IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC147/2023

BETWEEN	**BRETT DAVID GRINDER**
	Appellant
AND	**Attorney-General**
	First Respondent
AND	**New Zealand Parole Board**
	Second Respondent

APPELLANT'S SUBMISSIONS [REDACTED]

23 August 2024

Counsel certifies that to the best of their knowledge this REDACTED submission is suitable for publication (that is, it does not contain any supressed information).

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INTRODUCTION AND SUMMARY

1. This appeal concerns the proper approach to the imposition, variation or discharge of special conditions when a person subject to preventive detention is granted release on parole.[1]

2. The particular issue before the Court is whether the Parole Board is constrained by the threshold of 'undue risk' described in s 7(3) of the Parole Act 2002 when considering special conditions directed to reducing the risk of reoffending.

3. The appellant's position is that properly interpreted, the Parole Act provides important 'guard rails' constraining the Parole Board's powers to impose, vary and discharge special conditions. Special conditions that are directed to the risk of reoffending must always satisfy the threshold of being a reasonable, necessary and proportionate means of ensuring the applicant does not represent an undue risk to the community, when considered with the other conditions imposed.

4. This is in essence the approach adopted by Justice Gwyn in the High Court[2] but rejected by the Court of Appeal.[3] It is consistent with the wording of the Parole Act and the structure and objectives of the parole regime. It is also the interpretation of the Parole Act required by s 6 of the New Zealand Bill of Rights Act 1990, as the untethered discretion apparently endorsed by the Court of Appeal allows for conditions that restrict protected rights in a way that is not demonstrably justified in a free and democratic society.

5. The appellant wishes to make clear that this appeal does not call into question the Court's limited role in judicially reviewing the Parole Board's assessment of what is or is not 'undue risk' to the community, nor whether

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1 *Grinder v Attorney-General [Leave]* [2024] NZSC 50. While this case concerns a decision to vary (or not vary) a special condition, the appellant agrees that the approach to the initial imposition of conditions is of direct relevance.

2 *Grinder v New Zealand Parole Board* [2022] NZHC 3188, see especially at [51] and [130].

3 *Attorney-General v Grinder* [2023] NZCA 596.

particular conditions are necessary and proportionate to achieve that objective. Those assessments are matters for the expert Board.

6. This appeal is solely about whether and when that threshold applies at all. That is a question of law answered by the principles of statutory interpretation.

7. It is also important to be clear on the level of risk under debate here. "Undue risk" is described in s 7(3) of the Parole Act as follows:

> (3) When any person is required under this Part to assess whether an offender poses an **undue risk**, the person must consider both-
> (a) the likelihood of further offending; and
> (b) the nature and seriousness of any likely subsequent offending.

8. That is a broad and comprehensive definition, designed to capture any real risk to the safety of the community, and nuanced to calibrate likelihood of reoffending with the consequences to society and future victims should reoffending occur. This is the threshold set by Parliament to determine when an offender may be safely released into the community and when they must be recalled to prison.[4] There is no suggestion by any party that this threshold is too high, or that it does not allow the Parole Board to appropriately manage risk.

9. This case is <u>not</u> concerned with special conditions that the Board considers are appropriate to manage risk of further offending to bring it below that threshold of 'undue risk': that is one of this expert Board's primary functions and its jurisdiction is clear. What is at issue in this case is the Board's assertion that it can impose special conditions directed to the risk of reoffending where the risk is *already below* this threshold: to impose restrictive conditions to take the risk of reoffending from an already acceptable 'not undue' level to an even lower level.

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[4] Sections 28(2) and 61 of the Parole Act 2002.

10. The appellant's position is that special conditions that limit protected rights and freedoms cannot lawfully be imposed for such purpose: he says the Act sets a clear boundary to the Board's powers consistent with the NZBORA.

The role of the Parole Board in this appeal

11. The appellant raises a preliminary concern with the role the Parole Board has taken in this proceeding. As the Court of Appeal records, the Parole Board abided in the High Court, but took the unusual step of itself filing a notice of appeal against the High Court Judgment.[5] The Attorney-General then filed a 'cross-appeal' and became the 'lead appellant', but with the Parole Board taking an active role in the appeal. Counsel understands that this attempt to regularise the position was agreed between the parties.

12. Whatever may have been appropriate in the Court of Appeal to deal with the fact that the decision-maker had actually filed an appeal, the basis upon which the decision maker should be engaged in responding to the appeal in this Court is not clear. Counsel understands that the Board proposes to file written submissions and present oral submissions at the hearing.

13. It is of course for this Court to determine who it hears from and what assistance it may gain from hearing from the statutory decision-maker. The appellant however notes that the Board's intended role is unorthodox, especially given the engagement of the Attorney-General and the perspective she is able to bring to the appeal. The principles endorsed in *Environmental Defence Society Inc v The King Salmon Co Ltd [Procedure]*, would seem to have some application here.[6]

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5 CA fn3 [[05.0011]]

6 *Environmental Defence Society Inc v The King Salmon Co Ltd [Procedure]* [2014] NZSC 41, [2014] 1 NZLR 717 at [12] - [14] (noting that this concerned a statutory appeal): "The Board of Inquiry filed submissions covering [the] appeals. A decision maker cannot appear before this Court as of right and generally, any assistance that could be rendered by a decision maker will be of little value. This is because all the issues will be adequately addressed by the respective

FACTS RELEVANT TO THE APPEAL

Facts relevant to the application for judicial review before the Court[7]

14. Mr Grinder was sentenced to preventive detention in 2003 for sexual offending against 13 young victims between 1976 and 2001. He is therefore required to remain in prison unless granted release on parole. Mr Grinder will be either be in prison or subject to parole conditions for the rest of his life.

15. Mr Grinder was first released on parole in 2011 but recalled in 2012. He was released on parole for a second time on 1 April 2019, subject to standard and special conditions. The majority of the special conditions were imposed for five years, due to expire on 31 March 2024. They included two particularly onerous conditions directed to reducing the risk of him re-offending: the 'whereabouts' condition (noting the scope of this condition is misdescribed by the Court of Appeal[8]) and the EM (electronic monitoring) condition.

16. The Parole Board also convened two monitoring hearings at 6 months and 12 months after his release. At each hearing Mr Grinder sought to have these two conditions lifted, but the Board confirmed their continuing importance while Mr Grinder became established in the community and could demonstrate a record of compliance. The EM condition in particular

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parties. // In rare cases a decision maker may be of assistance, for example, where there is a need for a contradictor or where it is important that the Court have a wider perspective than the parties may be able to provide. If a decision maker does appear, it should as far as possible act in a non-partisan fashion."

7 See HC at [2] – [15] and CA at [3] – [9]. The relevant decisions are Parole Board 14 October 2021 COA tab 15 [[201.0015]], and Review 27 January 2022 COA tab 16 [[201.0018]]

8 CA at 5: the High Court sets out the correct position at [15], and the condition itself is at [[201.0008]] at [10] and more recently at [[202.0040]] at [3]: "Not to enter or loiter near any school, early childhood centre, park, library, swimming pool or other recreational facility, church **or other area specified in writing by a Probation Officer**, unless you have prior written approval of a Probation Officer, or unless you are under the supervision and in the presence of an adult approved in writing by a Probation Officer." The key point being that this is a specific list of venues that are prohibited, with the PO retaining discretion to add more by notice in writing. It is not a general prohibition against going to any place where children might be unsupervised without prior approval.

was seen as "supporting Mr Grinder's transition from prison to the community."[9]

17. Mr Grinder formally applied for discharge of the two conditions a year later, in 2021. The Parole Board declined his application on 14 October 2021, and the Panel Convenor dismissed his application for review of that decision in January 2022: these are the two decisions that are the subject of this judicial review proceeding.

18. As Justice Gwyn outlined, Mr Grinder's 2021 application to vary his special conditions was not opposed by Corrections Community Probation Service and was supported by an up to date expert psychologist's report which assessed him as low risk of reoffending.[10]

19. The Board recorded that Mr Grinder was "doing well on parole. He has good employment and accommodation and recently he had had a promotion in his work." The Board also acknowledged that these two conditions, and especially the EM condition, were causing some difficulties with Mr Grinder's work and reintegration into society.[11] As later pointed out in the High Court hearing, the expert evidence was that continuation of these conditions was in fact likely to be destabilising Mr Grinder's reintegration, and thus *increasing* the risk of reoffending.[12]

20. The Board however said this:[13]

> Whatever the current accurate assessment of risk is, it is not no risk. We consider that ensuring that Mr Grinder does not offend against children by the imposition of a GPS monitoring device to reassure the public that Mr Grinder is not going to places where children on their own might congregate and so providing him with an opportunity of developing relationships with those children out of sight of adults and out of contact with any of those supervising him is a reasonable protection against the risk of him doing so.

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9 HC [6]

10 HC [8] – [11]

11 At [6] – [8] [[201.0016]] and [16] [201.0017]]

12 HC at [123] – [125]

13 At [15] [[201.0017]]

21. The Panel Convenor in his review decision of 27 January 2022 crystalised the issue of concern, saying:[14]

> On October 2021 the Board was considering an application of the discharge of Mr Grinder's special conditions. It was not considering whether to grant parole. This means that the question of "undue risk" was not relevant to the Board's decision on this occasion.
> …
>
> The Board did not have to form a view about whether that was a low risk or the higher risk as contained in the 2018 risk assessment. It also did not have to establish that without the special conditions Mr Grinder was an undue risk. Special conditions mitigate risk. Sometimes they are necessary to ensure that an offender is no longer an undue risk. Sometimes they simply enhance mitigation for an offender who is already assessed as falling well below the undue risk threshold.

22. Justice Gwyn in November 2022 upheld Mr Grinder's challenge that the Board's and Panel Convenor's approach was contrary to the Parole Act. Her Honour directed the Parole Board to make a fresh determination, based on an up to date risk assessment.[15]

Subsequent events

23. While what follows after this is not directly relevant to the application for judicial review,[16] which is focussed on the lawfulness of the decisions at the time they were made, the events that follow illustrate the importance of the Courts clearly delineating and where necessary policing the boundaries of the Parole Board's powers when it comes to special conditions.

24. As noted, the Board appealed, but also issued a new decision in January 2023.[17] The Board recorded Mr Grinder's Probation Officer's confirmation that he had been fully compliant with his release conditions and had good engagement with her, and that Corrections did not oppose the discharge of

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14 At [19] and [30] [[201.0021]] and [[201.0023]]

15 HC at [129]

16 Noting that the appellant has formally objected to the inclusion of much of this material in the case on appeal.

17 COA tab 17 [[201.0026]]

the EM condition.[18] The Board accepted that the EM condition was no longer required, and discharged it.[19]

25. With regard to the 'whereabouts' condition, the Board did what appears to be an irrational volte-face. As noted above, the Board in October 2021 confirmed that this condition was aimed at preventing unsupervised contact with children on their own. The Board however now in January 2023 says:[20]

> There is no evidence that Mr Grinder has approached child victims at any of the areas specified … If the purpose of the whereabouts condition was to limit the opportunities for direct contact with children, the Board would not see a sufficient nexus with his offending to justify the imposition of the condition.
>
> In this case it seems to us that the whereabouts condition fulfils the different purpose of limiting the opportunities for contact with adults accompanying their child or children in places where children are gathered …

26. The Board declined to discharge the 'whereabouts' condition on this basis.[21]

27. The Court of Appeal's judgment overturning the High Court was released in November 2023. In December 2023, a month later, the Board reimposed the EM condition.[22] This was ostensibly on the basis that Mr Grinder had breached the whereabouts condition by attending the open day of a model train group to which he had belonged, and then left once he realised children were present.[23] The breach charge was subsequently withdrawn, but the EM condition has not been lifted. The Board instead said in March 2024:[24]

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18 At [7] – [8] [[201.0028]]

19 At [11] [[201.0029]]

20 At [13] – [14] [[201.0030]]

21 At [17] [201.0031]]

22 COA 31 [[202.0034]]

23 See [[202.0038]] at [6], noting attending this event does not appear to have been contrary to the 'whereabout' condition: see fn 8.

24 At [7] - [10], quoting from [8] and [10] [[202.0038]], see also [[202.0045]] at [20].

> … we formed the view that Mr Grinder's relationship with his Probation Officer lacked the openness and rigour the Board expects of someone on life parole … he felt able to make decisions about attending events where children were present without the intervention or involvement of others who might assist him in his decision making. Equally, the Board is concerned that Mr Grinder was disinclined to be more open about this relationship with his current [long distance] partner [having concerns about their privacy] …
>
> … As a life parolee we expect a much higher standard of engagement with his probation officer.

28. The Board determined to maintain the EM monitoring condition on this basis.

29. In other words, it appears that the Board is using the EM condition not as a way of ensuring Mr Grinder's compliance with his 'whereabouts' condition (which was not an issue of concern) but rather as a sort of penalty to enforce additional unwritten and unspecified requirements on him, categorised under the subjective heading of his 'relationship' and 'engagement' with his Probation Officer. And this is in the context where the Board had already decided the EM condition was not necessary in terms of reducing the risk of Mr Grinder reoffending, and had evidence before it that the condition is actually likely to be undermining Mr Grinder's rehabilitation.

30. This is a helpful demonstration of how the Board is approaching its currently understood broad scope of power to impose special conditions. A significantly intrusive and potentially harmful condition is imposed as a form of discipline, to incentivise conduct that: (a) is unrelated to the operative effect of the condition, which is to monitor Mr Grinder's location; and (b) reflects behavioural 'expectations' that are not clearly spelt out and are not required by the terms of Mr Grinder's parole.

31. The overtone of arbitrariness here is concerning. The parole regime is careful to ensure that offenders know exactly the requirements that they

must meet,[25] reflecting both the serious consequences of non-compliance and the importance of certainty for an offender's self-management of their rehabilitation and reintegration into society.[26] Using intrusive conditions as a form of discipline to control other (unstated) behavioural 'expectations' in this manner would seem more likely to set the offender up to fail than to support their "reintegration into society as a law-abiding citizen", contrary to the objectives of the Parole Act.[27]

32. REDACTED

33. REDACTED

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25 Sections 7(2)(b) and 13(7)

26 Also reflecting the requirements of s 5 of the New Zealand Bill of Rights Act 1990: as the Law Commission records specifically in relation to special conditions on parole: "The requirement that restrictions be prescribed by law means conditions should be identifiable and their nature and consequences should be clear." NZLC IP51 *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai he me ngā ōta nō muri whakahwui Public Safety and serious offenders: a review of preventive detention and post sentence orders* at [10.56]

27 Section 28(2)(b)

34. It thus appears that the statutory protections against error by the Parole Board, which are not strong to start with,[28] are not operating to protect a parolee from overreach by the Board. Respectfully, judicial review is not the answer: the regime should be operating lawfully and effectively at the appropriate level. What is required is:

34.1 a clear delineation of the Board's powers to impose and maintain special conditions that is consistent with NZBORA;

34.2 that is sufficiently straightforward for offenders to understand how it will affect them, and for predictable routine application by the Board;

34.3 and sufficiently straightforward for routine and effective oversight by the Panel Convenor on review.

35. In other words, guard rails.

36. An interpretation of the Parole Act that affirms a clear boundary of this kind will align with the structure of the parole regime, the policy and intent of the Parole Act, and the rule of law.[29] The appellant's position is that properly interpreted, the Act does set such a clear boundary with regard to special conditions directed to reducing the risk of reoffending, as set out below.

THE APPEAL: A QUESTION OF STATUTORY INTERPRETATION

Parole and the Parole Act 2002

37. Subpart 2 of Part 1 of the Parole Act governs the release of offenders on parole. Parole is available only to offenders subject to a long-term sentence (more than two years).[30] Decisions to release an offender on

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28 Section 67 Parole Act

29 As affirmed in a somewhat different context in *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at fn 174 at [127] (per Winkelmann CJ) and fn 411 at [326] per William Young J.

30 Section 6(4)(a) of the Parole Act, with "long term sentence" defined in s 4. Release conditions for short duration sentences can be imposed by the sentencing court under s 93 of the

parole, or to recall an offender back to prison are made by the Parole Board.[31] The Board also has the power to impose, vary and discharge special conditions.

38. Of note, the statutory provisions relating to special conditions do not differentiate between offenders subject to a determinate sentence and those, such as Mr Grinder, subject to an indeterminate sentence: the Board's powers are the same.

39. Where the difference lies in is in effect: offenders subject to a determinate sentence cannot be subject to special conditions for longer than six months after their statutory release date, but offenders such as Mr Grinder can be subject to special conditions (and to recall for their breach) for life.[32] The fact that the Board's powers have this inevitable scope and reach for the full life of an offender is a factor to be borne in mind when considering the purposive interpretation of the legislation. In particular, issues of certainty, scope, proportionality and justification need to be considered through that lens.

The key provisions: the constraints on the Parole Board's powers

40. Section 28 empowers the Board to release an offender on parole, but also confirms:

> (1AA) In deciding whether or not to release an offender on parole, the Board must bear in mind that the offender has no entitlement to be released on parole …
> …
> (2) The Board may give a direction [that the offender be released on parole] only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any

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Sentencing Act 2002. Section 94 allows for variation and discharge, while s 8(g) imports a similar proportionality assessment as required by s 7(2)(a) of the Parole Act. The constraints on the court's powers under s 93 were the subject of this Court's decision in *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743, and the Court of Appeal in *Patterson v R* [2017] NZCA 66 at [15] – [18].

31 Noting the Board does not have power to initiate a recall process: recall orders can only be made following application by the Chief Executive, a Probation Officer or Police: s 60.

32 Parole Act ss 6(4)(d) and 29(4)(b), contrast s 29AA(3) and s 29(3) for determinate sentences.

> person or class of persons within the term of the sentence, having regard to -
> (a) the support and supervision available to the offender following release; and
> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

41. Section 29 provides that all parolees are subject to the standard release conditions, which are found in s 14. The Board may also impose special conditions under s 29AA (including suspending any incompatible standard conditions). Section 29AA(1) states:

> In releasing an offender on parole, the Board may impose any special conditions on that offender that the Board specifies.

42. Subsections 29AA(2) and (3) relate only to the time periods for which special conditions can be in force, so any limits on the Board's powers in terms of the content of any special conditions are to be found outside this empowering provision.

43. Section 15 contains the purposive constraint, prescribing the only permitted objectives for which special conditions can be imposed:

> (1) The Board may (subject to subsections (2) and (4)) impose any 1 or more special condition on an offender.
>
> (2) A special condition must not be imposed unless it is designed to-
> (a) reduce the risk of reoffending by the offender; or
> (b) facilitate or promote the rehabilitation and reintegration of the offender; or
> (c) provide for the reasonable concerns of the victims of the offender; or
> (d) [relating to Extended Supervision Orders]
>
> (3) [sets out a non-exclusive list of the types of conditions that may be imposed]
>
> (4) and (5) [address conditions relating to prescription medication]

44. The next constraint is found in the more generic 'guiding principles' set out in s 7. Section 7 states:

> (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.

(2) Other principles that must guide the Board's decisions are -
(a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and
(b) [relating to information to be provided to offenders]
(c) [relating to the information before the Board]
(d) that the rights of victims [defined] are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.

(3) When any person is required under this Part to assess whether an offender poses an undue risk, the person must consider both -
(a) the likelihood of further offending; and
(b) the nature and seriousness of any likely subsequent offending.

45. Variation of conditions is governed by s 58, which again provides no express constraints:

(1) On an application under section 56 [which may be by the offender or their Probation Officer], the Board may direct the variation or discharge of any release condition imposed by the Board that applies to an offender.

46. Obviously, though, the exercise of this power is also governed by ss 7 and 15.

Bringing the provisions together: the mandatory threshold

47. Bringing these provisions together, what the legislation expressly provides for is that:

47.1 the Board can impose special conditions only for the purposes set out in s 15;

47.2 conditions *must* not be imposed - or maintained - where they are more onerous than "is consistent with the safety of the community" (s 7(2)(a)); and

47.3 the safety of the community is the paramount consideration (s 7(1)).

48. The question that immediately stands out is *what exactly* is the limit of interference with a parolee's life and protected rights that Parliament

considers will be justified as "no more onerous than is consistent with the safety of the community"? As Justice Gwyn recorded, the threshold is clearly not 'no risk', that would be "plainly the wrong threshold": there will always be *a* risk of offending by any parolee.[33] But at the same time, there *is* an express mandatory statutory threshold here: Parliament did not intend for this to be an untethered discretion by the Parole Board, requiring only a rational link with the purposes in s 15. Section 7(2)(a) requires something more than that.

49. This is the statutory interpretation question for this Court: what is the content of the mandatory threshold imposed by Parliament in s 7(2)(a)? The appellant says that in relation to special conditions that are imposed for the purpose of reducing reoffending, the threshold is the concept of 'undue risk' defined in s 7(3). This is apparent from s 7 on its terms, and when read in light of the regime as a whole, as discussed next.

Section 7 and "the safety of the community"

50. Section 7 is set out above. A number of points can be made about this provision.

51. First, it obviously contains operative decision-making criteria against which *all* decisions relating to release of an offender must be made. This includes all decisions relating to special conditions.

52. Second, it contains obvious inbuilt but unstated constraints. The "safety of the community" is the paramount consideration, but 'safety from what?' is unstated. The clear answer to that is safety from the offender re-offending: we are not talking about earthquakes here.

53. Third, it directs a proportionality assessment: offenders must not be detained longer, and conditions must not be more onerous, "than is consistent with the safety of the community". As above, while unstated,

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[33] HC at [49] and [50]

the provision is clearly directing an assessment of whether *the risk of the offender reoffending* is consistent with the safety of the community. But again, the provision is silent on *what level* of risk of re-offending will be inconsistent with the safety of the community.

54. Fourth, the decision to detain offenders (ie release or recall) and the decision to impose or vary or discharge special conditions are treated the same. All these decisions are subject to the same overriding objective in subsection (1), and both are subject to the identical proportionality standard in subsection (2)(a) that the constraint be no more than is consistent with the safety of the community.

55. The legislative history of s 7 may be briefly noted. Subsections (1) and (2) were in similar terms in the Sentencing and Parole Reform Bill 2002 as introduced.[34] Subsection 3 (defining how to assess 'undue risk') was added at select committee, with the Report from the Justice and Electoral Committee recording:[35]

> Most of us also recommend the addition of a new clause 169(3) to clarify 'undue risk'. When deciding on a person's suitability for release from prison, the Board must now take the safety of the community as its paramount consideration. We agree, when the Board assesses whether an offender poses an undue risk, that consideration must include both the likelihood of further offending and the nature and seriousness of that subsequent offending.

56. This confirms the legislative intention that, at least at the point of release on parole, the question of what is consistent or inconsistent with the paramount consideration of "safety of the community" is answered by assessing whether there is an undue risk of reoffending.

57. This is also confirmed in s 28 set out above (albeit in negative terms): for release decisions the threshold of acceptable risk to community safety is whether there is an undue risk of reoffending. Inextricably bound with

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[34] Sentencing and Parole Reform Bill 148-1, cl 169. The further changes adopted following recommendation of the select committee were to change from "protection of the community" to "safety of the community" in (1), and from "should" to "must" in (2)(a) – (c).

[35] Sentencing and Parole Reform Bill 148-1, Commentary

that assessment will of course be the content of the release conditions: if appropriate conditions can bring risk below the threshold of undue, then s 7(2)(a) effectively requires the Board to direct release. Section 7(2)(a) rebounds in the opposite direction as well: if special conditions imposed at the point of release go beyond what is needed to meet that threshold of undue risk, then they are by definition more onerous "than is consistent with the safety of the community".[36]

58. Case law also confirms that decisions on recall are to be determined by the undue risk threshold, despite there being no express reference to that in four of the five grounds for recall in s 61: see *Miller v New Zealand Parole Board* (discussed in more detail below).[37]

The mandatory threshold is 'undue risk'

59. The appellant's position is that in enacting s 7 Parliament intended a consistent approach to the threshold of acceptable risk to community safety across all decisions relating to release, including all decisions relating to special conditions. Section 7 cannot be read in any other way.

60. The most obvious reading of the statutory regime, therefore, is that s 7(2)(a) sets a mandatory constraint that special conditions imposed for the purpose of reducing risk of reoffending must meet the threshold of being no more onerous than is consistent with attaining an acceptable level of risk to community safety, measured by the concept of 'undue risk' as described in s 7(3).

61. As Justice Gwyn expressed this in the High Court, the Parole Board was required to assess whether continuation of the special conditions was a

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36 The appellant respectfully disagrees with the Court of Appeal's views to the contrary (CA at [52]).

37 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [129]

reasonable, necessary and proportionate means of ensuring the offender does not represent an undue risk to the community.[38]

The arguments to the contrary

"Undue risk" is not expressly mentioned in relation to special conditions

62. The Attorney-General is correct that none of ss 15, 29AA or 58 refer to an undue risk threshold, and this was the primary reason put forward in the Court of Appeal's analysis.[39]

63. Respectfully, as outlined above the specific empowering provisions relating to special conditions also do not refer to the Parole Board making any assessment of risk of re-offending at all, but it is clearly implied from s 15 and s 7 that such assessments must be made.

64. What is more notable is that every time the legislation expressly directs the Parole Board to consider an offender's risk of reoffending in the context of parole, the Board is directed to consider whether the risk is undue.[40] It is only when the Act moves to the quite separate provisions relating to Extended Supervision Orders where different language is used, and the direction is to assess whether there is 'high risk' or 'very high risk'. The Board is never directed to assess an uncalibrated 'risk of reoffending' in relation to an offender.

65. The assessment of 'undue risk' is of course the 'bread and butter' of this expert decision maker. It is in fact more problematic to suggest that the legislative regime by implication also contains a lesser and unstated threshold for some aspects of parole decisions than those expressly stated by Parliament.

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38 HC at [130]

39 CA at [39] – [43]. Noting there is one direct link between undue risk and special conditions mentioned in the legislation, in the context of special conditions for an ESO that are suspended while the offender is detained in a hospital or secure facility. Section s 107P(3), provides "but a probation officer may reactivate any condition that is required to ensure that the offender does not pose an undue risk to the community or any class of persons."

66. The authorities relied on by the Crown in the High Court and Court of Appeal also do not support the opposite conclusion.

67. *Gilmour* is not on point and the Court was not considering this issue: the two words "and when" in the single sentence relied on by the Crown cannot bear the weight the Crown seeks to place on them.[41]

68. The 2006 High Court decision in *Ryder* is no longer good law on this point,[42] following the Court of Appeal's decision in 2010 in *Miller v New Zealand Parole Board*. In *Miller* the Court affirmed that the undue risk threshold applied to all grounds for recall under s 61, despite being expressly referred to in (a) and not mentioned in (b) – (e):[43]

> Given the overall scheme of the 2002 Act and the human rights jurisprudence as to arbitrariness of detention, we conclude that the discretion under s 66 to make a final recall order ought only to be exercised where public safety is in issue. Where the ground specified in s 61(a) is made out, the Board will necessarily be satisfied that the offender poses an undue risk to public safety. The same is likely also to be true in respect of s 61(d)(i) and (e)(i). The issue arises more acutely in relation to the other grounds provided for in s 61. We are of the view that when those grounds are made out, the Board should address public safety directly. If the Board, having done so, is of the view that further detention of the offender is not required for purposes of consistency with the public safety of the community (cf s 7(2)(a)) and is satisfied that the offender can remain in the community without posing an undue risk to public safety (cf s 28(2)), the discretion to recall should not be exercised.

Interpretation negated by conditions not directed to reducing reoffending?

69. The Court of Appeal's second line of analysis places weight on the fact that conditions imposed for reasons listed in s 15(2)(b) to (d) - that is, other than to reduce the risk of reoffending under s 15(2)(a) - might have no

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40 See s 25 (early referral and consideration for parole), s 28 (release on parole), s 61 (grounds for recall) and s 62 (interim recall orders).

41 *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250. This case concerned a parole assessment report and the question was whether s 43(1)(c) required the report to address 'undue risk'. The Court of Appeal said it did not, and in so doing so said (at [34]): "the Parole Act is explicit in respect of those who are required to do assess the issue of undue risk **and when** they are required to do so."

42 *Ryder v Parole Board* HC Christchurch CRI-2006-409-67, 7 April 2006. Fogarty J in that case rejected an argument that the Parole Board was required to make an undue risk assessment in determining a final recall application.

43 *Miller v New Zealand Parole Board* [2010] NZCA 600 at [129]

direct relationship to reducing risk of reoffending, and from that infers that an undue risk threshold does not apply to any special conditions.[44]

70. This appeal of course concerns special conditions that are directed to reducing the risk of reoffending, and considers the threshold of risk that applies under s 7(2)(a) in that context.

71. It is not entirely clear how the regime is intended to operate for special conditions where the Board is not considering risk at all. For example, conditions under s 15(2)(c) that are "designed to … provide for the reasonable concerns of victims of the offender" may not readily link to the safety of the community. The directive in s 7(2)(a) appears to provide a strong indication that even for those conditions the mandatory threshold applies, and the approach in *Miller* might support that, but it is respectfully submitted that that more complex question is best addressed on another day, when the point is squarely at issue.

72. What is more obvious is the issue in this appeal: when considering onerous and intrusive special conditions that are designed to reduce the risk of reoffending, the mandatory proportional assessment of the safety of the community in s 7(2)(a) brings with it the question of what is an acceptable level of risk to the safety of the community. The task for the Court is to determine what Parliament intended that threshold to be.

Different thresholds apply to special conditions when the offender is in the community?

73. It is understood that the Attorney-General in the Court of Appeal accepted that the decision to impose special conditions at the point of release is constrained by the 'undue risk' threshold, but argued that the threshold did not apply to variations of conditions post release. The Attorney-

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44 CA [42] – [45]

General's position in the Court below appears to have been that the position post release is "more nuanced".[45]

74. If that remains the position of the Attorney-General, the appellant respectfully submits that this is in error.

75. Such an approach suggests that greater restrictions – with less justification – can be imposed by variation than could be justified on initial release. That cannot be correct.

76. Nor is there any coherent policy reason which would have one threshold applying when a condition is first imposed, and a different (lower or non-existent) threshold applying when the Board comes to consider whether to vary or discharge a condition. On the contrary, a coherent regime would say that if the basis which justified the imposition of a restrictive condition has fallen away, then the condition should be discharged (or varied, as appropriate to reflect the changed circumstances). Anything else is irrational, and such an intention cannot readily be inferred to Parliament.

77. Taking this back to the legislation, s 7(2)(a) requires as much. If the condition is no longer meeting the mandatory requirement that it is no more onerous than is consistent with the safety of the community, then it must go.

78. As outlined above, s 7(2)(a) also obviously imposes the same threshold test to the imposition and variation and discharge of conditions: it is not possible to read a 'more nuanced' approach to what constitutes an unacceptable risk to the safety of the community for some decisions and not others.

79. Respectfully, the Court of Appeal's second line of analysis[46] is incorrect for the same reason: s 7 clearly sets the same proportionality assessment and

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45 Attorney-General's written submissions to the Court of Appeal dated 28 April 2023 at [51].

46 CA at [43] – [45].

the same requirements for acceptable levels of risk to community safety for all decisions relating to parole, be that release, special conditions or recall. The fact that release and recall decisions directly affect the custodial status of the offender, whereas conditions affect their obligations in the community, is not a distinction recognised by s 7(2)(a). Nor is there any apparent policy reason why it should be, given that the focus is on community safety, not outcomes for the offender.

Too difficult for the Parole Board?

80. The Parole Board appears to have argued that it is not feasible for it to make a 'condition by condition' approach to special conditions, and this forms the basis of the Court of Appeal's third line of analysis.[47]

81. With respect, that is plainly wrong. Special conditions are by definition additional conditions that are only imposed by active decision of the Parole Board. Of course the Board is required to turn their minds to and make an assessment under s 7(2)(a) for each condition, both alone and as part of the suite of conditions. This is a legal requirement under the Act.[48]

82. In practical terms the concern also appears to be overstated. As case law relating to bail conditions[49] and the Board's decisions in Mr Grinder's case all illustrate, the specific conditions which cause concern as potentially going 'over the line' as being unjustified will stand out. These are the conditions that impose onerous intrusions into the parolee's life and/or

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47 CA at [46]

48 It is also a necessary step to ensure compliance with the New Zealand Bill of Rights Act. See for example the observations by the Court of Appeal in the analogous context of bail conditions in *R v Fatu* CA454/05, 15 December 2005 at [8] and [10]: "This case is apt for an observation by this Court of the need to analyse the need for the justification for, and efficacy of, unusual terms of bail. The Bail Act is coloured by the rights assured to everyone within New Zealand by the New Zealand Bill of Rights Act 1990. … . Section 18 of NZBORA simply reinforces the necessity for close examination of the justification for unusual terms of bail. … This is a timely reminder of the need for analysis in dealing with constraints on people's freedoms and rights under the New Zealand Bill of Rights Act. In the particular case all the appropriate concerns can be met by restrictions requiring geographical constraints and the reporting condition which we intend to impose by way of variation."

49 See for example *Belhajjam v Police* HC Wellington CRI 2012-485-84, Simon France J, 9 October 2012.

protected rights, and whether they are 'more onerous' than justified necessarily requires assessment.

83. It is also noted that according to the Law Commission's 2023 Issues Paper on post sentence orders, the practice reflected in the MOU between the Parole Board and the Department of Corrections is that the report from the Department to the Board will include "the rationale for each special condition."[50] Hence the Board will have before it information directed separately to each condition and its justification for inclusion in the suite of conditions under consideration.

84. Turning back to the mandatory threshold in s 7(2)(a), the interpretation question for the Court is whether that threshold relates to the safety of the community from an undue risk of reoffending, as the appellant says, or something else. How high or low the threshold is would seem to make no difference to the complexity of the task the Board is required to undertake: whatever the threshold is, the Board still has to be satisfied that the threshold is met.

85. For completeness, counsel was able to confirm when taking over this case from Mr Ewen KC that the appellant's case has not been that individual conditions were to be considered only on an isolated basis such that if a single condition could be removed without triggering the undue risk threshold then it must be unlawful. While that might be an obvious conclusion, the correct approach is not so narrow or artificial. Rather, the proposition put forward has been whether each onerous condition is "reasonably necessary and proportionate [to achieve the acceptable level of risk to the safety of the community] when considered with other conditions to be imposed."[51] This might mean that conditions that viewed

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50 NZLC IP51 *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai he me ngā ōta nō muri whakahwui Public Safety and serious offenders: a review of preventive detention and post sentence orders* at [10.12] and fn 17.

51 HC at [51], referring to the analogous approach in bail decisions endorsed in *Paterson v R* [2017] NZHC 49 and *Patterson v R* [2017] NZCA 66. See also HC at [130].

by themselves would be justified are not justified when the suite of conditions is taken into account, because risk is already appropriately managed.[52]

The New Zealand Bill of Rights Act

86. The Court of Appeal considered that:[53]

> …an NZBORA consistent interpretation of the Parole Act does not require the necessity of a special conditions to be tested against the undue risk threshold. We accept that special conditions can have NZBORA implications … The Parole Act seeks to ensure that this curtailment is a reasonable limit, as required by s 5 of NZBORA, through the proportionality requirement in s 7(2)(a) that conditions must not be "more onerous, or last longer, than is consistent with the safety of the community". An NZBORA-consistent approach to conditions is therefore already built into the Parole Act scheme.

87. First, it is noted that the Court of Appeal has understated the requirements of s 5 NZBORA: limits must be both reasonable and 'demonstrably justified in and free and democratic society'. This brings with it the need to establish that the specific objective of the condition is sufficiently important to warrant the limit, and that the limit is both proportional and minimally impairing of the right.[54]

88. But second, and more importantly, what the Court of Appeal here is describing the *mechanics* by which the Parole Act endeavours to ensure that an NZBORA compliant analysis is built into the regime. Yes, s 7(2)(a) sets up a proportionality assessment, but whether or not that assessment meets the requirements of s 5 NZBORA is another question entirely.

89. Respectfully, this is where the Court went into error: it appears to have simply assumed that the *content* of the proportionality assessment was sufficient, because the Act provided a *process* for it to be undertaken. However, the key question that needs to be answered in finding a NZBORA consistent interpretation is whether (properly interpreted) the mandatory

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52 Noting again the approach in the analogous context of bail in *R v Fatu* quoted in fn 51 above.

53 CA [51].

54 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

threshold of: "[not] more onerous … than is consistent with the safety of the community" is sufficient to meet the requirement of s 5 NZBORA.

90. The point can be illustrated by comparing the Court of Appeal's view of the what the assessment requires, with that of the High Court.

91. The Court of Appeal (in the sentences omitted in the above quote) sets the threshold of "consistent with community safety" that would justify imposing restrictions that interfere with fundamental rights so low as to be almost non-existent, saying:[55]

> It is the very nature of release on parole, subject to conditions that address the offender's risk, that the offender's rights typically will be curtailed. For the reasons we have discussed, that may occur even when an offender is assessed as a low risk of offending and does not present an undue risk of reoffending…

92. Similarly, in overturning the High Court, the Court of Appeal can be taken to have been satisfied with the Parole Board's assessment that "whatever the [current] risk is, it is not no risk."

93. The High Court on the other hand considered that the Board's task was to assess:[56]

> Is the continuation of the special conditions a reasonable, necessary and proportionate means of ensuring the [offender] does not represent an undue risk to the community?

94. The Court of Appeal's approach appears to water s 7(2)(a) down to such a level that it authorises limits on rights for reasons that barely have a rational connection to protecting the community from the risk reoffending, let alone constituting a demonstrable justification for those limits. Respectfully, the Court of Appeal appears to have lost sight of what is at issue here. Guaranteed freedoms are not to be limited for some 'nice to have' improvements in risk management when the risk is already so low

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55 At [51]. See also [44].

56 HC at [130], see also [51]

that Parliament considers that the offender can be safely in the community.

95. Even if the Court of Appeal's view of the threshold for such conditions is an available interpretation of s 7(2)(a) (which the appellant submits it is not), s 6 of NZBORA would militate against it.[57] The statutory threshold this interpretation implies is simply not high enough to meet the requirements of s 5 NZBORA, and read in this way the Act would authorise special conditions that are an unjustified contravention of protected rights.[58]

96. The appellant's position is that s 6 NZBORA requires the Parole Act to be interpreted in such a way that the proportionality of conditions that infringe on protected rights is assessed against an appropriate threshold of risk to community safety. For conditions directed to reducing the risk of reoffending, this threshold is the level of undue risk affirmed by Parliament. Anything lower is both uncertain and insufficient in terms of s 5.

Dated 23 August 2024

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Victoria Casey KC/ Imogen Hensman
Counsel for the appellant

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57 See also the discussion in the context of bail conditions in *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [62] – [64]

58 Noting the Court of Appeal in *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484 at [220] rejected an argument that rights consistency can be addressed merely through the application of a broad discretion: "To say the Acts may be able to be applied in a rights-compliant way does not answer the central question, which is whether the relevant provisions of the Parole Act and the [Public Safety (Public Protection Orders)] Act delineate regimes that limit rights in a way, and to an extent, that has been demonstrably justified."

LIST OF AUTHORITIES

Parole Act 2002 ss 6, 7, 14, 15, 25, 28, 29, 29AA, 58, 61, 62, 67, s 107P(3)

Sentencing Act ss 8, 93 and 94

Sentencing and Parole Reform Bill 148-1, Commentary

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Belhajjam v Police HC Wellington CRI 2012-485-84, Simon France J, 9 October 2012

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Gilmour v Chief Executive of the Department of Corrections [2017] NZCA 250

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