IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2022-485-579
[2023] NZHC 592

UNDER	the Judicial Review Procedure Act 2016
BETWEEN	ELETISE NATASHA WALLACE, RACHEL VINCENT, DOMINIQUE CARROLL, MIHI ISABELLA BASSETT, TIPARE ROPITINI, TARIANA JONES AND LARA ATKINS Applicants
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 7 December 2023

Appearances: V E Casey KC and A L Hill for Applicants
D J Perkins and D P Neild for Respondent

Judgment: 15 December 2023

JUDGMENT OF COOKE J
(Relief)

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[1] By judgment dated 18 August 2023 I upheld the applicants' judicial review challenge to the transfer of the majority of sentenced women prisoners at Arohata Prison in Wellington to prisons in Auckland and Christchurch, and the effective closure of Arohata for other than remand or high security prisoners.[1] I held that the respondent had not complied with the requirements of the Corrections Act 2004 (the Act) for such transfers, and that the decisions involved discrimination on the basis of sex in contravention of the rights in s 19 of the Bill of Rights Act 1990, as well as a failure to consider relevant considerations.

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1 *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2248.

[2] I reserved the question of relief to be considered at a further hearing. That hearing has now occurred and this judgment deals with that question. This judgment should be read in conjunction with my earlier decision.

Fuller background

[3] It is first appropriate to outline the steps that have taken place since delivery of the earlier judgment. I held:[2]

> It was suggested at the hearing that given the potential complexities the Court could release a judgment with its findings and then have a further hearing in relation to relief. I understood that to be agreed to by both parties. In the circumstances that seems to be the appropriate way forward. It may be that the remedy may involve considering the re-opening of Arohata for sentenced women. But important resource management issues are involved in that, and it is appropriate to give the respondent a period of time to reflect on how the position can now be appropriately remedied.

[4] I then held a telephone conference on 21 September and gave directions for a hearing in relation to relief, including a direction that the respondent file and serve evidence "explaining the steps that it has and will take to address the position described in the judgment".[3]

[5] An affidavit dated 9 October was then filed from Ms Brigid Kean, the Deputy National Commissioner at the Department of Corrections. She explained that the Department's recruitment drive had seen success in that it had just over 100 more full time staff compared with the same time the previous year, and that staff retention was also improving. She said, however, that there were approximately 1,000 more prisoners in the network compared with the same time the previous year, and that prison numbers were predicted to increase. That increase was projected irrespective of the effects any potential change in government policy following the general election. The consequence was that the increased staff numbers had not addressed the overall problem with the shortage of Corrections staff.

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2 At [119].

3 *Wallace v Chief Executive of the Department of Corrections* HC Wellington CIV-2022-485-579, 21 September 2023 at [3(a)].

[6] Ms Kean explained that the Department was "down to single figures" in terms of available places within the prison network and that she oversaw a daily meeting called the "Prison pressures meeting" which sought to address the capacity shortage, and that the Department had "… operated at these high-pressure settings for some months now and it is becoming more pressured. Often we are trying to find literally any available bed in the network for anticipated weekend arrests".

[7] Ms Kean also explained that of the 69 women that had been transferred from Arohata, 34 had since been released, 29 remained in either Auckland or Christchurch, two had been returned to Arohata, and four were at Arohata on remand having allegedly committed further offences since release. Of the 29 prisoners who remained, 19 had proposed release addresses in the lower North Island. Only two of these were high security.

[8] Ms Kean said that the Department still intended to restore capacity at Arohata, and that it would be able to reconsider individual transfer or cohort level decisions in accordance with the Court's judgment. But she said:

> Increasing the capacity for sentenced prisoners at Arohata prison requires more available staffing resource, but the network-wide pressures remain such that Corrections does not have the resource to increase capacity at Arohata prison. Doing so would create what the Department assesses as unacceptable impacts to health and safety elsewhere in the network.

And that:

> At this stage, Corrections has not identified a short-term measure that would involve a significant restoration of sentenced prisoner capacity at Arohata prison. It expects that it will be in a position to achieve this as corrections officer numbers continue to increase, but that is in part dependent on the number of prisoners in custody, which is not in Corrections' control.

[9] At a further directions conference then held the applicants contended that the position described in the evidence was inadequate. I accepted that more evidence was required given the unusual circumstances the Court was faced with. I said in a minute accompanying further directions:[4]

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4 *Wallace v Chief Executive of the Department of Corrections* HC Wellington CIV-2022-485-579, 12 October 2023 at [4].

> I agree that the Court is being asked to address a somewhat unusual situation — where it is said by the respondent that effective relief cannot be granted because of the circumstances. In effect the affidavit is suggesting that any steps requiring the applicants to be moved back to Arohata, or for Arohata to be re-opened, would cause an unsafe environment elsewhere in the prison network.

[10] I then identified two areas where the Court would be assisted by further evidence from the respondent — the number of staff that would be necessary to re-open Arohata, and the extent of the compliance with the requirement to provide minimum entitlements under s 69 of the Act elsewhere in the network.

[11] In a second affidavit dated 2 November Ms Kean updated the position. She explained that Corrections needed 78 full time staff at Arohata if the prison was to hold 124 prisoners, and that it currently operated with 66 staff, with 13 seconded to Rimutaka (although two more were scheduled to move). In addition to providing more information in relation to Corrections' assessment of safety she explained that the Department was struggling to comply with the obligation to meet minimum entitlements under the Act throughout the prison network. Two of the requirements were particularly focused on — the requirement that prisoners be entitled to one hour's physical exercise each day (ss 69(1)(a) and 70 of the Act), and the requirement that they be allowed one private visitor each week for a minimum of 30 minutes (ss 69(1)(d) and 73).[5] In particular:

(a) At Rimutaka no private visits were currently allowed, with visits by lawyers (required by s 74) only having recommenced on 20 March 2023. Prisoners were being provided with the one hour's exercise, but were only being unlocked from their cells for a minimum of one hour and 30 minutes each day.

(b) At Christchurch Men's prison visits were only being offered at one hour per fortnight.

(c) At Christchurch Women's the regime for being unlocked from a cell was being operated normally, but only when staffing levels permitted.

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5 These provisions do not contemplate AVL contact which may have been provided by Corrections.

(d) At Springhill in Auckland the ability to unlock prisoners was being determined daily depending on staffing resource, with prisoners being unlocked for a minimum of one hour and up to four hours per day.

(e) At Auckland Men's unlock times were being addressed daily, with failures to meet the one hour requirement being reported. In terms of private visits some units had visits on one day per week, visits in high security units had recommenced, but visits for maximum security prisoners had not yet recommenced.

[12] I note that these issues only address the minimum entitlements set by the Act, which are based on the international minimum standards set in the Nelson Mandela Rules.[6] Even when these minimum standards were met the broader objectives of the Act may not be. The requirement to allow one hour's exercise is being equated with a period of time when prisoners are unlocked from cells. A regime that only allows prisoners to be unlocked from cells for only one in every 24 hours does not seem consistent with the broader purposes of the Act, and gives rise to other issues. In addition there is the issue of staff and prisoner safety raised by the Department. It is also of real concern that the breaches of standards appear to have been in existence for some time.

[13] It was against that background that the parties filed their written submissions in anticipation of the relief hearing.

[14] The day before the hearing, however, counsel for the respondent filed a memorandum indicating that the Chief Executive now contemplated re-opening Arohata for approximately 20 lower security prisoners, and that this would happen before Christmas. At the hearing itself Mr Perkins indicated that the Court had been advised of this development as soon as possible, but that the position could not yet able to be confirmed by affidavit evidence. He said, however, that this could be done within a matter of days. It was agreed that the respondent should file that further

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6 United Nations Standard Minimum Rules for the Treatment of Prisoners A/Res/70/175, adopted by the General Assembly on 17 December 2015.

evidence, and that the hearing would proceed and that I would convene a telephone conference once the further evidence was received to address further submissions.

[15] The parties took divergent positions on the relief at the hearing against that background. The applicants contended that the relief by way of mandatory orders supported by declarations that clearly identified the respondent's legal obligations were required. The respondent argued that the position was most appropriately dealt with by directions for reconsideration, although declaratory relief could also be given. Both parties provided proposed wording for orders/directions in reasonably elaborate form.

[16] Ms Kean then provided a third affidavit dated 12 December. She explained that the situation across the prison network as previously described remains acute, and that there had been an increase in the number of women prisoners — when the challenged decisions were made in August 2022 there were 434 women prisoners, and there are now 544. But she explained that Corrections was now able to re-open one of the units at Arohata — the Te Araroa unit — for 20 women in low security conditions. This would involve four officers being utilised. These would not be returning from Rimutaka but involved a mixture of new recruits, retaining existing staff, and more efficient staff utilisation. The first prisoners to be moved to the re-opened unit would be 15 low and medium security prisoners currently kept at Arohata in high security conditions together with then four or five women from the other prisons, with further women prisoners from other prisons then being moved into Arohata as the first tranche of women are released over the next six months or so.

[17] At a further telephone conference held after the affidavit was received Ms Casey KC renewed the argument for mandatory orders. She emphasised that there were three related reasons why they should be made. First, the unlawfulness found by the Court could not be addressed only by a direction for reconsideration because the Chief Executive had explained he was not in a position to take any effective steps given the resource constraints. The Court had a duty to itself ensure that the requirements of the law, including s 19 of the New Zealand Bill of Rights Act, were met. Secondly, there were the practical and humanitarian circumstances as had been explained in the evidence received by the Court. This was not an academic exercise,

and declarations were not sufficient. Thirdly she identified that the context of this challenge was that the prison system was underfunded and understaffed, and how the Court responded to that situation was important for the rule of law, and how judicial review challenges would be responded to in the future. For the respondent Mr Perkins emphasised that mandatory orders were not appropriate, particularly if they contemplated the Court engaging in ongoing supervision of discretionary decision-making. He indicated that the Chief Executive welcomed the formulation of relief involving a direction to reconsider decisions, and that the Chief Executive would comply with such directions.

Assessment

[18] I accept that this case raises difficult issues in relation to the appropriate formulation of relief. That is particularly so in relation to the position that was being initially taken, or explained by the Chief Executive in the affidavit evidence. That evidence raised a real question relating to the extent to which the Court should properly go when faced with a situation where the executive was advising that it would not, or could not comply with legal obligations. The difficulties have been reduced to some extent by the revised position now explained, but the key issues still remain. In effect the Chief Executive has said that Arohata can now be partially re-opened, albeit operating less extensively than it was before the challenged decisions. That step does not appear to eliminate the unlawfulness identified in the judgment, however. There will still be women who have been transferred out who will not be returned to Arohata when they should be, and the proposal is only to operate the Te Araroa wing for short term imprisonment, at least in the first instance.[7]

[19] There were two separate statutory decisions found to be unlawfully made here, although in the end they are inherently interrelated. The first was the decision to second/transfer the prison officers from Arohata to Rimutaka, a decision of the Chief Executive under s 8 of the Act. The second was a decision to transfer the prisoners to other prisons under s 53 of the Act. Both of the relevant decisions have been implemented. For that reason the appropriate remedy is not to quash these decisions, which would now be pointless. Effective relief only arises by further decisions which

[7] So, for example, the rehabilitation programmes for longer term prisoners will not be available.

have the effect of reversing the earlier decisions found to be unlawful. It is partly for this reason that mandatory orders are potentially relevant.

[20] Mr Perkins referred to and relied on the summary of the relevant principles concerning mandatory orders provided in the Northern Ireland High Court in *Napier v First Minister of Northern Ireland and others*.[8] Scoffield J said the following basic principles were evident from the authorities:[9]

> (1) Rarity in general: … mandatory or coercive orders are rare in judicial review. This just result is more often achieved by the grant of a constitutive remedy such as a quashing order and/or an educative remedy by way of declaration. Nonetheless, mandatory orders remain an important tool within the courts' toolkit to do justice in an appropriate case and where there is a proper basis for compelling a particular action on the part of the respondent.
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> (2) Need for clarity as to obligation: Mandatory orders are most appropriate in cases where the relevant public authority has a clear statutory duty to do a certain thing … This means that, in practice, the situations where the courts are willing and able to order a public authority to do a specific act are limited. A mandatory order is most suitable where the obligation to act is clear and the act to be performed is also clear. That is not to say, however, that an implied statutory duty may not be enforced by way of mandatory order where the court has identified the relevant obligation.
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> (3) Rare where discretion involved: Generally, a mandatory order will not be granted compelling a particular outcome where the public body in question enjoys a discretion – unless (exceptionally) the discretion may only lawfully be exercised in one particular manner in the circumstances of the case – although an order may be granted securing performance of the duty to *exercise* the discretion …
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> (4) Need for clarity as to act required: A mandatory order will also not normally be granted unless the court can specify precisely what the public body needs to do in order to perform its duties; and such an order should be framed in terms which make it clear what the public body is required to do and also therefore to allow a clear assessment to be made as to whether the order has been complied with … That is not to say that a court may not, for instance, grant an order requiring a particular purpose to be achieved within a particular timescale (where there is a public law obligation to achieve the purpose in question); but the court will be more cautious as the complexity of the result to be achieved or the steps required for that purpose increases.
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> (5) Presumption against continuing supervision: In general, a mandatory order will not issue to compel the performance of a continuing series of acts which the court is incapable of superintending … Nor will a mandatory order be granted if it will require close supervision by the court to ensure that it is

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8 *Napier v First Minister of Northern Ireland and others* [2021] NIQB 120; [2023] NI 1 (references omitted).

9 At [59].

being observed, or ongoing monitoring of the exercise of the public body's functions …

[21] I generally agree with these factors. But there is an important difference between the approach in New Zealand compared with overseas jurisdictions arising from the specific legislation which addresses the remedial orders the Court can make. Section 16 of the Judicial Review Procedure Act 2016 provides that the Court can grant relief when the applicant is entitled to orders in the nature of mandamus, prohibition, certiorari, declaration or injunction. Under s 16 the Court can set aside the decision. Section 17 then provides that the Court can give the following directions instead of, or in addition to setting aside the decision:

> **17 Court may direct reconsideration of matter to which statutory power of decision relates**
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> …
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> (3) The court may direct any person whose act or omission is the subject matter of the application to reconsider and determine, either generally or in respect of any specified matters, the whole or any part of any matter to which the application relates.
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> (4) In giving a direction to any person under subsection (3), the court must—
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> (a) advise the person of the reasons for the direction; and
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> (b) give the person such directions as it thinks just as to the reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration.
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> …

[22] These provisions allow the Court to direct a decision-maker to reconsider the decision — itself a kind of mandatory order — and provide directions about the reconsideration "as it thinks just". That provision should not be read down. It allows the Court to tailor directions in an appropriate way, including in light of the factors summarised in the *Napier* decision. Giving quite tightly prescribed directions may be appropriate if the Court considers that there is only one lawful way of exercising a discretion, or to ensure that effective relief is provided for a prior unlawful exercise of a discretion. Such an approach is consistent with the New Zealand authorities, although the provisions of this legislation have not normally been expressly referred to. In particular:

(a) In *Haronga v Waitangi Tribunal* the Supreme Court concluded that the Waitangi Tribunal was obliged to exercise a discretion to grant an urgent remedies hearing in the circumstances, and directed that it must do so.[10]

(b) In *Fiordland Venison Ltd v Minister of Agriculture & Fisheries* the Court of Appeal required a Minister to grant a licence. It held that the statute expressly or impliedly limited the reasons for which the licence could be refused, and the facts all pointed one way.[11]

(c) In *Financial Services Complaints Ltd v Chief Ombudsman* the Court of Appeal held that the only lawful decision the Chief Ombudsman could make under the statute given the circumstances was to grant the applicant the permission it sought.[12]

(d) In *Christiansen v Director-General of Health* the Court directed the Director-General of Health to allow the applicant to enter New Zealand to visit a dying relative notwithstanding the COVID-19 restrictions as there was no time for a sensible alternative remedy.[13]

(e) In *Dunne v CanWest TVWorks Ltd* the Court directed the respondent to invite a leader of a political party to a televised leaders election debate as this was the only effective remedy for the unlawful failure to invite him.[14]

(f) By contrast, in *Taylor v Chief Executive of the Department of Corrections* the Court of Appeal declined mandatory interim orders requiring the Chief Executive to allow prison visits from an identified family member. That was because prisoner safety issues arose under

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10 *Haronga v Waitangi Tribunal* [2011] NZSC 53, [2012] 2 NZLR 53 at [100], [111] with Young J dissenting at [112].

11 *Fiordland Venison Ltd v Minister of Agriculture & Fisheries* [1978] 2 NZLR 341 at 350–352, 357.

12 *Financial Services Complaints Ltd v Chief Ombudsman* [2022] NZCA 248, [2022] 2 NZLR 740 at [96] and [107].

13 *Christiansen v Director-General of Health* [2020] NZHC 887, [2020] 2 NZLR 566 at [60]–[63].

14 *Dunne v CanWest TVWorks Ltd* [2005] NZAR 577 (HC) at [48]–[54].

> the Act. So there were reasons why mandatory orders were inappropriate.[15]

[23] The provisions of the Judicial Review Procedure Act and its legislative predecessor (the Judicature Amendment Act 1972) are of importance to judicial review in New Zealand. Their significance is sometimes overlooked. The architects of the legislation struck a careful balance when framing the relief the Court could grant. The provisions were then further amended in 1977 to add what is now s 17(5) and (6) to give power to grant interim relief when giving such directions, adding further sophistication.[16] Ultimately the nature of the relief granted is highly circumstantial, and the Court should not hesitate to give even quite prescriptive directions when doing so is consistent with the rule of law and the justice of the case.

[24] The difference between mandatory orders and other orders by way of relief may also not be as stark as it first appears in some circumstances. Orders preventing something being done (prohibition) and requiring something to be done (mandamus) are traditional remedies just as much as orders quashing a decision (certiorari). All such forms of relief are expressly contemplated by ss 16 and 17 of the Judicial Review Procedure Act. All exist to ensure discretionary decision-making is conducted lawfully. Here, for example, the applicants approached the Court and sought interim orders under s 15 before the transfer decisions were implemented. Had such interim relief been granted it would have prevented the implementation of the decisions. A mandatory direction under s 17 requiring the staff and prisoners to now be returned would restore the same status quo. So the difference between a prohibitory and mandatory order is only one of timing. One further reason why the Court might consider making a mandatory order here would be the concern expressed about the respondent's evidence, including at the interim relief stage, which may not have been consistent with the duty of candour. Had the true position been known by the Court at that stage it is possible that interim orders might have been granted. That makes the case for mandatory orders stronger.

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15 *Taylor v Chief Executive of the Department of Corrections* [2010] NZCA 371, [2011] NZLR 112 including at [26].

16 Judicature Amendment Act 1977. See also the Eighth Report of the Public and Administrative Law Reform Committee (1975) at [28].

[25] But the Chief Executive has indicated that he is able to follow a process to reconsider the position of individual prisoners for the purposes of transferring them to Arohata and to address the discrimination found by the Court. I consider that the appropriate course in those circumstances is to direct the Chief Executive to reconsider both the staffing decision, and the decisions concerning the location of prisoners under s 17 in light of the findings in the earlier judgment and this judgment.

[26] Ms Casey indicated that one of the main reasons why the applicants sought mandatory orders was a concern that the Chief Executive would raise resource constraints as a reason why effective remedial action would not be taken. I agree that it would not be appropriate for the Chief Executive to do so. But that does not mean that reconsideration is not the appropriate remedy. That is because directions can be given under s 17(4) prescribing how reconsideration should take place.

[27] There is one feature of the formulation of relief suggested by the Chief Executive that raises a potential issue in that respect. He argued that the decision concerning the Corrections staff should be made first, with the reconsideration of decisions concerning the location of the prisoners then following. I do not accept that submission, at least to the extent that it indirectly suggests that resource constraints can legitimately limit what can be done in accordance with the prisoner location decisions. When considering the implementation of decisions to move prisoners for muster management reasons, the requirements of ss 55 and 196 of the Act must be complied with. Resource limitations cannot be advanced as a reason not to apply these provisions. The Court has also found that resource limitations do not provide demonstrably justified reasons to engage in decision-making that discriminates against women prisoners.[17] If on the correct application of ss 53–54 of the Act or the provisions of the Prisons Operations Manual the women who have been transferred out need to be transferred back to Arohata, or newly sentenced women should have been sent to Arohata, then those women should be transferred to Arohata. That is what the legislation requires. The staff needed to operate Arohata at that level need to be made available. Equally, if more staff are needed to allow all newly sentenced women who should be imprisoned at Arohata to avoid discrimination under s 19 of the

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17 *Wallace v Chief Executive of the Department of Corrections*, above n 1, at [106].

New Zealand Bill of Rights Act then that is what needs to happen. If that requires more staff to be returned to Arohata than the Chief Executive currently plans, then the Chief Executive must do so to remove the unlawfulness that currently exists. Again, that is what the law requires.

[28] Resource constraints are not a legitimate reason for failing to comply with the law. But equally the Court's role is not to take over the Chief Executive's decision-making functions, or to provide ongoing supervision. The appropriate orders are to require the Chief Executive to reconsider both sets of decisions under s 17(3), with directions that he do so so that the unlawfulness identified by the Court no longer exists under s 17(4). I accordingly consider that the appropriate orders are along the lines of those proposed by the Chief Executive, but with some adjustments, including adjustments in light of the applicants' submissions. I give the following directions under s 17(3) and (4) of the Judicial Review Procedure Act:

(a) The Chief Executive is to:

(i) identify the women who were subject to the unlawful transfer decisions who remain at other prisons;

(ii) identify the women sentenced since August 2022, whose sentencing court, or area with which they are associated, is within Arohata Prison's catchment area, and who remain located at other prisons; and

(iii) reconsider the placement of those women in the prison network under ss 53 and 54 of the Act, and in particular whether they should be transferred to Arohata.

(b) When undertaking the reconsideration referred to at (a) above, the Chief Executive must:

(i) do so in a manner that is consistent with the Court's reasons in [2023] NZHC 2248 and this judgment;

(ii) must have regard to:

a. each women's individual circumstances, including the considerations in s 54(4) of the Act and section M.04.03.04 of the Prison Operations Manual;

b. the Women's Strategy; and

c. the interests of any children of the prisoner.

(c) The Chief Executive is also to reconsider the decisions concerning the staffing of Arohata:

(i) in a manner that is consistent with the Court's reasons in [2023] NZHC 2248 and this judgment;

(ii) in light of the implications of the decisions referred to in (a) and (b) above; and

(iii) in accordance with his obligation to not unlawfully discriminate on the ground of sex.

[29] I give no specific directions as to the precise timing of these decisions which may involve a series of decisions and the reconsideration of preliminary decisions. But the required reconsiderations should not be deferred.

[30] Although both parties put forward formulations of proposed declarations that would be made by the Court, I do not consider it necessary to grant declarations as well as giving the above directions. The very purpose of directions under s 17 is to identify what the respondent must do. There is no additional need for declarations.

Other issues

[31] The applicant also sought directions that the above remedies do not prevent the bringing of claims for other remedies under the Human Rights Act 1993, or for *Baigent*

damages, or further claims relating to the closure of the drug treatment programme and whether the newly established alternative drug treatment programme was not the full equivalent.

[32] I accept the submissions for the Chief Executive that neither directions are necessary. The applicants retain the right to bring such claims if grounds to bring such claims exist. For example, if there is a basis to bring a claim for *Baigent* damages for breach of the right in s 19 of the New Zealand Bill of Rights Act that claim can be pursued. It is not determined by this proceeding. That might be particularly relevant if there was any continuation of the discrimination found by the Court.

[33] In the same way this judgment does not deal with any other issues of unlawfulness that have been disclosed by the evidence. It is a matter of considerable concern that the minimum entitlements established by s 69 of the Act, and reflected by New Zealand's international obligations, are not being met in a number of prisons in the prison network, and that these minimum standards appear not to have been met for a significant period of time. This proceeding has not dealt with any claims that may be brought as a consequence. For example, this proceeding does not deal with any claims that the current conditions of some prisoners are not consistent with the right in s 23(5) of the New Zealand Bill of Rights that everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the person, or with any claims that the current regime is unlawful for failure to meet the minimum entitlements at some prisons. I have held that such issues arising elsewhere in the prison network cannot be advanced as a justification for the unlawful treatment of the applicants and other women prisoners, and I have noted a general concern about the current circumstances that arises on the affidavit evidence that has been filed. But otherwise these matters are not formally before the Court.

[34] These broader matters raise significant issues. They are not unique, however. In the United Kingdom there has been a recognised difficulty with a lack of prison capacity. The Lord Chancellor has recently announced that this will be addressed, in part, by use of a power in the Criminal Justice Act 2003 (UK) to release less serious

offenders early.[18] In addition the English and Welsh Courts have taken into account overcrowded prison conditions in determining whether prison sentences should be suspended for particular offenders.[19] If the current more widespread problems with prison capacity continue in New Zealand measures of this kind may need to be considered. But these are not matters that are currently before the Court.

Conclusion

[35] For these reasons I give the directions under the Judicial Review Procedure Act outlined at [28] and [29]above.

[36] The applicants are entitled to costs on the same basis as earlier determined[20] — that is on a 3B basis with a 25 per cent uplift, but with the award to be no greater than the actual legal aid payments made.

Cooke J

Solicitors:
Amanda Hill, Barrister and Solicitor, Lower Hutt for Applicants
Crown Law, Wellington for Respondent

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18 (16 October 2023) 738 GBPD HC.
19 *R v Ali* [2023] EWCA Crim 232; *R v Manning* [2020] EWCA Crim 592.
20 *Wallace v Chief Executive of the Department of Corrections* [2023] NZHC 2830.