpose and principles of the Corrections system as referred to in ss 5 and 6 of the Act.

[84] In *Ministry of Health v Atkinson*,[24] the Court of Appeal set out the test to determine whether a policy or law is discriminatory and in prima facie breach of s 19 of NZBORA:

(a) is there differential treatment as between persons or groups in comparable situations on the basis of a prohibited ground of discrimination?

(b) does that differential treatment have a discriminatory impact in that it causes a material disadvantage?

(c) is the differential treatment justified by reference to policy objections?

Step (c) above can be addressed by applying the approach of Tipping J in *Hansen v R*.[25]

[85] To establish the rule was invalid on the basis the rule was unlawfully discriminatory on one of the grounds listed in s 21(1) of the HRA, Mr Smith had to first prove that prisoners in the Kia Marama and Totara Units of Rolleston Prison were being treated differently from others (a comparative group).

[86] On the premise the 2021 rule prohibited consensual sexual activity between prisoners in any part of the Rolleston Prison, Mr Smith argued the comparative group was all prisoners who were otherwise held within the prison estate, being mainstream prisons. For reasons discussed at the outset, the 2021 rule related only to the Kia

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24 *Ministry of Health v Atkinson*, above n 5, at [55] and [136].
25 *Hansen v R*, above n 10.

Marama and Totara Units. I thus do not need to consider whether prisoners in Rolleston Prison, including those in the treatment units, were being treated differently because prisoners in other prisons were not subject to the same rule.

[87] Mr Smith however also submitted prisoners in the Te Piriti Special Treatment Unit were a comparative group. The Director accepted that this is another child sex offender treatment unit and the eligibility criteria for both the Kia Marama and Te Piriti child sex offender units is the same. I also accept, from the information booklet for the Te Piriti Special Treatment Unit, that the therapeutic programme available at Te Piriti is similar to that provided in the Kia Marama and Totara units.

[88] For Te Piriti, there is no rule under s 33 prohibiting consensual sexual activity. Mr Smith submitted prisoners in the Te Piriti Unit are treated differently in that they are not subject to an equivalent rule and "to the contrary, abstinence from consensual sexual activity at Te Piriti is voluntary, as a part of the retention criteria for participation in the treatment programme".

[89] Involvement in all such units is voluntary. Prisoners must meet the eligibility criteria for involvement in the different programmes and consent to treatment in terms of the programmes available in the different units. The information booklet for Te Piriti informs prisoners that:

> In consenting to enter treatment, you are consenting to a "package deal". You need to be prepared to take part in all aspects of the assessment, treatment and the community of change programme.

[90] Under the heading "*Behaviour in the unit*", the Te Piriti booklet says:

> Our first priority is the safety of our community members. Physical aggression or threats of violence will not be tolerated. If you see, hear or are on the receiving end of any violence or threats, we want you to report it immediately to staff. This is not "narking" but a positive step to protect the therapeutic atmosphere of the unit.
>
> Men who enter Te Piriti often have problems managing their sexual feelings and urges. Sexual contact (including displays of physical affection) between individuals in the unit is prohibited and anyone found to be pressuring others to engage in sexual activity may be dismissed from the programme.

[91] The Te Piriti booklet says *suspected* inappropriate sexual behaviour would result in progress review and *actual* inappropriate sexual behaviour would result in placement review. Although in Te Piriti there is no disciplinary rule prohibiting inappropriate sexual behaviour, it is clear from the booklet that, from the outset, prisoners in the Te Piriti Unit have to accept that, while in the unit, there would be no sexual activity between prisoners. Mr Smith was thus misrepresenting the situation in Te Piriti by submitting abstinence from consensual sexual activity is voluntary.

[92] In this respect, there is no material difference between the way prisoners in Te Piriti are treated from the way prisoners are treated in the Kia Marama and Totara units. To be involved in any of the three programmes, from the outset, prisoners must accept that they cannot be involved in any sexual activity with another prisoner, whether consensual or not. The fact there is a rule, a breach which could result in a prisoner being involved in a disciplinary process, is not a material distinction. In all three units, prisoners are prohibited from involvement in any sexual activity with another prisoner. There are serious consequences if they do engage in sexual activity, the most serious of which, expulsion from the programme, is a potential consequence at Te Piriti as it is in the Kia Marama and Totara units. There is thus no material differentiation between the way prisoners at Te Piriti, Kia Marama and Totara are treated, as would have to be established to prove there has been discrimination against those in the Kia Marama and Totara units in a way that would breach NZBORA and the HRA.

[93] Section 33 of the Act allows the Chief Executive to authorise the manager of a Corrections' prison to make rules that the manager considers appropriate for the management of the prison and for the safe conduct and safe custody of the prisoners. The Act does not require the managers of all prisons to make the same rules. Although there is much that is similar in the way the Te Piriti, Kia Marama and Totara units operate, there are differences. That is apparent from the booklets for the three different units.

[94] The evidence for the Director indicates that the Kia Marama and Totara programmes are directed by individuals who have been committed to the therapeutic programmes in those units over many years. The way they have done this must have

contributed significantly to the success of these programmes. It is consistent with the purposes and principles of the Act that they should be permitted and indeed supported in making such rules as they consider are appropriate provided the rules are not so inconsistent with the programmes elsewhere as to be objectively unreasonable. The Director should be able to make rules, as the Chief Executive has authorised under s 33 of the Act, consistent with the purpose and principles of the Act as set out in ss 5 and 6 of the Act, without having to necessarily duplicate in detail what has been considered appropriate for the Te Piriti unit.

[95] Accordingly, Mr Smith has not proved, as was required of him, that, through the rule, prisoners at the Kia Marama and Totara units have been subject to unlawful discrimination in terms of NZBORA.

[96] I am satisfied on the evidence that the rule here does prohibit consensual sexual activity between prisoners in the Kia Marama and Totara Special Treatment Units at Rolleston Prison. However, the rule was not made to prohibit consensual sexual activity *based on* prisoners' sexual orientation, whether directly, indirectly or in effect.

[97] The rule is not gender-specific and was imposed to ensure the safety of all prisoners in the Kia Marama and Totara Units, and to promote the rehabilitation and reintegration of those prisoners through the therapeutic programmes those men had chosen to take advantage of.

[98] For completeness, I also deal with the various issues that would have to be considered on the *Hansen* approach.

[99] That would require me to consider:[26]

(a) whether the limiting measure served a purpose sufficiently important to justify curtailment of the right or freedom?

(b) (i) is the limiting measure rationally connected with its purpose?

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[26] *Hansen v R*, above n 10, at [104].

(ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(iii) is the limit in due proportion to the importance of the objective?

[100] Mr Smith accepted the evidence for the Director established the rule serves a sufficiently important purpose to justify the curtailment of the right or freedom which Mr Smith argued adult homosexuals now have to engage in consensual sexual activity. That is because the rule, as he said, can be interpreted to assist with rehabilitation and reintegration, and to mitigate the risk of further offending both within the prison context and within the community upon release.

[101] Through the evidence I have discussed, the Director has established that the rule is rationally connected with its purpose. That evidence explains why allowing prisoners to engage in consensual sexual activity would potentially put prisoners at risk of harm and, just as importantly, would jeopardise the therapeutic benefits which all prisoners at the two units seek to obtain from engagement in the programmes.

[102] The evidence has also established the rule does not impair any right or freedom for an adult to be engaged in consensual sexual activity more than is reasonably necessary for the purposes of the rule. The evidence has explained to my satisfaction why the blanket prohibition on sexual activity is necessary and, in particular, why allowance of consensual sexual activity would put prisoners at risk of harm and/or prejudice the therapeutic programmes with which they are engaged.

[103] I infer from the evidence for the Director which I have referred to and from the rule itself that, on each occasion when the Director made the rule, he considered whether prisoners in the units should be permitted to engage in consensual sexual activity. The Director rejected that as an alternative which could achieve the purposes for which the rule was being considered.

[104] I accept there was good reason for rejecting that as a reasonable alternative given the potential for prisoners to be harmed at the beginning of a relationship when one prisoner might seek to initiate what he hoped would be consensual sexual activity; the risk for a prisoner to be harmed at the end of such a relationship if and when he no

longer wished to participate in any such consensual activity; and the way an involvement in consensual sexual activity would distract those involved in such activity from learning how to adjust their behaviour and preoccupation with sexual matters so as to reduce the risk of future offending. I also accept that allowing prisoners to engage in consensual sexual activity would likely impact adversely on the dynamics of the therapeutic environment needed for prisoners to benefit from the programmes so as to reduce the risk of further offending.

[105] The evidence also satisfies me that the rule was in due proportion to the objectives for which it was made.

[106] As to this, Mr Smith's argument was that, given criticisms made of solitary confinement as a potential penalty for a breach of rules, the rule was out of all proportion to the purposes for which it had been made. The rule does not however require such a sanction to be imposed if and when there is a breach. A prisoner who breaches the rule commits an offence against discipline and may, on proof of such a breach, be subject to penalty, but a breach of the rule does not amount to a criminal offence.[27] Where a breach of the rules has been proved, penalties could include forfeiture or postponement of all or any privileges for a specified period, forfeiture of earnings for a specified period, and confinement in a cell for a specified period. The hearing adjudicator/visiting justice has a discretion in imposing these penalties.[28] Individuals within the Kia Marama or Totara Units may also be dismissed from the programme. A prisoner who breaches the rule will not be automatically removed from the programme.

[107] The Kia Marama information booklet provides evidence as to how a breach of the rules would be considered:

> **Consequences for Problematic Behaviours:**
>
> While you are in this unit, the normal rules and regulations apply and you can be charged for breaking any of the prison rules. Engaging in sexual behaviour towards others or any threatening behaviour may result in you being exited. However, being charged and found guilty of a misconduct or engaging in any inappropriate behaviours, will not necessarily mean you will be exited from

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27 *Genge v Visiting Justice, Christchurch Men's Prison* [2021] NZHC 1727 at [4].
28 Corrections Act, ss 133(3) and 137(3).

> the unit/community. We know that everyone is on a journey and that changes do not happen overnight. Support is given to those on a journey of change. Each case will be considered on an individual basis. If you are found guilty of a misconduct or engage in behaviour that breaks the rules of the programme you will attend a meeting where you remaining in the unit will be discussed. The outcome of this meeting will depend in a large part on whether you are open and honest, willing to take responsibility for your behaviour, and are willing to make changes.

[108] It was Ms Green's evidence that the rule is important because it provides another option in terms of behaviour consequences for any sexual engagement. Without a rule, the only way to provide a consequence for problematic engagement in sexual behaviour between prisoners would be to remove someone from the treatment programme. Both the Director and Ms Graham said this would be a far greater consequence than a prison misconduct because of the potential impact not completing treatment would have on considerations of parole and future management of risk of reoffending.

[109] In his submissions, Mr Smith highlighted rule 44 of the Nelson Mandela Rules[29] which states solitary confinement as a sanction that should only be used in exceptional cases and as a last resort.

[110] The rule does expose a prisoner who breaches it to the potential of the disciplinary process. In response to a notice to admit facts, the Director said in January 2021 a prisoner pleaded guilty to a charge of failing to comply with the 2019 rule. They received a penalty of five days' cell confinement and 21 days' forfeiture of privileges. He served that confinement in a particular cell which complied with the requirements in sch 6 to the Corrections Regulations 2005. He was afforded the minimum entitlements referred to in s 69 of the Corrections Act 2004 including a minimum of one hour of physical exercise and time out of his cell for ablutions.

[111] The possibility of a penalty of solitary confinement in a manner permitted by the Act or regulations for breach of the rule is no reason to find that the rule itself is not in due proportion to the objectives for which the rule was made.

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[29] *Nelson Mandela Rules* A Res 70/175 (2016) at 44–45.

[112] For all these reasons, I am satisfied that, if s 33 had to be interpreted in a manner that recognised that consensual sexual activity between adult men is lawful, it would nevertheless be consistent with Parliament's intention for me to hold that s 33 allowed the Chief Executive of the Department of Corrections to authorise the Director to make the rule which is at issue here.

Conclusion

[113] Mr Smith has not established, for any of the reasons he advanced, that the rule prohibiting sexual activity between prisons in the Kia Marama and Totara Units of Rolleston Prison was invalid. His application for review under the Judicial Review Procedure Act 2016 is declined.

Costs

[114] Through counsel, the Director, if successful, sought costs as the successful party. The Director is entitled to costs. Unless there is an agreement as to this, a memorandum as to the costs sought is to be filed for the respondent within four weeks. Mr Smith may file a memorandum in reply within two weeks of receiving the memorandum from the respondent. The Director may reply to that memorandum within two weeks of receiving the memorandum from Mr Smith. The memoranda are to be no longer than four pages each. If necessary, I will determine any issue as to costs on the papers.

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