IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA528/2022
[2024] NZCA 163

BETWEEN	PHILIP JOHN SMITH Appellant
AND	PRISON DIRECTOR AT ROLLESTON PRISON Respondent

Hearing: 10 April 2024

Court: Mallon, Thomas and Wylie JJ

Counsel: Appellant in person
P J Gunn and S Cvitanovich for Respondent

Judgment: 16 May 2024 at 12 pm

JUDGMENT OF THE COURT

A The respondent is given leave to adduce in evidence rule PR/001 made on 1 October 2021 by the Prison Director at Auckland Prison under s 33(1) of the Corrections Act 2004.

B The appeal is dismissed.

C The appellant is to pay costs to the respondent in the sum of $1,000.

REASONS OF THE COURT

(Given by Wylie J)

Table of Contents

Introduction

[1] The appellant, Philip Smith, is, and at all relevant times was, a sentenced prisoner. In June 2020, he was transferred to the Kia Marama Unit at Rolleston Prison, near Christchurch. The Kia Marama Unit is a special treatment unit for men who have been convicted of child sex offences. There is another specialist unit at Rolleston Prison, also for male child sex offenders — the Totara Unit.

[2] Since 2017, the respondent, the Prison Director at Rolleston Prison (the Director), has made a series of rules under s 33(1) of the Corrections Act 2004 (the Act) that have applied to prisoners in the Kia Marama and Totara Special Treatment Units. Each of the rules has been in substantially the same terms. The current rule, rule PR/004 in force as from 29 September 2021 (the rule), provides that 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. Any prisoner breaching the rule commits an offence against discipline

pursuant to s 128(1)(a) of the Act and may, on conviction, be subject to any penalty that can be imposed under ss 133 or 137.

[3] Mr Smith became aware of a previous version of the rule when he was transferred to the Kia Marama Unit. It was prominently displayed in the Unit. He considered that the rule sought to prohibit what was otherwise lawful homosexual sexual activity between consenting males, and he commenced judicial review proceedings under the Judicial Review Procedure Act 2016 challenging the lawfulness of the rule.

[4] Mr Smith claimed that the rule is ultra vires s 19 of the New Zealand Bill of Rights Act 1990 (the NZBORA). He referred to s 21(1)(m) of the Human Rights Act 1993 (the HRA), noting that it makes sexual orientation a prohibited ground of discrimination, and to s 65 of that Act, which deals with indirect discrimination. He asserted that the rule applies only to prisoners in the Kia Marama and Totara Units and that it treats such prisoners differently from other prisoners held in other prisons and in particular, from other prisoners held in another specialist treatment unit for child sex offenders — Auckland Regional Prison's Te Piriti Unit. He said that there is no rational justification for the discrimination and that the rule is inconsistent with relevant domestic legislation and with New Zealand's international treaty obligations. He sought a declaration that the rule is ultra vires s 19 and an order in the nature of certiorari quashing the rule.

[5] The Director denied that the rule is discriminatory. He asserted that it does not differentiate between prisoners on the basis of any prohibited ground of discrimination; rather, it applies to all prisoners in the Kia Marama and Totara Units. He further claimed that the rule is not inconsistent either with domestic legislation or with New Zealand's treaty obligations. He said that there is rational justification for the rule and that Mr Smith's arguments as to its efficacy cannot be supported on the available evidence.

[6] Nation J, in the High Court at Christchurch, dismissed Mr Smith's various arguments.[1] He rejected the assertion that the NZBORA recognises that prisoners have the right and freedom to participate in consensual sexual activity and held that the rule does not breach that Act.[2] He was satisfied on the evidence that the rule was made for the conduct and safe custody of prisoners and that it is consistent with the purpose and principles of the Act.[3] He considered that the rule was not made to prohibit consensual sexual activity between prisoners because of their sexual orientation and that it does not do so.[4] He further concluded that New Zealand's international obligations do not require that s 33 of the Act be interpreted so as to preclude the Chief Executive of the Department of Corrections from allowing prison directors to make rules prohibiting consensual sexual activity between prisoners.

[7] Mr Smith appeals this decision.

Factual background

Mr Smith

[8] In 1996, Mr Smith was sentenced to life imprisonment for murder with a minimum non-parole period of 13 years.[5] At the same time, he was also sentenced for a number of child sex offences (including sexual violation), aggravated burglary and kidnapping, to be served concurrently with the sentence in relation to the murder charge. When sentenced, Mr Smith was already serving a sentence of imprisonment for extortion.[6] More recently, he was sentenced to a further 33 months' imprisonment for escaping lawful custody and for obtaining a passport by false pretences, such sentence to be served concurrently with his life sentence.[7] Mr Smith has sought, but been denied, parole. He is still in custody and has been in prison for some 28 years.

---

1 *Smith v Prison Director at Rolleston Prison* [2022] NZHC 2366, [2023] 2 NZLR 365 [High Court judgment].
2 See [50], [92] and [95].
3 At [83].
4 At [96].
5 *R v Smith* HC Wellington T23/96, 16 August 1996, aff'd *R v Smith* CA 114/02, 4 August 2003.
6 *R v Smith* HC Wellington S23/96, 15 April 1996.
7 *R v Smith* [2016] NZDC 13828; aff'd *Smith v R* [2020] NZCA 499, [2021] 3 NZLR 324.

[9] Mr Smith identifies as gay. He has co-facilitated a gay, lesbian and transgender support group within Auckland Prison.

[10] In June 2020, Mr Smith was transferred from Rimutaka Prison in Upper Hutt, near Wellington, to Rolleston Prison, in Rolleston, near Christchurch. He had volunteered for placement in the Kia Marama Unit, so that he could undertake the treatment programme available in that Unit for child sex offenders.

The Kia Marama Unit

[11] The Kia Marama Special Treatment Unit offers intensive group-based intervention programmes for male prisoners who have sexually offended against children and young persons under the age of 16 years.

[12] The Kia Marama programme was established in 1989. It was designed in accordance with best practice principles and, on the evidence, it is well regarded internationally. The programme is based on cognitive behavioural principles and social learning theory. It has two main parts. The first phase involves the development of insight into offence related patterns of thinking and the behaviour that contributed to each participant's offending. The second phase focuses on skill development, in an endeavour to help participants manage the risks they pose of reoffending in the future. Participants are encouraged to talk openly and honestly about their offending. It is considered important to explore with participants the totality of their abusive behaviour in order to comprehensively address its causes, to facilitate learning and to help them to remain offence free.

[13] The duration of the programme is approximately 84 sessions (32 weeks) at 2.5 hours per day, three to four days per week, together with other therapeutic community activities. When the preparation phase of the programme and pre- and post-treatment assessment requirements are taken into account, a minimum of one year is usually required to complete the core treatment programme.

[14] Participation in the programme is voluntary and prisoners need to transfer to a location where the programme is offered in order to participate. Currently, the programme is offered at Rolleston Prison and at Auckland Regional Prison. There are

60 beds available in the Kia Marama Unit. It is a segregated unit, so prisoners must be willing to undergo segregation from the rest of the prison population.

[15] Placement in the Kia Marama programme is determined by national waitlist. All prisoners with relevant convictions serving indeterminate sentences are automatically waitlisted. For others, there are detailed eligibility criteria. A participant should generally be aged 20 years or over, be male (or in a men's prison), have at least one conviction for a child sex offence or for offences related to child sexual abuse images, have been assessed as posing at least a moderate to high risk of reoffending or as requiring high intensity treatment, have a security classification of minimum to low medium and be serving a sentence of more than two years' imprisonment. Exclusion criteria include significant responsivity barriers, denial of sexual offending, low cognitive function or a security classification of high or above.

The Totara Unit

[16] The Totara Unit also provides rehabilitation to prisoners in a therapeutic environment. It has the same philosophy as the Kia Marama Unit. It offers a short intervention programme for male prisoners who have offended sexually against children or young persons and who are assessed as posing a lower risk of sexual reoffending than those prisoners who seek to go into the Kia Marama Unit. The short intervention programme is designed to help prisoners develop insight into their offending and plan for their future risk management.

[17] The Totara Unit also houses male prisoners who are completing an adapted version of the Kia Marama Programme. The adapted programme is available for those prisoners whose cognitive functioning and responsivity issues indicate that they would benefit from an experiential learning environment with reduced literacy demands.

[18] Again, participation in the programme is voluntary. The pre-treatment phase lasts four weeks and is followed by a group treatment phase of four weeks duration, at 2.5 hours per day, three days a week. Completing the programme usually takes between six and 12 months, allowing for triage, scheduling, transfer, assessment, programme completion and post-treatment reporting.

[19] There are 60 beds in the Totara Unit and a maximum of 10 participants per group. The eligibility criteria are similar to those for the Kia Marama Unit, although prisoners serving a sentence of preventive detention or a life sentence are not eligible. Participants must have enough time still to serve to enable them to complete the programme.

Rule PR/004

[20] Although there was initially some confusion given the various iterations of the rule, by the time the matter was before us there was no dispute as to the rule the subject of Mr Smith's challenge. We nevertheless briefly set out the provenance of the rule.

[21] In March 2017, the Director put in place a rule pursuant to s 33(1) of the Act, forbidding any prisoner from engaging in sexual activity with any other prisoner in the Kia Marama or Totara Special Treatment Units. The rule was put in place following consultation with the Special Treatment Units' Psychology Team and following a request by the Units' principal corrections officer/manager at the time. In so far as the Director can recollect, the rule was promulgated as a result of relationships within the Units ending in "less than amicable circumstances". This was considered problematic, because of the friction that such relationships can create, because such relationships can have a flow-on effect on others, and because such relationships can impact the progress of participants in the group environments in the Units.

[22] On 4 March 2019, the Director revoked the 2017 rule and put in place a revised rule, also pursuant to s 33(1) of the Act. The revised rule was intended to simplify the wording of the 2017 rule. It provided that all prisoners in the Kia Marama or Totara Special Treatment Units were forbidden from participating in, or encouraging, pressuring or threatening any other prisoner to be involved in any sexual activity with any other prisoner.

[23] On 29 September 2021, the Director revoked the 2019 rule and replaced it with a further revised version. This revised version of the rule is still in force. It reads as follows:

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.

[Signed]

Michael Howson
Prison Director
Rolleston Prison

[24] The rule is summarised in an information booklet made available by the Department of Corrections to persons contemplating going to the Kia Marama Unit. The booklet records as follows:[8]

> **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. ...

The booklet goes to on to invite participants experiencing difficulty relating to living at Kia Marama, to raise the issue with the Residential Manager, the Principal Corrections Manager, Unit staff or their therapist.

---

8 Emphasis in original.

[25] There is a similar booklet for the Totara Unit. It contains similar commentary.

[26] The rule is reinforced by an additional, more general, rule, as follows:

> **Southern Region**
> **Rolleston Prison**
> **PRISON RULES**
>
> Date: 29.9.21
>
> ---
>
> For the management of the prison and for the conduct and safe custody of the prisoners, I make the following rules pursuant to section 33(1) of the Corrections Act 2004:
>
> **Sparring and types of physical activity (PR / 001)**
>
> **Tampering (PR / 002)**
>
> **Sexual activity (PR / 004)**
>
> Prisoners who breach these rules commit 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.
>
> **All other rules are revoked.**
>
> [Signed]
>
> Michael Howson
> **Prison Director**
> Rolleston Prison

[27] This rule was not challenged by Mr Smith.

[28] Any prisoner who breaches the rule that is challenged commits an offence against discipline and can, on proof of such breach, be subject to penalty. A breach of the rule does not however amount to a criminal offence.

[29] Where there is a breach of the rule (or any other prison rule), a misconduct charge can be laid under the Act.[9] Such charge is heard by a delegated adjudicator or by a Visiting Justice.[10] The prisoner is able to call witnesses and adduce evidence in

---

9 Corrections Act 2004, s 128(1)(a).
10 Sections 134 and 137.

his defence. The prisoner can also apply for legal representation.[11] The standard of proof is beyond reasonable doubt. Where a charge is proved, penalties can 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.[12] Prisoners in the Kia Marama or Totara Units can also be dismissed from the programme.

[30] There has been a high level of compliance with the rule. The evidence before us established that, in January 2021, a prisoner in the Kia Marama Unit was charged with an offence against prison discipline for engaging in consensual sexual activity with another prisoner. The prisoner pleaded guilty, and the offence was found to be proved. A penalty of five days' cell confinement and 21 days' forfeiture of privileges was imposed. The prisoner was not however removed from the Kia Marama programme.

[31] In so far as we are aware, there have been no other breaches of the rule resulting in disciplinary sanction.

Te Piriti Unit

[32] As noted above, there is another specialist child sex offender treatment unit at Auckland Regional Prison called Te Piriti. The eligibility criteria for both the Kia Marama and Te Piriti Special Treatment Units are the same. At the Te Piriti Unit, 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 can be dismissed from the Unit. No rule has been made by the Auckland Prison manager to this end. Rather, the prohibitions are recorded in an information booklet made available to prospective participants in the programme.

[33] Other than the possibility of dismissal from the Unit, there are no prescribed sanctions set out in the information booklet for breach of the prohibitions. The Director has however stated, in a response to a notice to admit facts, that breach

---

11 Section 135.
12 Sections 133 and 137.

of the prohibition found in the information booklet can constitute an offence against discipline under s 128(1)(a) of the Act. There is nothing before us to contradict this assertion.

The High Court decision

[34] The Judge started his analysis by setting out ss 5 and 6 of the Act, which deal respectively with the purpose of the corrections system and with the principles guiding that system.[13] He then set out s 33 of the Act, which provides that the Chief Executive of the Department of Corrections can authorise the manager of a prison to make rules for the management of the prison and for the conduct and safe custody of the prisoners.[14] He next referred to s 19 of the NZBORA and to ss 20I and 21 of the HRA.[15]

[35] The Judge recorded 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 and that, pursuant to s 19 of the NZBORA, everyone has the right to freedom from discrimination on the grounds of sexual orientation.[16]

[36] The Judge did not however accept that the NZBORA recognises that prisoners have a right to participate in consensual activity whether heterosexual, homosexual, lesbian, or bisexual.[17] The Judge considered that New Zealand is a signatory to the Yogyakarta Principles and the Yogyakarta Principles Plus 10,[18] and that they may appear to require recognition of such a right, but he was satisfied that those principles should be interpreted and applied in accordance with their purpose: to require States to repeal provisions that discriminate against sexual activity based on sexual orientation.[19] The Judge did not accept that the Yogyakarta Principles recognise that

---

13 High Court judgment, above n 1, at [38]–[39].
14 At [40].
15 At [41]–[43].
16 At [48]–[49].
17 At [50].
18 At [47]. The Yogyakarta Principles and the subsequent Yogyakarta Principles Plus 10 (jointly, the Principles) set out human rights in relation to sexual orientation and gender identity. They were the outcome of an international meeting of human rights groups at Yogyakarta in Indonesia. The initial Principles are dated 2007. The subsequent principles are dated November 2017. See below at [89]–[93].
19 At [51]–[52].

prisoners have a right to engage in consensual sexual activity with other persons.[20] He considered that this view was consistent with court decisions considering similar human rights issues in other jurisdictions.[21] Accordingly, the Judge rejected 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".[22]

[37] The Judge then turned to the evidence before him, including the information booklet published by the Department of Corrections which informs prisoners of important aspects of the Kia Marama Programme. He noted the rationale for the rule (which we deal with below at [106]–[112]). The Judge was satisfied on the evidence that the rule was made for the conduct and safe custody of prisoners and that it is consistent with the purpose and principles of the corrections system as recorded in ss 5 and 6 of the Act.[23]

[38] The Judge discussed the differences between the regimes imposed in Kia Marama and Totara Units, and in the Te Piriti Unit. He referred to the expectations placed on prisoners entering the Te Piriti Unit. While there is no rule made under s 33 prohibiting sexual activity, the Judge noted that, by entering into treatment at Te Piriti, a prisoner accepts that sexual activity, including displays of physical affection, between individuals in the Unit is prohibited and that prisoners found to be pressuring others to engage in sexual activity can be dismissed from the programme.[24] The Judge considered that there is no material difference between the way prisoners are treated in the Te Piriti Unit and the way prisoners are treated in the Kia Marama and Totara Units.[25]

[39] The Judge noted that s 33 allows the Chief Executive to authorise the director of a prison to make rules that the director considers appropriate for the management of the prison and for the safe conduct and safe custody of the prisoners. He observed that the Act does not require the directors of all prisons to make the same rules. He

---

20 At [53]–[54].
21 At [56]–[63].
22 At [65].
23 At [83].
24 At [88] and [91].
25 At [92].

considered it is consistent with the purposes and principles of the Act that the director of any particular prison is able to make rules without having to necessarily duplicate what is considered appropriate in other prisons.[26]

[40] The Judge found that Mr Smith had not proved that, through the rule, prisoners at the Kia Marama and Totara Units are subject to unlawful discrimination.[27] He accepted that the rule does prohibit consensual sexual activity between prisoners in the Kia Marama and Totara Special Treatment Units, but he held that the rule was not made to prohibit consensual sexual activity based on prisoners' sexual orientation, whether directly or indirectly.[28] He observed that the rule is not gender-specific and that it was imposed to ensure the safety of all prisoners in the Kia Marama and Totara Units and to promote the rehabilitation and reintegration of the prisoners in those units through the therapeutic programmes the prisoners have chosen to take advantage of.[29]

[41] For completeness, the Judge went on to deal with the various issues that, pursuant to the Supreme Court's decision in *R v Hansen*,[30] require consideration under s 5 of the NZBORA.[31] The Judge was satisfied, that if s 33 has to be interpreted in a manner that recognises that consensual sexual activity between adult men is lawful, it would nevertheless be consistent with Parliament's intention to hold that s 33 allows the Chief Executive of the Department of Corrections to authorise the Director to make the rule.[32]

[42] The Judge concluded that Mr Smith had not established, for any of the reasons he had advanced, that the rule prohibiting sexual activity between prisoners in the Kia Marama and Totara Units was invalid. The application for review was therefore declined.[33]

---

26 At [93]–[94].
27 At [95].
28 At [96].
29 At [97].
30 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.
31 High Court judgment, above n 1, at [98]–[112].
32 At [112].
33 At [113].

Additional evidence

[43] On 5 April 2024, counsel for the Director filed a memorandum, seeking leave to put before us (and to make submissions on) a rule made by the Director of Auckland Prison on 1 October 2021 — rule PR/001 (the additional rule). It provides that a prisoner must not enter any cell that he is not allocated to and that any prisoner breaching the rule commits an offence against discipline, pursuant to s 128(1)(a) of the Act and may, on conviction, be subject to any penalty imposed pursuant to ss 133 or 137 of the Act.

[44] Mr Smith opposed the application. He initially argued that he was not in a position to make submissions on the additional rule and that there is no evidence as to its provenance or what it seeks to address.

[45] We considered that it was in the interests of justice to allow the Director to put the additional rule before us and we granted leave accordingly. We allowed Mr Smith 10 working days to make any further submissions he wished to make in regard to the application and relevance of the additional rule. In the event, Mr Smith was able to make submissions in relation to the additional rule at the appeal hearing and he advised that he did not require the opportunity to make any further submissions in relation to it.

The submissions

Mr Smith

[46] Mr Smith focussed his submissions on the rule in so far as it seeks to forbid consensual sexual activity between male prisoners and in so far as it imposes disciplinary sanctions if it is breached. His submissions proceeded on the premise that prisoners are permitted to do anything in prison that is not unlawful and that the rule seeks to prevent and punish what is otherwise lawful activity. He argued that prisoners retain a right to engage in consensual sexual activity because such activity is not against the law. He submitted that the blanket prohibition in the rule is unlawful. He asserted that, because involvement in the programmes offered in the Kia Marama or Totara Units is voluntary, by implication the consent given by prisoners when they go into the Units to abstain from sexual activity, should be able to be withdrawn. He

suggested that prisoners in a romantic relationship should be able to seek approval for their relationship from the Department of Corrections on a case-by-case basis and that this is precluded by the rule's catch-all prohibition.

[47] Mr Smith noted that the rule applies only to the Kia Marama and Totara Units and that there is no equivalent rule in the Te Piriti Unit. He submitted that the rule is unnecessary and that the objective that is sought to be achieved by its imposition can be achieved by voluntary measures such as those that apply in the Te Piriti Unit.

[48] Mr Smith went on to argue that the rule is discriminatory and that it offends s 21(1)(m) of HRA. He noted the decision of this Court in *Ministry of Health v Atkinson*, which discusses discrimination.[34] He accepted that, in its terms, the rule applies to all prisoners in the Kia Marama and Totara Units, but argued that, in a practical sense, it only applies to prisoners of homosexual or bisexual orientation. He argued that, as a result, there is discrimination on a prohibited ground and that the High Court erred in law when it held otherwise. He further argued that prisoners in the Kia Marama and Totara Units are in a comparable situation to prisoners in the Te Piriti Unit and that prisoners in the Kia Marama and Totara Units are at a material disadvantage to those in the Te Piriti Unit, because they are subject to punitive sanctions through a quasi-judicial process if they engage in sexual activity, whereas prisoners in the Te Piriti Unit are not subject to such sanctions.

[49] Mr Smith next discussed s 5 of the NZBORA and the decision of the Supreme Court in *R v Hansen*.[35] He accepted that the rule is intended to serve a sufficiently important purpose such as to justify curtailment of the infringed right, but said that there is no empirical or other evidence that the imposition and use of the rule has resulted in statistically significant reductions in reoffending by child sex offenders. He also argued that the rule goes further than is reasonably necessary for the achievement of its purpose and that the blanket restriction imposed, without consideration of prisoners' individual circumstances, goes further than is necessary. He argued that the rule is a disproportionate response to achieving the objective of reducing reoffending rates by child sex offenders. He suggested that there is a prima

---

34 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.
35 *R v Hansen*, above n 30.

facie more effective process which can achieve the purpose of the rule — namely the voluntary consent of participants in the rehabilitative programmes without recourse to punitive sanctions.

The Director

[50] The Director emphasised the therapeutic purpose the Kia Marama and Totara Units seek to fulfil. He argued that, in order to succeed on the appeal, Mr Smith has to establish differential treatment of the prisoners in the Kia Marama and Totara Units on a prohibited ground of discrimination. It was submitted that the rule does not distinguish between different groups of prisoners on the basis of a prohibited ground of discrimination. Rather, it applies to all prisoners in the Kia Marama and Totara Units.

[51] It was said that any claim of discrimination involves a comparison between the treatment to which the complainant (or the group of which he/she is a part) is subjected and the treatment to which some other person (or persons) is subjected. It was noted that Mr Smith submitted that the comparative group for prisoners in the Kia Marama and Totara Units is prisoners in the Te Piriti Unit. It was argued that, on the evidence, there is no differential treatment between these two groups of prisoners. The Director did not suggest that there is exact equivalence between the rule and the expectations placed on prisoners by the prohibition in the Te Piriti information booklet. Rather, he suggested that the expectations set out in the information booklet, and the prohibition on entering the cells of other prisoners found in the additional rule (see above at [43]), narrow the point of difference between prisoners in the Kia Marama and Totara Units and prisoners in the Te Piriti Unit such that there is no material difference to be drawn between them. It was suggested that the primary difference is one of location, and that this is not a prohibited ground of discrimination.

[52] Further, it was submitted that there is no indirect discrimination — the rule does not require that prisoners of homosexual or bisexual orientation be treated differently from prisoners of heterosexual orientation within the Kia Marama and Totara Units. It was put to us that Mr Smith's assertion that the rule only applies to prisoners with non-heterosexual orientation, was too simplistic and that there will be

prisoners in the programme who will be heterosexual but who will have violent or predatory characteristics, and who, but for the rule, might seek to prey on and take advantage of other more vulnerable prisoners. It was asserted that the rule keeps all prisoners safe and ensures that there is no misunderstanding about what is and what is not allowed.

[53] The Director accepted that prisoners in the general prison muster can engage in sexual activity if they wish to do so. It was submitted that, in the wider prison environment, homosexual and bisexual prisoners have an advantage over heterosexual prisoners and that when homosexual or bisexual prisoners volunteer to go into the Kia Marama and Totara Units, they surrender that advantage and place themselves on an equal footing with their heterosexual counterparts. It was argued that removal of an advantage to put all on an equal footing does not amount to discrimination.

[54] It was also put to us that there is, in any event, no evidence as to the sexual orientation of prisoners in the Kia Marama and Totara Units, and whether prisoners in those Units want to have sexual activity with other prisoners.

[55] It was argued, by reference to s 5 of the NZBORA and *R v Hansen*, that even if Mr Smith succeeds in establishing that there is discrimination, the rule is lawful, because it is demonstrably justified.

Analysis

[56] Notwithstanding the prominence that the issue assumed in the High Court,[36] it was common ground before us that whether or not prisoners have a right to conjugal visits or a right to engage in consensual sexual activity in prisons is largely beside the point. It was not disputed that prisoners retain all civil rights and freedoms of ordinary citizens, unless such rights and freedoms are removed by law expressly or by necessary implication.[37] Further, it was common ground that prisoners in the general prison muster are not prohibited from engaging in consensual sexual activity. What

---

[36] See High Court judgment, above n 1, at [50]–[65].

[37] *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [97] per Elias CJ; and see *Attorney-General v Smith* [2018] NZCA 24, [2018] 2 NZLR 899 at [47].

was primarily in issue was whether or not the rule is ultra vires because it imposes a blanket prohibition and/or because it is discriminatory.

Section 33

[57] The rule is made under s 33(1) of the Act. Section 33(1) provides as follows:

> **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.

[58] The scope of a prison manager's power to make rules falls to be considered in the light of the purpose of s 33, interpreted in the context of the Act as a whole and any other relevant legislation. Rules made under the section must not be inconsistent with the Act (or various related statues referred to in the Act).[38] Nor should they be inconsistent with other legislation, including the NZBORA,[39] or with this country's international obligations.

The statutory context — is the rule consistent with the Act?

[59] The Director made the decision to put the rule in place, based upon the operational needs of the Kia Marama and Totara Units. The rule seeks to do the following:

> (a) Ensure that prisoners participating in the therapeutic programmes have the best opportunity to do so in an appropriate learning environment without disturbance. It was the Director's view that sexual activity between prisoners can create a distraction from the programmes offered. Relationships can break down and what starts as a consensual relationship can quickly turn into alleged sexual assault, which is damaging not only to the dynamic of the Units and to the various treatment groups operating within those Units, but also to the therapeutic community and friendships within the wider prison.

---

38 Corrections Act, s 33(5).

39 *Taylor v Manager of Auckland Prison* [2012] NZHC 3591 at [11]–[12].

(b) Manage the risk that individual prisoners might further offend within the Units. The Director was aware that more vulnerable or younger prisoners can be preyed on by others. Inter alia, the rule was intended to reduce the risk of intimidation and/or pressure being placed on prisoners while they are undertaking the rehabilitative programmes on offer which are designed to address their risks of further sexual offending. The rule endeavours to mitigate the risk that prisoners in the Units pose to themselves and to others.

[60] The Director did consider an alternative option — moving the Units to a closed-door policy at recreation time. This would have seen doors closed when prisoners were out in the compound with the effect that any prisoner who for whatever reason preferred to stay in their prison cell rather than go out into the compound would not be able to do so. The Director rejected this option and considered that the rule was a less restrictive option, better providing for the conduct and safe custody of prisoners.

[61] This evidence was not disputed. It is, in our judgement, clear that the rule is consistent with the purposes of the corrections system set out in s 5 of the Act. Inter alia, that section records that the purpose of the corrections system is to improve public safety and contribute to the maintenance of a just society by ensuring that sentences that are imposed by the courts are administered "in a safe, secure, humane, and effective manner",[40] and by assisting in the rehabilitation of offenders and their reintegration into the community through the provision of programmes and other interventions.[41]

[62] The rule is also, in our view, consistent with s 6, which sets out the principles guiding the corrections system. The maintenance of public safety is the paramount consideration in decisions made about the management of persons under control or supervision pursuant to s 6(1)(a) of the Act. Section 6 also provides that:

---

40 Corrections Act, s 5(1)(a).
41 Section 5(1)(c).

(a) the corrections system must ensure the fair treatment of persons under control or supervision by, inter alia, providing them with information about the rules that affect them;[42]

(b) sentences and orders should 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;[43] and

(c) offenders must, so far as is reasonable and practicable, be given access to activities that can contribute to their rehabilitation and reintegration into the community.[44]

[63] Mr Smith did not take issue with the Judge's finding that the rule is consistent with ss 5 and 6 of the Act.[45] Nor did he assert that the rule is otherwise inconsistent with the Act, or with the related legislation referred to in s 33(5) of the Act — namely the Sentencing Act 2002 and the Parole Act 2002, or with any regulations made under those Acts or under the Act itself.[46] Accordingly, we take this issue no further.

Is the rule inconsistent with other legislation?

[64] The prohibitions in the rule are in two parts. First, it prohibits prisoners in the Kia Marama and Totara Special Treatment Units from participating in sexual activity. Secondly, it prohibits prisoners in those Units from encouraging, pressuring or threatening other prisoners to participate in sexual activity.

[65] While he did not itemise any specific conflict, Mr Smith asserted broadly that the rule (presumably the first part of the rule) is inconsistent with various statutes that Parliament has passed liberalising the law in relation to homosexuality — in particular the Homosexual Law Reform Act 1986, the Civil Union Act 2004, the Relationships (Statutory References) Act 2005, the Marriage (Definition of Marriage) Amendment

---

42 Section 6(1)(f).
43 Section 6(1)(g).
44 Section 6(1)(h).
45 See High Court judgment, above n 1, at [83].
46 Corrections Act, s 33(5).

Act 2013, the Criminal Records (Expungement of Convictions for Historical Homosexual Offences) Act 2018 and the Conversion Practices Prohibition Legislation Act 2022.

[66] We do not accept this submission. The rule does not single out prisoners of any particular sexual orientation. It applies to all prisoners in the Kia Marama and Totara Units. There is no obvious inconsistency with any of the Acts referred to by Mr Smith.

[67] The second prohibition imposed by the rule also seems to us to be consistent with other legislation, for example s 138 of the Crimes Act 1961 which provides that everyone commits an offence who has exploitative sexual connection with a person with a significant impairment. Mr Smith did not suggest otherwise. Indeed, he took no issue with the second part of the rule.

[68] Mr Smith's primary argument was that the prohibition on sexual activity between prisoners in the Kia Marama and Totara Units is inconsistent with the NZBORA. We deal with this below.

Does the rule impose an unlawful blanket prohibition?

[69] Mr Smith argued that the rule imposes a blanket restriction, and that, by reference to *Ministry of Health v Atkinson*, it does not fall within the reasonable range of alternatives for the purposes of the proportionality test required by *R v Hansen*.

[70] We discuss *R v Hansen* below, but for present purposes we note that the rule does not impose a blanket prohibition on all prisoners at Rolleston Prison. It applies only to prisoners who volunteer to go into the Kia Marama and Totara Units and only while they are in either of those Units. The rule does not apply to other units in Rolleston Prison, and prisoners are not prohibited from engaging in sexual activity with other prisoners elsewhere in the prison, or once they have left the Kia Marama and Totara Units. Further, the rule does not forbid consensual relationships between prisoners while they are in the Kia Marama and Totara Units, even consensual relationships which are romantic in nature. Prisoners in the Kia Marama and Totara Units can still apply to the Prison Director if they wish to have a wedding or

civil union. Despite the rule, all prisoners at Rolleston Prison, regardless of their location within the prison, are advised that they can access condoms, via nurses who work in the prison. Such requests are treated in confidence.

Is the rule discriminatory and inconsistent with the NZBORA?

[71] Section 19(1) of the NZBORA provides as follows:

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

As can be seen, s 19 is linked to the grounds of discrimination prohibited by the HRA.[47] The section cannot be relied on if the ground of discrimination is not listed as a ground of discrimination in the HRA.[48]

[72] The prohibited grounds of discrimination are set out in s 21 of the HRA. Relevantly, it provides as follows:

> **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.

As the learned authors of *The New Zealand Bill of Rights Act: A Commentary* observe, sexual orientation is exhaustively defined in s 21(1)(m).[49] They comment that the definition "may perhaps" include being transsexual (or more properly transgender).[50] Notwithstanding that Mr Smith's submissions referred, on occasion, to transgender prisoners, we do not need to resolve this issue. It was not argued before us, and it is better left to an appropriate case where it is in issue.

---

47 See Human Rights Act 1993, s 21.

48 *R v King* [2008] NZCA 79, [2008] 2 NZLR 460 at [36] per Robertson J.

49 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, Wellington, 2015) at [17.8.37].

50 At [17.8.37].

[73] The leading case dealing with s 19 is the decision of this Court in *Ministry of Health v Atkinson*.[51] It was there held that differential treatment on a prohibited ground of a person or group in comparable circumstances will be discriminatory if, when viewed in context, it imposes a material disadvantage on the person or group differentiated against.[52] The Court adopted what is, in effect, a three step process in any s 19 analysis.

(a) The first step is to ask whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination. The Court noted that any claim to discrimination involves comparison between the treatment to which the complainant (or the group of which he or she is a member) is subjected and the treatment to which some other person (or group of persons) is subjected.[53]

(b) The second step is to ask whether the differential treatment has a discriminatory impact.[54] A discriminatory impact arises if the differential treatment on a prohibited ground imposes a material disadvantage on the person or group differentiated against.[55]

(c) If discrimination is found, then consideration needs to be given to s 5 of the NZBORA,[56] which recognises that the rights and freedoms set out in the NZBORA are not necessarily absolute. They "may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[57]

[74] In order to determine whether a person or group is being treated differently to another person or group in comparable circumstances, it is necessary to identify the

---

51 *Ministry of Health v Atkinson*, above n 34. The Court distinguished an earlier decision of this Court dealing with s 19 and discrimination, *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA), at [127].
52 *Ministry of Health v Atkinson*, above n 34, at [109].
53 At [55] and [60]; and see Butler and Butler, above n 49, at [17.10.1]–[17.10.2].
54 *Ministry of Health v Atkinson*, above n 34, at [55].
55 At [109].
56 At [75].
57 New Zealand Bill of Rights Act 1990, s 5.

relevant comparator person or group. The selection of the comparator group should be conducive to a determination of the potential impact of the rule.[58] Selection of the appropriate comparator is for the court.[59] In this case, the potentially relevant comparator groups referred to in the submissions of the parties were those in the Kia Marama and Totara Units who are not transgender or of homosexual orientation, the general prison muster in Rolleston or in New Zealand and prisoners in the Te Piriti Unit.

[75] We assess each of these groups although, as will become apparent, we consider that the comparator group most conducive to determining the impact of the rule is the general prison muster (whether in Rolleston or in New Zealand). Regardless of the comparator group, for the reasons that follow, we have concluded that there are no differential treatment or effects arising from the rule on the basis of a prohibited ground of discrimination.

[76] Mr Smith submitted that as a result of the rule, there is differential treatment between homosexual and bisexual prisoners on the one hand and heterosexual prisoners on the other hand, when they volunteer to go into the Kia Marama and Totara Units.

[77] We disagree. The rule does not refer either directly or indirectly to prisoners of any particular sexual orientation. Rather, it applies to all prisoners who volunteer to go into the Kia Marama and Totara Units, regardless of their sexuality.

[78] Nor do we consider that there is any differential treatment on a basis of a prohibited ground between the prisoners in the Kia Marama and Totara Units, and prisoners in the general muster either in Rolleston Prison or in the general prison muster in New Zealand. Prisoners who volunteer to go into the Kia Marama and Totara Units are prohibited by the rule from engaging in sexual activity; prisoners who do not volunteer remain in the general muster in the prison and are not subject to a like

---

58 *Hutchinson v BC (Ministry of Health)* (2004) BCHRT 58 at [100]; aff'd *R v Hutchinson* 2004 BCSC 1536, (2004) 261 DLR (4th) 171. *Hutchinson v BC* discussed in *Ministry of Health v Atkinson*, above n 34, at [69]; and applied in *Attorney-General v IDEA Services Ltd* [2012] NZHC 3229, [2013] 2 NZLR 512 at [139].

59 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [34] per Elias CJ, Blanchard and Wilson JJ.

prohibition. This comparison gives rise to differential treatment (a prohibition for those in the programme that does not apply to the comparator group). However, the differential treatment arises not on the basis of a prohibited ground of discrimination, but rather as a result of the voluntary participation in the programmes offered in the Units.

[79] Section 19 of the NZBORA proscribes not only direct discrimination, but also indirect discrimination.[60] Indirect discrimination can occur when a law, rule or practice is neutral on its face, but has a disproportionate impact on a group (or person) because of a particular characteristic of that group or person.[61] Indirect discrimination is prohibited by s 65 of the HRA.

[80] Mr Smith submitted that the rule indirectly discriminates, because:

> … in a practical sense [the rule] only applies to prisoners with an orientation that is homosexual, lesbian, or bisexual, who choose to exercise their free choice to withdraw their voluntary consent to agree to the programme retention criteria. …

[81] We consider the relevant indirect impact is a comparison between homosexual, lesbian or bisexual prisoners in the programme as compared with homosexual, lesbian or bisexual prisoners who are not in the programme. Homosexual or bisexual prisoners (or indeed heterosexual prisoners who seek to do so) can engage in homosexual activity while they are part of the general prison muster. They lose the ability to do so if they go into the Kia Marama or Totara Units, and, in common with heterosexual prisoners who have not chosen to engage in homosexual activity in prison, they become subject to the prohibition contained in the rule while they are in either Unit. Being put in a position of equality with others is not discrimination.[62]

[82] Mr Smith suggested that the comparator group for prisoners in the Kia Marama and Totara Units is prisoners in the Te Piriti Unit. He submitted that there is discrimination because the prisoners in the Kia Marama and Totara Units are subject

---

60 *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 (HC) at 236.

61 Butler and Butler, above n 49, at [17.12.1].

62 *Ngaronoa v Attorney-General; Taylor v Attorney-General* [2017] NZCA 351, [2017] 3 NZLR 643 at [140].

to a quasi-judicial punitive regime if they infringe the rule whilst prisoners in the Te Piriti Unit are not exposed to such sanction.

[83] We agree with Mr Smith that prisoners in the Kia Marama and Totara Units can be compared to prisoners in the Te Piriti Unit. Both groups of prisoners are in an analogous situation. The prisoners volunteer to go into the Units to undertake treatment for sexual offending against children and adolescents under the age of 16. All prisoners are male (or in a male prison). The eligibility criteria for the Units are the same. All three Units are segregated. There is no evidence before us to suggest that there are any ethnic, social, cultural or other differences between the prisoners in the Units.

[84] To the extent that there is any differential treatment between these prisoners, it is not on a prohibited ground. All prisoners in the Kia Marama and Totara Units, and in the Te Piriti Unit, whether they are homosexual or bisexual or otherwise, are prohibited from engaging in sexual activity. The differential treatment between the Kia Marama and the Totara Units on the one hand and the Te Piriti Unit on the other is as to the consequences of breaching the rule. Those consequences apply regardless of the sexual orientation of the prisoner.

[85] We acknowledge Mr Smith's point that any breach of the prohibition on sexual activity in the Kia Marama and Totara Units could result in the imposition of penalties. Those penalties include the possibility of solitary confinement. In Te Piriti, any breach of the prohibition set out in the information booklet,[63] can be enforced by an internal review and it could result in removal from the treatment programme. That is likely to be a matter of real consequence to a prisoner, because it is likely to adversely affect his parole eligibility. The admissions of facts document also suggests that a breach of the prohibition set out in the Te Piriti information booklet can result in a charge under s 128(1)(a) of the Act. If the sexual activity took place in a prison cell, then it is also likely that the additional rule, noted above at [43], would also be breached by at least one of those involved. Again, this could result in a breach of discipline under s 128(1)(a). Any breach of s 128(1)(a) can result in the imposition of the same

---

[63] The information booklet is provided by the Department of Corrections to prisoners contemplating going into the Te Piriti Unit: discussed above at [32]–[33].

penalties as can be imposed for breach of the rule by those in the Kia Marama and Totara Units.

[86] In our view, even if the rule differentiates between those in the Kia Marama or Totara Units and those in the Te Piriti Unit on a prohibited ground (which we do not consider to be the case), it does not give rise to a material disadvantage. We consider there is no material difference between the way prisoners in the Te Piriti Unit who breach the prohibition can be sanctioned and the way prisoners can be sanctioned in the Kia Marama and Totara Units if they breach the rule. To be involved in any of the programmes, prisoners must accept from the outset that they cannot be involved in any sexual activity. The difference in consequence if the rule/prohibition is breached is, in our view, not material. As we have noted, the consequence of greatest import for prisoners is the risk of expulsion from the programme. We agree with the Judge in this regard.[64]

[87] For the reasons we have set out, we do not consider that the rule is discriminatory. It does not, in our judgement, infringe s 19(1) of the NZBORA.

Does the treatment afforded to prisoners who go into the Kia Marama and Totara Units have a discriminatory impact?

[88] Given the views we have set out above, we do not need to consider the second step. There is no discrimination and thus, no discriminatory impact.

Is the rule inconsistent with New Zealand's international obligations?

[89] Mr Smith referred to the Yogyakarta Principles and the Yogyakarta Principles Plus 10 (jointly, the Principles).

[90] The Yogyakarta Principles were drawn up by a group of human rights experts, following a meeting held at the Gadjah Mada University in Yogyakarta, Indonesia, between 6 and 9 November 2006. They were published in March 2007. They address a broad range of human rights standards and their application to issues of sexual

---

64 High Court judgment, above n 1, at [92].

orientation and gender identity. They affirm the obligations of States to implement human rights.

[91] The Yogyakarta Principles Plus 10 were drawn up in November 2017, following a further meeting in Geneva from 18–20 September 2017. The Yogyakarta Principles Plus 10 seeks to affirm international legal standards as they apply to all persons on grounds of their sexual orientation, gender identity, gender expression and sex characteristics. They articulate nine additional principles and 111 additional State obligations.

[92] The Principles were signed by individuals, including academics, United Nations special rapporteurs and jurists. The only signatory from New Zealand was an individual, Paul Hunt. He signed the Yogyakarta Principles. It is there recorded that Mr Hunt was a professor in the Department of Law at the University of Essex in the United Kingdom and that he was a United Nations special rapporteur on the right to the highest attainable standard of health.[65] The Principles Plus 10 were not signed by anybody from this country.

[93] The Principles have not been adopted by or ratified in New Zealand.

[94] In the High Court, Nation J considered that New Zealand is a signatory to the Principles.[66] He went on to refer to:

(a) Principle 2 in the Yogyakarta Principles, which addresses rights to equality and non-discrimination, and requires that States 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

(b) Principle 33 in the Yogyakarta Principles Plus 10, which records that everyone has the right to be free from criminalisation and any form of

---

65 Sonia Onufer Corrêa and Vitit Muntarbhorn (co-chairpersons) *The Yogyakarta Principles*: *Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (March 2007) at 34.

66 High Court judgment, above n 1, at [47].

> sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

[95] The Judge held that, while the Principles might appear to require recognition of a right and freedom to participate in consensual sexual activity, whether heterosexual, homosexual, lesbian or bisexual, they fall to be interpreted and applied in accordance with their purpose.[67] Their purpose is to require States to repeal legislation and legal provisions that discriminate against sexual activity based on sexual orientation.[68] He did not consider that the Principles recognise that prisoners have the right to engage in consensual sexual activity with other persons.[69]

[96] Mr Smith accepted that the Principles have not been ratified or adopted by New Zealand, but he argued that they nevertheless apply, albeit indirectly, in this country. He submitted that they inform the approach which should be taken to issues that can impact on individual sexual orientation.

[97] However, as noted, the Principles have not been ratified or adopted in this country. They can have no effect, unless they are referred to in a statute.[70] That has not occurred. Accordingly, we conclude that the Judge erred when he held that New Zealand was a signatory to the Principles. We also note that, as we understand it, the Principles have not been adopted by the United Nations.

[98] We nevertheless agree with the Judge that the purpose of the Principles is to require States (who agree to be bound by them) to repeal legislation and provisions that discriminate against sexual activity based on sexual orientation.[71] In this regard, we reiterate that, in our view, the rule does not discriminate against prisoners on the basis of their sexual orientation. It follows that the rule does not infringe the Principles.

---

67 At [52].
68 At [52].
69 At [53].
70 *New Zealand Air Line Pilots' Association Inc v Attorney-General* [1997] 3 NZLR 269 (CA) at 280–281.
71 High Court judgment, above n 1, at [52].

[99] It was not suggested that there are any other relevant international obligations which affect the validity of the rule.

Section 5 of the NZBORA

[100] We have found that the rule is not in breach of s 19 of the NZBORA. For completeness, however, we briefly address s 5 of that Act. It provides as follows:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[101] The leading case considering s 5 is the decision of the Supreme Court in *R v Hansen*.[72] The Court was there dealing with the reverse onus found in s 6(6) of the Misuse of Drugs Act 1975 that applies if a defendant is in possession of more than a specified amount of a controlled drug. It was argued that requiring a defendant to persuade a jury that he did not have the purpose of sale or supply was inconsistent with the right to be presumed innocent until proven guilty, contained in s 25(c) of the NZBORA. The majority held that the reversal of the onus of proof found in s 6(6) was inconsistent with the presumption of innocence[73] and that this was not a justified limitation on the right.[74] Even so, in the absence of a reasonably possible alternative meaning, it was held that s 4 of the NZBORA required that Parliament's intended meaning be adopted.[75]

---

72 *R v Hansen*, above n 30.

73 At [100] per Tipping J, [202] per McGrath J and [281] per Anderson J. The minority agreed that the reversal of the onus of proof was inconsistent with the right to be presumed innocent: at [7] per Elias CJ and [63] per Blanchard J

74 At [127] and [149] per Tipping J, [234] and [260] per McGrath J and [281] per Anderson J.

75 At [90] and [166]–[167] per Tipping J, [257] and [261] per McGrath J and [290] per Anderson J.

[102] There were different articulations of the majority's approach. Broadly, they are distilled to a six-step test proposed by Tipping J. Adapted for present purposes, that test requires as follows:[76]

(a) that the Court ascertain the intended meaning of the rule;

(b) that the Court ascertain whether that meaning is inconsistent with a relevant right or freedom;

(c) if any inconsistency is found, that the Court ascertain whether the inconsistency is nevertheless a justified limit in terms of s 5;

(d) if the inconsistency is a justified limit, the inconsistency is legitimised and the intended meaning prevails;

(e) if the intended meaning of the rule represents an unjustified limit under s 5, the Court must examine the words in question again under s 6 of the NZBORA, to see if it is reasonably possible for a meaning consistent, or less inconsistent, with the relevant right or freedom to be found in them. If so, that meaning must be adopted;

(f) if it is not reasonably possible to find a consistent, or less inconsistent, meaning, s 4 of the NZBORA mandates that the rule's intended meaning be adopted.

[103] We have already set out what the rule was intended to mean. Relevantly, it seeks to prohibit sexual activity between prisoners in the Kia Marama and Totara Units. The words "sexual activity" are not defined and the current version of the rule does not refer to sexual activity between prisoners. Nevertheless, the Director, in his statement of defence, in his evidence and in the submissions filed on his behalf, took the stance that what is prohibited is sexual activity between prisoners, but did not refer to sexual activity (for example masturbation) engaged in by a single prisoner. This is

---

[76] At [92] per Tipping J.

consistent with the explanation given in the information booklet for the rule set out above at [24].

[104] For the reasons we have set out, we do not consider that the intended meaning is inconsistent with the any right or freedom identified in the NZBORA, but for present purposes, we proceed on the basis that we are wrong in this regard.

[105] On this assumption, we turn to consider whether or not the inconsistency would nevertheless be a justified limit in terms of s 5. That necessitates an inquiry into whether a justified end is achieved by a proportionate means. Several sub-issues inform this enquiry — including whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom.[77]

[106] Mr Smith accepted that the aim of rehabilitating and reintegrating into society prisoners who have offended against children and adolescents justifies the infringement of the right not to be discriminated against. In our view, he was correct to do so.

[107] We have set out above at [59] the Director's evidence as to the circumstances in which the rule was initially promulgated and his intentions in putting the rule into place. The rule was clearly made for the management of Rolleston Prison, for the integrity of the programmes offered in the Kia Marama and Totara Units, and for the safety of the prisoners in those Units and persons elsewhere in the prison.

[108] The Kia Marama and Totara Units operate as therapeutic community environments. Prisoners in the Units are in a treatment-supportive area that provides opportunities for change. The rule is justified, because it seeks to ensure that prisoners have the best opportunity to participate in the programmes offered without distraction. Sexual relationships between prisoners have the potential to undermine the benefits of the treatment programmes.

[109] As the affidavit evidence before us explains, all of the prisoners participating in the programmes have taken sexual advantage of others. Participants have had

---

[77] At [123] per Tipping J.

difficulty managing their sexual preoccupations and they have poor sexual boundaries. They lack insight into their problems and the offence-related nature of their behaviour. One of the primary purposes of the treatment programmes is to help participants gain control over their sexual behaviour and learn more appropriate ways of coping with their sexual needs. As noted in the Kia Marama Unit information booklet,[78] any sexual behaviour between participants in the programme is problematic, as it would reflect actions similar to the offence-related behaviour and serve to avoid directly dealing with treatment issues.

[110] The treatment programmes target sexual deviance, sexual compulsivity and poor insight. Engagement in sexual behaviour, or in sexual coercion, could inhibit the ability of participants to develop better ways of coping. Further, the programme relies on participants being able to provide feedback to each other in an open environment and that could be compromised if prisoners were allowed to engage in sexual activity with others due to the inevitable dynamics that are inherent in that context. As the Director noted in his evidence (and as noted above at [59]), what starts off as a consensual relationship can quickly turn to an alleged sexual assault, which damages not only the dynamic in the Units and in the various treatment groups, but also the wider prison community.

[111] The rule is also intended to manage the risk of individuals within the Units committing further offending, given the predatory nature of their index offending. The rule is intended to help manage the risk the participants pose to themselves and to others. As noted by the manager of psychological services at the Units, Alexandra Green, there is real concern that younger and/or vulnerable prisoners can be subject to grooming or predation. If prisoners in the Units seek to impose their sexual deviancy on others in the Units, they will typically target those they perceive as being vulnerable, or as possessing characteristics reflective of their preferred victim type. There can be patterns of sexual coercion that some in the Units may not recognise as abusive, as well as coercive elements in the behaviour of others. The rule helps keep all prisoners in the Units safe.

---

78 See above at [24].

[112] Under the Health and Safety at Work Act 2015, unit managers have a responsibility and a duty of care to ensure that the environment they oversee gives priority to the health and safety of workers and other persons in the unit.[79] Given the type of prisoner the Units accommodate, steps have to be taken to ensure the safety of prisoners who are more vulnerable to sexual coercion. The rule assists in ensuring that the Units are safe environments where prisoners can receive therapeutic interventions.

[113] The evidence suggests that the programmes offered at the Kia Marama and Totara Units have been effective. The effectiveness of the programmes has been researched, albeit some years ago and before any rule relating to sexual activity was put in place. Results then showed that attendance at the Kia Marama programme has been associated with a reduction in sexual reoffending (from 10 per cent down to 7.2 per cent), a reduction in violent reoffending (from 18.4 per cent down to 10.3 per cent) and a reduction in general reoffending (from 40.2 per cent down to 32.7 per cent). While Mr Smith suggests that there has been no meaningful reduction, we disagree. The research noted above is clear and it is the opinion of the researcher that the percentage reductions are statistically significant. There is no evidence to the contrary.

[114] The goal of preventing sexual reoffending, particularly against children and adolescents, is important and has a high social value, not only for the affected prisoners, but also for the community as a whole. In our judgement, any infringement of the right to be free from discrimination is justified.

[115] We turn to the issue of whether or not the rule is a proportionate means of seeking to obtain this justified end.

[116] Mr Smith argued that the prohibition contained in the rule is disproportionate and that the aim sought to be achieved could be better achieved by fostering an expectation on prisoners who volunteer to go into the Units.

[117] We do not consider that the rule is a disproportionate response. We take into account the type of persons subject to the rule. On the evidence, many will be

---

79 See Health and Safety at Work Act 2015, s 36(3)(a).

manipulative and may engage in patterns of sexual coercion. Many will have cognitive impairments. A clear rule is simple and straightforward. It puts in place a "bright line".

[118] Further, the evidence suggests that any sexually-related behaviour in the Units could be problematic. Allowing sexual activity on a case-by-case basis would have the potential to impact on the success of the programmes offered.

[119] While the rule permits the imposition of a range of penalties, the imposition of a penalty is not automatic. The decision to charge a prisoner with misconduct if it is considered that the rule has been breached, is discretionary. What penalty to impose is a matter for the hearing adjudicator or Visiting Justice. There is both a right of appeal and a right to judicial review of any decision.[80] On the evidence, since a rule prohibiting sexual activity in the Kia Marama and Totara Units was first put in place in 2017, there has been only one prisoner who has been charged with misconduct.

[120] In our judgement, the rule cannot be said to be a disproportionate response.

[121] It follows that if, contrary to our view, there is an inconsistency between the rule and the right to be free from discrimination, that inconsistency is a justified limit on the right, it is legitimised and that the intended meaning of the rule prevails.

[122] We need take the s 5 enquiry no further.

Costs

[123] Mr Smith is a sentenced prisoner and the Director properly accepted that his ability to meet any costs award is limited. Nevertheless, the Director sought a contribution to his costs.

[124] We were advised that Mr Smith paid the sum of $1,000.00 by way of security for costs. We consider it appropriate to award costs against him in that sum.

---

[80] Corrections Act, s 136.

Result

[125] The respondent is given leave to adduce in evidence rule PR/001 made on 1 October 2021 by the Prison Director at Auckland Prison under s 33(1) of the Corrections Act 2004.

[126] The appeal is dismissed.

[127] The appellant is to pay costs to the respondent in the sum of $1,000.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent