IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV-2017-485-872
[2018] NZHC 2977

UNDER	the Judicature Amendment Act 1972 or Judicial Review Procedure Act 2016
IN THE MATTER OF	Defamation
BETWEEN	IVAN JAMES WILSON Plaintiff
AND	THE DEPARTMENT OF CORRECTIONS First Respondent
	SANDRA POFF Second Respondent
	ALEX GREEN Third Respondent
	GILL ROPER Fourth Respondent
	JOHN SAVIN Fifth Respondent
	GILLIAN CROSS Sixth Respondent
	MARVIN DENNISON Seventh Respondent
	OFFICE OF THE OMBUDSMAN Eighth Respondent
	OFFICE OF HUMAN RIGHTS PROCEEDINGS Ninth Respondent
	THE PSYCHOLOGISTS BOARD Tenth Respondent

CIV-2017-485-987

UNDER	the Judicature Amendment Act 1972 or Judicial Review Procedure Act 2016
IN THE MATTER OF	Torture
BETWEEN	IVAN JAMES WILSON Plaintiff
AND	THE DEPARTMENT OF CORRECTIONS Defendant

CIV-2017-485-160

UNDER	the Judicature Amendment Act 1972 or Judicial Review Procedure Act 2016
IN THE MATTER OF	Negligence
BETWEEN	IVAN JAMES WILSON Plaintiff
AND	THE DEPARTMENT OF CORRECTIONS Defendant

Hearing:	30 August 2018
Appearances:	I J Wilson in person P Rishworth QC and J B Watson for the First to Seventh Respondents and Defendant
Judgment:	16 November 2018

JUDGMENT OF COOKE J
(Strike-out applications)

---

[1] The plaintiff is a prisoner currently in Tongariro Prison. He is serving a sentence of preventive detention imposed on 27 August 2010 following conviction on three counts of sexual violation by unlawful sexual connection, three counts of

attempted sexual violation, and three counts of committing indecent acts with young males.[1]

[2] In these three sets of proceedings Mr Wilson makes a series of allegations against the Department of Corrections (the Department) and other bodies and individuals. All claims are broadly associated with the way he is being managed within prison, particularly in relation to his rehabilitation. There are a number of causes of action, or separate claims, advanced. In the first proceeding, Mr Wilson advances approximately eight claims (CIV-2017-485-872). In the second proceeding, there are separate claims for damages based around the alleged failure to provide rehabilitation programmes (CIV-2017-485-987). The third proceeding is a claim in negligence based around the alleged failure to provide such programmes (CIV-2017-485-160). By minute dated 29 May 2018 Dobson J decided against a formal order for consolidation at that stage, but directed that the three proceedings be managed and progressed together.

[3] By three applications dated 20 April 2018, the first to seventh respondents in the first proceeding, and the defendant in the second and third proceedings, seek orders striking out the claims against them. The applications were considered at a judicial conference on 28 May 2018 and set down for hearing.

Striking out in judicial review

[4] In addressing the applications, it is first appropriate to review the role that strike out applications have in relation to judicial review proceedings. That was something that I invited Mr Rishworth QC, who appeared for the Department and associated respondents, to address before me as a more general point.

[5] In *Ngāti Tama Ki Te Waipoumanu Trust v Tasman District Council*, this question was reviewed in the context of a successful application to strike out a judicial review proceeding.[2] In the course of that judgment, I considered the inter-relationship between the High Court Rules 2016 and the case management powers set out in ss 13

---

1 *R v Wilson* HC Gisborne CRI-2010-016-278, 27 August 2010.
2 *Ngāti Tama Ki Te Waipounamu Trust v Tasman District Council* [2018] NZHC 2166.

and 14 of the Judicial Review Procedure Act 2016. I expressed the view that there is no automatic right to apply to strike out a judicial review proceeding, as the application of the High Court Rules, such as r 15.1, is subject to judicial control under ss 13 and 14. That is to adopt the approach reflected in earlier Court of Appeal decisions that the predecessor to the Judicial Review Procedure Act 2016 was to some extent intended to create a procedural code for judicial review.[3] Whether a strike out application should be allowed to be argued will depend on the most efficient procedural path for the proceedings in light of the overarching goal of a simple, untechnical and prompt approach to judicial review.

[6] The present case is an illustration of the complexities that can arise if strike out applications are argued in advance of a substantive hearing of the judicial review claim. Mr Wilson's pleadings can fairly be criticised for a number of reasons. Many of the difficulties were identified in a minute of Churchman J dated 27 November 2017. A number of allegations, or claims, or causes of action are set out in his handwritten documents. Many of the claims are not clear, and he has inappropriately blended together judicial review claims with claims for damages. He is not a lawyer, but a prisoner serving a sentence of preventive detention. He frankly accepted at the hearing before me that he did not have all the skills that were necessary to properly formulate a claim before the Court. But equally he believed that he had genuine grievances that needed to be considered by the Court.

[7] The pleadings are accordingly vulnerable to attack on strike out grounds. But proceeding with a strike out application, as opposed to a substantive hearing, may not achieve the objective of the simple, untechnical and prompt approach to judicial review. That is particularly the case when there is no attempt to strike out the claim in its entirety. If successful there are then potentially two sets of proceedings – those remaining in the High Court, and any potential appeals of the strike out decision. Even in a case where it is said that the whole proceeding is liable to be struck out, it may still be better to set down the substantive judicial review for hearing given these implications. After all, both matters proceed on affidavit evidence and submissions

---

3 See *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 (CA) at 353 and *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650 (CA) at 656-658.

before a Judge. The affidavits may need to cover more ground, but that need may not be seen to involve an unsatisfactory burden compared with the complexities that a strike out application may create.

[8] I should stress that I am not suggesting that a strike out application is always inappropriate. There may well be circumstances where allowing one to be pursued may be the more efficient way to manage the proceedings. Judicial review proceedings have been struck out.[4] The key point is that no party can apply to strike out a judicial review proceeding as of right. It is always subject to judicial control under ss 13 and 14.

[9] The position is complicated in the present case because of the inclusion of tort claims, and other claims for damages, in the same proceedings as the judicial review claims. But this is still all subject to judicial control under ss 13 and 14. One other way of managing a case such as the present one is that followed in *Harriman v Attorney-General*.[5] That also involved a prisoner bringing both judicial review and tort claims. There the judicial review and tort claims were severed by the High Court.[6] Mr Harriman then unsuccessfully pursued his judicial review claims in the High Court[7] and the Court of Appeal,[8] with leave to appeal to the Supreme Court being declined.[9] The defendants then applied to strike out the remaining tort claims, and were successful. When doing so, Simon France J noted:[10]

> [7] The normal practice is of course to accept, for strike-out purposes, the facts as pleaded. The situation is somewhat different here given the full judicial consideration the matter has already had. I do not intend to traverse the facts in full, but instead rely upon the summary provided by the Court of Appeal.

[10] A potentially even more efficient way of dealing with that kind of case would involve a strike out application of damages claims being argued at the same hearing as the substantive judicial review claims. If that occurs the hearing still proceeds on

---

4 See, for instance, *Ngāti Tama Ki Te Waipounamu Trust v Tasman District Council*, above n 2; and *Te Whakakitenga O Waikato Inc v Martin* [2016] NZCA 548, [2017] NZAR 173.
5 *Harriman v Attorney-General* [2015] NZHC 3197.
6 *Harriman v Attorney-General* [2012] NZHC 2148.
7 *Harriman v Attorney-General* [2013] NZHC 1516.
8 *Harriman v Attorney-General* [2014] NZCA 544.
9 *Harriman v Attorney-General* [2015] NZSC 37.
10 *Harriman v Attorney-General*, above n 5, at [7] (footnote omitted).

affidavit evidence. The observation made by Simon France J above would also still apply — at the hearing the Court will have a better, and fuller understanding of the facts, and may not need to rely on the facts as pleaded alone. Moreover, proceeding with a single judgment may mitigate against the risk of the proceeding unnecessarily splitting in two, causing unnecessary complexity. In the above case, Mr Harriman did not appeal the second High Court judgment, but he could have, and there could have been a second round of proceedings right through the hierarchy.[11]

[11] Turning to the present case, it may have been preferable for Mr Wilson's judicial review claims to have been set down for hearing, and for the strike out applications of the tort claims to have been heard at the same time. This may have avoided the risk of the proceedings splitting into two streams in the Court hierarchy with the potential complexity that this involves, and would allow the Court to address the strike out application with a fuller understanding of the underlying facts.

[12] Mr Rishworth pointed out the general difficulty with Mr Wilson's pleadings, which could affect whether this would have been the more efficient way forward. But notwithstanding the confused nature of the claims, it is tolerably clear what Mr Wilson's fundamental complaints are. And with respect to Mr Wilson, it is unlikely that requests for further particulars, or directions for re-pleading, would have led to a substantially better pleading. Prior to the applications being argued before me, there have already had three judicial conferences before three different Judges. Sometimes it is just better to get on with it. In the end, I did not understand Mr Rishworth to really disagree with that — as he said what the respondents/defendant really wanted was to make progress with this case generally. Equally, Mr Wilson said that he just wanted to get on to a substantive fixture.

[13] Given Mr Wilson's stance, the risk of these proceedings splitting and becoming divided in the Court hierarchy may not be high. And in any event, these proceedings and the strike out applications have been before the Court for case management, and the strike out applications have been set down for hearing and have now been heard. Accordingly, I will determine them. But for the future it may be appropriate for

---

[11] Simon France J noted in the judgment that his release was imminent, which may have been relevant to this.

respondents seeking to make strike out applications in judicial review to file a memorandum explaining why that course is better than proceeding straight to the substantive claim so that this issue can be considered at the judicial conference as contemplated by ss 13 and 14 of the Judicial Review Procedure Act.

Relevant strike out principles

[14] There is no dispute in terms of the relevant principles to be applied in relation to the strike out applications. The applicants rely on all the basis set out in r 15.1(1) of the High Court Rules, which provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> …

[15] The relevant approach to these rules was set out by the Court of Appeal in *Attorney-General v Prince*.[12] In *Te Whakakitenga O Waikato Inc v Martin*, the Court of Appeal said:[13]

> [15] A court may strike out a claim if it discloses no reasonably arguable cause of action. It is inappropriate to strike out a claim unless "the court can be certain that it cannot succeed". The jurisdiction should be exercised sparingly. However, as this Court said in *Attorney-General v McVeagh*:
>
> > … if the claim is doomed to failure, there can be no justification for allowing it to continue. The striking-out jurisdiction is founded on the realisation that resources are finite and are not to be wasted.
>
> [16] The same principles apply to striking out an application for judicial review.

---

12 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA).

13 *Te Whakakitenga O Waikato Inc v Martin*, above n 4 (footnotes omitted). See also *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 (CA).

[16] These principles involve proceeding on the basis that pleaded facts, whether or not admitted, are assumed to be true.[14] In the present case a number of affidavits have been filed in support of the strike out application from Neil Beales (the Chief Custodian Officer at the Department), Juanita Ryan (the Chief Psychologist at the Department), and Gillian Roper (a Senior Psychologist at the Kia Marama Special Treatment Unit at Rolleston Prison). Mr Rishworth explained that the affidavits provided the Court fuller context surrounding the claims, and they also addressed the question of qualified privilege relating to the defamation claims. Also before the Court is a detailed bundle of documents relied on by Mr Wilson for his allegations. That this more comprehensive factual information was considered relevant to the strike out applications perhaps further illustrates the points made above about strike out applications in these circumstances. It is difficult to proceed on the basis that the allegations in the statements of claim are true to properly address this case, even for the purposes of strike-out.

[17] A further relevant principle is that the Court will permit amendment to a statement of claim, rather than striking it out, if a defect can be cured by amendment.[15] The authors of *McGechan on Procedure* suggest that this "makes an application to strike out a 'repairable' pleading somewhat pointless".[16] This principle is important in the current case for the reasons I explain in greater detail below.

[18] Against that background I address Mr Rishworth's comprehensive submissions on each of the causes of actions and claims in detail below. In formulating his response to those submissions Mr Wilson was brief. He indicated that he had followed the exchanges between Mr Rishworth and the Court, but did not claim to have the legal sophistication to provide detailed submissions on some of the legal technicalities. He did, however, stress his main point – that he has been adversely affected by discriminatory behaviour by the Department and its employees, and that this improperly prejudiced his ability to rehabilitate himself in order that he may be released from his sentence of preventive detention.

---

14 *Attorney-General v Prince*, above n 12, at 267.
15 See *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316 (HC).
16 Jason Bull (ed) *McGechan on Procedure* (looseleaf ed, Thomson Reuters) at [HR15.1.08].

[19] For the reasons outlined below, I accept many of the submissions advanced by Mr Rishworth in relation to the claims as pleaded. But the real point is whether all of Mr Wilson's claims against the Department and associated respondents should be struck out, or whether there are claims that should be allowed to proceed to trial, even if they need to be repleaded.

Mr Wilson's key allegations

[20] Mr Wilson's key allegations are that he has been prevented from engaging in rehabilitative programmes that would allow him to be released from his sentence of preventive detention. He says that as he has been improperly withdrawn from the Kia Marama programme, that he no longer receives proper rehabilitative assistance, and that the reason why this has occurred is because of the discrimination he alleges has been exercised in relation to him. He alleges that he is being discriminated against because of his sexuality, and that he has done nothing wrong that would justify being removed from the programme.

[21] There is no dispute that Mr Wilson has been withdrawn from the programme. His most recent transfer to, and withdrawal from, the programme was described by Ms Roper in the following terms:

> Unfortunately following this transfer on 26 June 2016 Mr Wilson engaged in a number of behaviours that were again contrary to the retention criteria at Kia Marama. Despite being placed on a "behaviour contract", which Mr Wilson drafted to assist him with problematic behaviours he continued to interact with younger vulnerable men in a manner that indicated engagement in offence-paralleling behaviour and this was viewed with concern (a hand written version of the contract, drafted by Mr Wilson, is annexed at GR-6; a typed version is annexed at GR-7).
>
> Contracts are effective ways to help inmates change pro-offence or disruptive patterns of behaviour. Such contracts should clearly specify the undesirable behaviours, and how the person can change such behaviour, as well as take responsibility (and make amends to the community) for past mistakes. It should also clearly state consequences for both desirable change to behaviour and failure to comply with the contract. Although such contracts may be initially made with prison staff or a therapist, the contract should be acknowledged in community meetings, effectively making the contract with the whole community. The contracts are not 'punitive' in nature. Nor do they impose on prisoners obligations or expectations more onerous than those to which they wold be expected to adhere as members of Kia Marama. The "behaviour contracts" are more in the nature of instruments that make explicit

> what is expected of a prisoner, in an attempt to help that prisoner conform with the pre-existing expectations.
>
> When provided with feedback regarding this from custodial staff, Mr Wilson was observed to engage in his previous pattern of reactive hostility. His placement was consequently reviewed and the decision was made to exit him from the treatment unit on 28 July 2016. A copy of the letter communicating that decision to Mr Wilson is annexed at GR-8.

[22] In Mr Wilson's submissions before me he challenged this approach. He said that he had never engaged in inappropriate conduct — there had been no complaint of any sexual assault, and neither had he "hit on" any of the other participants. He said that the Department psychologists and officers were overacting to situations such as him being in a cell with another inmate with a door closed when there was no sexual activity involved. The way Mr Wilson put it was that he was being discriminated against because of his sexuality.

Available judicial review challenge

[23] As indicated, it is not the role of the Court at the strike out stage to make any findings in relation to these facts. The question is whether the Court can be certain that there is no claim that could succeed. Given that threshold, it seems to me that Mr Wilson's key claim should be allowed to continue, and should not be struck out.

[24] Rehabilitation programmes are of high importance, and are the subject of legal requirements. Section 52 of the Corrections Act 2004 provides:

> **52 Rehabilitative programmes**
>
> The chief executive must ensure that, to the extent consistent with the resources available and any prescribed requirements or instructions issued under section 196, rehabilitative programmes are provided to those prisoners sentenced to imprisonment who, in the opinion of the chief executive, will benefit from those programmes.

[25] I was not referred to any relevant instructions issued under s 196. If some have been formulated they may be relevant to Mr Wilson's claims. I also note that no issue of the availability of resources is presently raised as an issue. Mr Wilson's claims do raise an issue concerning potential "prescribed requirements", as the Department has raised certain rules relating to his participation in the Kia Marama programme, and

suggested that breaches of those rules led to him being removed from the programme. Mr Wilson challenges these matters.

[26] In *Taylor v The Chief Executive of the Department of Corrections*, Ellis J reviewed the potential duty to provide rehabilitative programmes under s 52 in relation to a person serving a finite sentence.[17] In that context Ellis J held:[18]

> [56] Putting to one side those prisoners who are subject to indeterminate sentences (discussed above) there can, therefore, be no absolute right to access rehabilitative programmes of a particular kind at a particular time. There can, in my view, be no question of s 52 imposing either a private or public law duty to offer rehabilitative programmes to a particular prisoner; the most that can be said is that the chief executive (and his delegates) have a discretion in that regard. None of the other references to rehabilitation in the CA (or s 7(1)(h) of the Sentencing Act 2002) alters that position.

[27] But, as indicated, her Honour distinguished the position of prisoners serving indeterminant sentences, and referred to the decision of the United Kingdom Supreme Court in *R (Haney & Ors) v Secretary of State for Justice*,[19] which in turn referred to the decision of the European Court of Human Rights in *James, Lee and Wells v United Kingdom*.[20] These decisions address the duty to provide rehabilitative programmes to prisoners in light of the obligations under art 5 of the European Convention on Human Rights, which has similar provisions to those in the New Zealand Bill of Rights Act 1990 (NZBORA). Her Honour noted that the Supreme Court had agreed with the European Court of Human Rights that it was implicit in art 5 that "the state is under a duty to provide a reasonable opportunity for such a prisoner to rehabilitate himself and to demonstrate that he no longer presents an unacceptable danger to the public".[21] Interestingly, in *Haney* the Supreme Court suggested that the duty to facilitate progress towards rehabilitation and release might be founded more readily in article 5(4), which is roughly equivalent to s 27 of NZBORA, than article 5(1)(a) which more closely corresponds to s 22 of NZBORA.[22]

---

17 *Taylor v The Chief Executive of the Department of Corrections* [2016] NZHC 1805.
18 (Footnote omitted).
19 *R (on the application of Haney) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344.
20 *James, Lee and Wells v United Kingdom* (2013) 56 EHRR 399.
21 At [49(c)].
22 *R (on the application of Haney) v Secretary of State for Justice*, above n 19 at [37]–[38].

[28] The extent to which such principles apply in the New Zealand context is a matter of legitimate argument. In *Miller v New Zealand Parole Board*, the Court of Appeal noted that the obligation under article 10(3) of the International Covenant on Civil and Political Rights (ICCPR) to provide rehabilitative programmes had fairly been given effect to by s 52. William Young P for the Court held:[23]

> [146] Section 52 is only one of a number of legislative provisions which address rehabilitation and reintegration. All prisoners sentenced to more than two months' imprisonment must have in place a regularly reviewed management plan, which is based on an assessment of the prisoner's needs, capacity and disposition and outlines how the prisoner can make constructive use of his or [her] time in prison (including ways of addressing offending. behaviour and preventing re-offending) and be prepared for eventual release and reintegration into the community.

[29] And he also noted:[24]

> [155] … If it is the case that for child offenders, release on parole is unlikely unless and until an appropriate programme has been completed, a policy of deferring the provision of such programmes until after the offenders' parole eligibility dates could have the effect of improperly or unfairly deferring the practical ability to obtain parole.

[30] In terms of Mr Wilson's position, a letter dated 5 May 2017 from the Chair of the Parole Board, the Hon J W Gendall QC, responding to Mr Wilson's complaints was before the Court. In it the history of the decisions of the Board concerning Mr Wilson and his rehabilitation were summarised. The Chair noted that, in its decision of 29 January 2014, the Board had hoped that a place would be available for Mr Wilson to undertake the Te Piriti programme. In its decision of 28 January 2015, the Board noted that he had been waitlisted. Then, in its decision of 22 January 2016, the Board specified pursuant to s 21A of the Parole Act 2002 that the next parole hearing for Mr Wilson would be in December 2018, and that it expected Mr Wilson to have successfully completed a child sex offender treatment programme together with all necessary maintenance sessions by that time. Thus, the completion of such a programme is formally specified as something the Board expects Mr Wilson to complete by December 2018. It seems clear that this will not occur. This illustrates the significance of such a programme for Mr Wilson's ability to be released from preventive detention, and the potential importance of the legal duty in s 52.

---

23 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [146] (footnotes omitted).
24 At [155].

[31] Further consideration has been given to the overall New Zealand framework following the decision of the Court of Appeal in *Miller v New Zealand Parole Board*, as the two complaining prisoners in that case took their challenge to the Human Rights Committee of the United Nations. In their report of 7 November 2017, the Committee upheld some of the complaints.[25] It rejected an argument that the complainants had had their rights infringed by a failure to provide rehabilitative programmes, but largely because there were no established successful programmes for adult sex offenders.[26] Two other related findings of breach by New Zealand of the ICCPR are relevant, however. First, the Committee concluded:[27]

> 8.5 The Committee considers that as the length of preventive detention increases, the State party bears an increasingly heavy burden to justify continued detention and to show that the threat posed by the individual cannot be addressed by alternative measures. As a result, a level of risk which might reasonably justify a short-term preventive detention, may not necessarily justify a longer period of preventive detention. The State party also failed to show that no other, less restrictive means were available to the aim of protecting the public from the authors which would not require further extending their deprivation of liberty.
>
> 8.6 The Committee further recalls that article 9 of the Covenant requires that preventive detention conditions be distinct from the conditions of convicted prisoners serving punitive sentences and be aimed at the detainee's rehabilitation and reintegration into society.
>
> …
>
> the Committee considers that the authors' term of preventive detention has not been sufficiently distinct from their terms of imprisonment during the punitive part of their sentence (prior to eligibility to parole), and has not been aimed, predominantly, at their rehabilitation and reintegration into society as required under articles 9 and 10(3) of the Covenant. Under these circumstances, the Committee considers that the length of the authors' preventive detention, together with the State party's failure to appropriately alter the punitive nature of the detention conditions after the expiration of their period of non-eligibility for parole, constitutes a violation of articles 9 (1) and 10(3) of the Covenant.

[32] Second, the Committee found a breach of the obligation under art 9(4) of the ICCPR, which entitles detainees to have the lawfulness of their detention considered by a Court. This was on the basis that the Parole Board could not be regarded as a Court for this purpose, that the rights of appeal from the decisions of the Board to the

---

25 Human Rights Committee Views: Communication No 2502/2014 CXXI CCPR/C/121/D/2502/2014 (21 November 2017) (*Miller v New Zealand)*.

26 At [8.2].

27 (Footnote omitted).

High Court were limited, and that the rights of judicial review of a decision of the Board were also limited in scope.[28]

[33] Considered in light of the other authorities referred to above, the report of the Committee might suggest that this Court should be more open to exercise greater scrutiny of decisions made by the Department concerning the availability of rehabilitation programmes, particularly when they are effectively necessary prerequisites to release for a prisoner is facing a sentence of preventive detention. It is arguable that the requirements for a lawful and non-arbitrary detention need to be considered in light of the duty in s 52, interpreted and applied in light of the international materials.[29]

[34] I say no more than these points are arguable. But given that background, in my view it would be wrong to strike out Mr Wilson's claims in totality. As presently formulated, none of Mr Wilson's claims involve judicial review challenges precisely on that basis. But it is the theme running through his challenge, and complaints based on an alleged failure to conform with the duty in s 52 are expressly contained in his tort claims. Mr Rishworth argued that there could be no legitimate public law reformulation of his tort claims in this respect, as any such claim would need to be for breach of legitimate expectation, and that such a claim would be untenable. But a claim would not need to be formulated as a breach of legitimate expectation. Given the nature of Mr Wilson's complaints, he can argue that in light of s 52:

(a) the failure to offer rehabilitative programmes, and his withdrawal from the Kia Marama programme, is unreasonable/unlawful as it is inconsistent with the duty in s 52;

(b) any conditions of participation he has alleged to have broken are not reasonable or lawful conditions; and

(c) the Department has wrongly concluded that he has failed to comply with prescribed conditions of such rehabilitation programmes.

---

28 At [8.13]–[8.15].

29 Noting, however, as William Young P said for the Court of Appeal in *Miller*, that the Court is bound by s 52 rather than art 10(3) of the ICCPR – above n 23, at [143].

[35] I make no comment on the ultimate strength of such arguments. But Mr Wilson should be allowed to reformulate his allegations so that they are a judicial review challenge to the decisions of the Department on the above basis. I give leave for him to file a further amended statement of claim advancing such a judicial review claim.

[36] It follows that the current proceedings against the defendant should not be struck out in their entirety. Mr Wilson should be able to pursue his core complaint as reformulated above, and is given leave to reformulate it for that purpose. In the circumstances that would appear to be best achieved by giving that leave in the context of the proceedings in CIV-2007-485-872.

[37] Against that background, however, I consider the other causes of action advanced in the three sets of proceedings. Assessing the claims is difficult not only because Mr Wilson's handwritten statements of claim have not been formulated by a person with legal training, but also because Mr Wilson has indicated that he wishes to further amend his claims, first by way of a memorandum received by the Court on 26 July 2018, and subsequently in a further submission dated 30 August 2018 expanding upon his proposed amended claims. It is this latter document that has been addressed by the respondents in their strike-out submissions.

[38] Mr Wilson makes a series of claims in CIV-2017-485-872, and I address them first.

First and second causes of action

[39] In his first two causes of action Mr Wilson pursues claims against the Office of Human Rights Proceedings, the Office of the Ombudsman and the Psychologists Board.

[40] Those three bodies, whilst named as respondents, have not taken an active role in the proceeding, and were not represented at the strike-out application. At the hearing, the core issues arising from Mr Wilson's complaints were focused on. At the conclusion of the hearing I asked Mr Wilson what his stance was on leaving out these three bodies from his proceedings given that his essential complaint was not focused

on those three bodies. He indicated to me that his gripe was with the Department, and that for that reason he was happy for these parties to be struck out.

[41] I accordingly strike-out the claims against those three bodies, with no issue as to costs. I direct the Registrar to provide a copy of this judgment to those three bodies.

Third cause of action against Department

[42] In the third cause of action Mr Wilson contends that the Department has targeted him, and persecuted him, which has put him at a disadvantage before the Parole Board. The particular focus is file notes that have been made recording allegations about Mr Wilson's behaviour which suggest that Mr Wilson has been acting in a sexualised manner, or demonstrating sexualised behaviour towards other inmates. Mr Wilson denies any inappropriate behaviour, and says that the file notes are inappropriate.

[43] Mr Rishworth contends that there is no ability to conduct a judicial review of the making of file notes, and that there is no basis for a judicial review claim on this basis.

[44] I accept that the making of a file note is not a decision that is normally capable of being subjected to judicial review. The complaints that Mr Wilson advances in relation to the suggested prejudice against him can be referred to in the course of his refocused claim for which he has been granted leave. But there is no basis for this as a separate cause of action. Accordingly, I strike it out.

Fourth cause of action: NZBORA breaches of the rights to freedom of expression and freedom of association

[45] In these formulations of his complaints Mr Wilson contends that his interaction with other inmates engages his rights to freedom of association and freedom of expression, and that the conduct of the Department preventing him from undertaking these activities involves breaches of those rights. Mr Wilson seeks financial compensation in the amount of $100,000 for breach of each right. He also seeks $25,000 each for breaches of his right against discrimination, and for "victimisation".

[46] Again, these are alternative ways of formulating Mr Wilson's key complaint. It might be that these rights would have some relevance to assessing that core complaint. But it is the core complaint that is of real significance — either there have been restrictions that are legitimately imposed as part of a reasonable and responsible rehabilitation programme, or there have not. It is that key issue that calls to be determined under the principal claim.

[47] In his 30 August 2018 reformulation Mr Wilson also refers to the confiscation of a piece of writing in connection with the alleged breach of the right to freedom of expression. Mr Rishworth responds by saying the allegations are vague, and refer only to the Department checking on the policy that would be applied in light of the ability of the authorities to check correspondence under ss 103A–110C of the Corrections Act 2004. It is not difficult to imagine written material of a potentially inappropriate kind being authored by an inmate serving a sentence of preventive detention for child sex offences. But equally it may be that the material is not of an inappropriate nature. Once again, any such issue seems to me to be subsumed within the key issue for which Mr Wilson is given leave to pursue.

[48] Similarly, the allegations of breaches of ss 19 and 23(5) NZBORA, ss 21(m) and 62 of the Human Rights Act 1993, and ss 81(1) and 51–154 of the Corrections Act seems to be an attempt to add further legal principles associated with Mr Wilson's claims that he is being improperly discriminated against on the basis of his sexuality. They add little to the key complaint.

[49] As standalone claims all these matters have little utility, have no real prospect of success, and I strike them out. If Mr Wilson's key judicial review complaint was to succeed, the determination that he had not been treated lawfully would allow the Court to frame appropriate relief. It is possible to imagine some scenarios where the challenge to the legality of the Department's decisions succeeded in a way that might give rise to a potential for additional relief for other claims, such as compensation, as part of an effective remedy. But on the face of the materials provided there is nothing to suggest that is presently the case. Striking out the claims at this stage would not prevent such claims being allowed to be addressed appropriately by the Court if any such unlawful behaviour warranting such additional relief emerged.

Fifth cause of action: attempted strip search in breach of s 98 of the Corrections Act and s 23(5) of NZBORA

[50] This allegation, which does not appear to have been directly addressed in the Department's written submissions, involves an allegation of an attempted strip search of Mr Wilson by the seventh respondent on 8 December 2015. In the pleadings, it is alleged that he did not comply with an instruction to remove his clothes for this purpose (i.e. the search did not take place) and that he was found guilty of misconduct as a consequence, and that whilst waiting for the Visiting Justice in connection with an appeal he was pressured to abandon it. The allegation appears to be that the Department officers broke procedural requirements in association with these events.

[51] Given that no strip search took place, and that there was an appeal process in relation to the suggestion that Mr Wilson engaged in misconduct by failing to comply with it, I conclude that there is no proper basis for the matter to be reassessed in a parallel claim by way of judicial review some three years later. Accordingly, I strike it out.

Sixth cause of action: battery, and breach of s 23(5) of NZBORA

[52] Mr Wilson alleges here that his rights were infringed because he has been forced to work outside, or stand outside in the sun, when the Department knows that he has photosensitivity, which causes him pain and burns when exposed to sunlight due to topical steroid medications he has used over a long period of time. Mr Wilson seeks damages in the amount of $250,000.

[53] I agree with Mr Rishworth's submissions that these allegations could not amount to the tort of battery, or meet the thresholds required under s 23(5) of NZBORA.[30] Accordingly, these claims are struck out.

Seventh cause of action: defamation

[54] Here Mr Wilson makes a series of claims against a series of Department staff members for publishing allegedly defamatory comments about him in file notes and

---

30 See *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [177] per Blanchard J.

in other ways. The relevant targets of this claim are the second to sixth defendants. Mr Wilson has put details of the alleged defamation in the file notes before the Court.

[55] I received detailed submissions from Mr Rishworth about the relevant principles applicable to striking out a claim in defamation, including submissions directed to the acceptance in New Zealand of the principle recognised in *Jameel (Yousef) v Dow Jones & Co Inc*,[31] as well as the related principle referred to in *Thornton v Telegraph Media Group*.[32] Potentially different thresholds for strike out have been considered by the New Zealand courts in this area — see for example Palmer J in *Sellman v Slater*[33] and Fitzgerald J in *Craig v Stiekema.*[34]

[56] There is no need for me to address these very refined arguments. In the present case, what was involved was Departmental staff and psychologists making file notes in relation to prisoner behaviour. The file notes were made to communicate information to other officers and psychologists concerning Mr Wilson. Such communication is consistent with the duties of such staff under the Corrections Act, including to ensure the "safe custody and welfare of prisoners" under s 14(1)(a). These seem quite clearly to be occasions of qualified privilege as recognised by the well-established principles.[35] Qualified privilege would attach to communications amongst staff, and communications by staff to the Parole Board. It also seems to me to apply to communications by staff to other inmates if the staff were concerned to protect the position of other inmates.

[57] For these reasons, I conclude that the claims in defamation have no prospect of success, and should be struck out.

---

31 *Jameel v Dow Jones & Co Inc* [2005] EWCA Civ 75, [2005] QB 946.
32 *Thornton v Telegraph Media Group* [2010] EWHC 1414 (QB) at [89]–[90] and [94].
33 *Sellman v Slater* [2017] NZHC 2392, [2018] 2 NZLR 218 at [68]–[69]
34 *Craig v Stiekema* [2018] NZHC 838, [2018] NZAR 1003 at [51].
35 *Adam v Ward* [1917] AC 309 (HL); and *Durie v Gardiner* [2018] NZCA 278, [2018] 3 NZLR 131 at [36].

Seventh cause of action: breach of Privacy Act 1993

[58] Once again these are a different legal formulation of Mr Wilson's key complaint — to quote Mr Wilson's reformulated allegation in his 30 August 2018 memorandum:

> The plaintiff claims that Corrections' staff were biased against him as a gay man and stereotyped him in file notes with inaccurate information betraying him as a devious sexual predator.

[59] To the extent that this could be relevant it goes to the key allegation that Mr Wilson has leave to pursue in an amended pleading. Privacy Principle 11 — outlined in s 6 of the Privacy Act — does not bestow a legal right enforceable in a court of law.[36] As a standalone claim it has no merit and should be struck out.

Eighth cause of action

[60] Similar principles apply in relation to the eighth cause of action involving breach of s 58 of the Corrections Act, breach of contract by undue influence, and breach of Principle 8 of the Privacy Act. These claims centre on the alleged disclosure of Mr Wilson's past convictions and sexual orientation to other inmates. Again, it adds nothing to the matters already canvassed above and it is struck out.

CIV-2017-485-160

[61] In this separate proceeding Mr Wilson pursues a single claim for damages of $50 million. The heading on the statement of claim states that it is a claim for judicial review, but the cause of action in the body of the document is for negligence. The otherwise brief pleading comes the closest to identifying Mr Wilson's core complaint – that the Department has failed to provide rehabilitation programmes to him.

[62] As a separate claim in tort it has no prospects of success, and the proceeding is struck out in its entirety. As I say, however, Mr Wilson's core complaint relating to the lawfulness of Mr Wilson's management in terms of the rehabilitations offered or not offered to him is allowed to proceed in the manner described at [34] above.

---

[36] Privacy Act 1993, s 11(2).

CIV-2017-285-987

[63] In this separate proceeding Mr Wilson again makes the same essential complaint about the lack of rehabilitation programmes, and discrimination against him, which he says involves criminal conduct by the Department, including torture. He once again seeks millions of dollars by way of damages.

[64] The same point applies. Mr Wilson can pursue his core complaint in his judicial review proceeding. This separate proceeding has no prospects of success and is struck out.

Conclusion

[65] By way of summary, for the reasons set out above I make the following orders:

(a) Mr Wilson has leave to amend his statement of claim in CIV-2017-485-872 to pursue the claims for judicial review in relation to the rehabilitation programmes provided, or not provided to him, and whether the Department's conduct in this respect has been lawful, as more fully described at [34] above.

(b) The other causes of action in CIV-2017-485-872 are struck out. For the avoidance of doubt, I record that the claims against the second to tenth respondents are struck out so that the first respondent remains as the only respondent to the proceeding.

(c) The Registrar is directed to provide a copy of this judgment to the eighth, ninth and tenth respondents in CIV-2017-485-872.

(d) The proceedings in CIV-2017-485-160 and CIV-2017-485-987 are struck out in their entirety.

(e) Costs on the present applications are reserved.

[66] It seems to me to be appropriate to make directions to bring the remaining claim to trial. Accordingly, I give the following directions for the proceeding. They

are subject to any changes that may be made if either of the parties seek a further judicial conference:

(a) Mr Wilson is to file and serve his amended statement of claim by **Friday 14 December 2018**.

(b) The Department is to file and serve any amended statement of defence by **Friday 25 January 2019**.

(c) Mr Wilson is to file and serve any affidavits or bundles of documents in support of the hearing of his claim by **Friday 15 February 2019**.

(d) The Department is to file and serve any affidavits and further documents in response by **Friday 8 March 2019**.

(e) The Registrar is to allocate a one day fixture after consultation with the parties.

(f) Mr Wilson is to file and serve his written submissions 10 working days prior to the fixture.

(g) The Department is to file and serve its written submissions five working days before the fixture, together with an organised bundle of the material being relied on by the parties.

(h) Leave to apply by either party is granted to seek further directions, or to amend this timetable.

Cooke J

Solicitors:
Crown Law, Wellington for First to Ninth Respondents/Defendant
Minter Ellison Rudd Watts, Wellington for Tenth Respondent

Copy to:
The Plaintiff