IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 147/2023**

BETWEEN	**BRETT DAVID GRINDER** **Appellant**
AND	**ATTORNEY-GENERAL OF NEW ZEALAND (FOR AND ON BEHALF OF THE DEPARTMENT OF CORRECTIONS)** **First Respondent**
AND	**NEW ZEALAND PAROLE BOARD** **Second Respondent**

FIRST RESPONDENT'S SUBMISSIONS ON APPEAL

7 October 2024

Counsel for the First Respondent certify these submissions contain no suppressed information and are suitable for publication

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TĒNĀ, E TE KŌTI

Issue and summary of argument on appeal

1. Central to the functions and purposes of parole is the nature, extent, and duration of conditions of release. This is particularly so for special conditions, tailored to the unique characteristics of an offender, and the success of them, to reintegrate an offender safely and fully to the community s/he wishes to return to and remain within. The offender ultimately is a part of that community, the safety of which the Parole Board (Board) is directed to keep paramount "within the term of the [offender's] sentence".[1] These core principles are not disputed in this appeal.

2. Before the Court of Appeal, the Attorney-General appealed a narrower but important point of law relating to post-release parole decision-making:[2]

> Is the Parole Board "required" to assess whether a paroled offender poses an "undue risk"[3] if a special condition of release is varied or discharged, when determining an application under s 56, Parole Act 2002?

The High Court said yes.[4] The Court of Appeal agreed with the Attorney-General and said no, the Board is not.[5] The unanimous Judgment of the Court is decisive in resolving the point.

3. The appellant, Mr Grinder appeals to this Court to reinstate the High Court decision. In granting leave, this Court recast the approved question as follows:[6]

> [W]hether the Court of Appeal was correct to allow the appeal and in particular the proper approach to the imposition, variation or discharge of special conditions when a person subject to preventive detention is granted release on parole.

4. In responding to the question as recast, the Attorney-General distinguishes between release/recall decisions and variation decisions for an offender on parole.

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1 Parole Act 2002, ss 7(1) and 28(2).

2 Notice of Cross Appeal by Second Respondent, 18 January 2023 at [1.1]. **Case on Appeal (COA), 101.0037**. It is noted the Attorney-General was later re-joined as the first appellant to lead the appeal as originally filed by the Parole Board. This was due only to a gap in the Court of Appeal (Civil) Rules 2005, rr 30-32 preventing the Attorney-General filing the Crown's intended appeal once it had already been named a respondent to the Parole Board's appeal. See Memorandum by Cross Appellant /Second Respondent Seeking Directions of Court, 18 January 2023 at [1]-[6]; Minute of Goddard J in CA23/2023, dated 8 February 2023 at [2]-[4]. **Supplementary Addition to COA (to be filed)**.

3 As assessed by reference to the factors identified in s 7(3), Parole Act 2002, "when any person is required under this Part to assess whether an offender poses an undue risk…"

4 *Grinder v New Zealand Parole Board* [2022] NZHC 3188 at [48] (High Court Judgment). **COA, 05.0031**.

5 *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 at [40], [43], [44], [52], [53] (Court of Appeal Judgment). **COA, 05.0009**.

6 *Grinder v Attorney-General* [2024] NZSC 50 (Leave Judgment). **COA, 05.0008**.

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This is both due to the scheme of the Parole Act itself, but importantly also the pleadings and facts of Mr Grinder's case. The application for judicial review,[7] and the responses to it, were centred only on the Board's variation decision of 14 October 2021[8] declining to discharge two specific categories of special conditions during Mr Grinder's parole, and the Panel Convenor's review of that decision under s 67.[9] The applicability of the undue risk threshold was determined in that context.

5. The Attorney-General's position was and remains:

5.1 Determining whether an offender poses an undue risk to the safety of the community is the question that must be answered by the Board when deciding to release an offender from prison or to recall an offender. The setting of special conditions within those contexts forms part of the framework of the undue risk assessment relating to release and recall. Why? Because custodial detention is the highest restraint on liberty and, through the scheme of the Parole Act, only justified while the risk of an offender (who is eligible for parole) remains undue.

5.2 Conversely, that is not the question when the Board considers applications to vary special conditions post-release, sought by offenders on parole or probation officers under s 56, Parole Act. Here the statutory purpose is designed to look earlier, to capture risk *before* it rises to the level of undue requiring a return to custody. The critical purpose is to maintain a successful parole, within reasonable and proportionate limits with respect to conditions lawfully imposed (s 7(2)(a)).

5.3 While evidence of undue risk is not irrelevant to s 56 applications, it is not the filtering mechanism by which variation applications are intended to be determined under the Parole Act, and the Act makes this clear in its drafting and purpose. There is no slip or omission in any of ss15(2)(a), 29B(5), 56-58 where undue risk is absent, nor inconsistency in the Act's many express references to undue risk relating to release/recall decisions. A proactive, rights consistent interpretation of the Act does not require overlaying of an undue risk threshold as some form of brightline

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7 Statement of Claim at [1.2], [2.5], [2.15]-[2.18], First Ground of Review at [3]. **COA, 101.0002, 101.0004, 101.0006**.

8 Decision of the Board, 14 October 2021 (Variation Decision). **COA, 201.0015.**

9 Review Decision of Ms Snook, Panel Convenor, 27 January 2022 (s67 Review Decision). **COA, 201.0018.**

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in all parole decision-making. Upholding the Court of Appeal's approach does not permit the Board to impose, vary, or continue more intrusive or ever more restrictive special conditions on a paroled offender than is demonstrably justified. Here the principle of minimum restriction will always loom large under the guiding principles of the Act.

Factual background

Context remains important in appeal on question of law

6. A full description of the factual background affecting Mr Grinder, provided to the Courts below, is submitted (and updated) here to assist this Court. This factual context, including the navigation of the evidence in the case on appeal examined in the High Court and before the Board, is important when interpreting the scheme of the Parole Act. The question does not arise in a factual vacuum, particularly considering the circumstances and complexities of Mr Grinder's release (and prior recall), and ongoing monitoring of his parole and conditions for life.

7. What filters through this background are two features: First, is the acceptance by the Board, at least prior to late 2023, Mr Grinder had been doing well on parole and making positive progress; his risk was not rising and could be seen as reducing or stabilising. Second, and notwithstanding such progress, is a determination on Mr Grinder's part to not be subject to electronic monitoring and whereabouts conditions from the commencement of his parole in 2019,[10] and the Board's concurrent oversight of this clear desire in partnership with those responsible for the safe management of Mr Grinder's parole. That is not a criticism of Mr Grinder, rather it reflects his focus as an affected individual. For the Board and Community Corrections, guided by their functions under the Parole Act, Mr Grinder's wishes must be assessed, lawfully and proportionately, against broader considerations.

The release decision, special conditions at issue and their current status

8. In its release decision of 1 March 2019, the Board granted Mr Grinder parole for a second time. It was "essentially his last chance".[11] This followed an unsuccessful parole and recall for material breach of conditions in 2011/12.[12]

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[10] The October 2021 Variation Decision was the third decline of Mr Grinder's applications (all made within the first two years of his parole), to discharge the electronic monitoring and whereabouts conditions, citing their ongoing importance as protective factors in the context of Mr Grinder's sentence and serious offence history.

[11] Release Decision at [7]. **COA, 201.0002**.

[12] See Dr Sheree Crump, Registered Psychologist, Addendum Psychological Report to the New Zealand Parole Board, 6 September 2021 at [9]. (Crump Addendum Report). **COA, 301.0047**: "Mr Grinder was released from prison in

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9. Standard release conditions for life and 14 special conditions of parole were imposed. The special conditions were temporal and originally imposed for five years following release (expiring on 31 March 2024),[13] unless varied or discharged.

10. Three special conditions were at issue in the High Court:[14]

10.1 Two "electronic monitoring conditions":

> Special condition 6: To comply with the requirements of electronic monitoring and provide unimpeded access to your approved residence by a Probation Officer and/or representatives of the monitoring company for the purpose of maintaining the electronic monitoring equipment as directed by a Probation Officer.
>
> Special condition 7: To submit to electronic monitoring as directed by a Probation Officer in order to monitor your compliance with any conditions relating to your whereabouts.

10.2 A "whereabouts condition":

> Special condition 10: Not to enter or loiter near any school, early childhood centre, park, library, swimming pool, other recreational facility, church, or other area specified in writing by a Probation Officer, unless you have the prior written approval of a Probation Officer, or unless an adult who has been approved by a Probation Officer in writing, is present.

11. It is noted the whereabouts condition does not ban Mr Grinder from any of its specified locations. The condition requires he seek prior approval to attend any specified location if unaccompanied, or he must be accompanied by a pre-approved adult. Self-evidently, the purpose is so no unsupervised or unmonitored interaction (even if inadvertent) between Mr Grinder and any child takes place.[15]

12. The need to monitor Mr Grinder's whereabouts through the imposition of these special conditions was given "deliberate consideration" at release.[16] They were considered important and tailored protective factors to mitigate Mr Grinder's risk

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2011 and subsequently recalled to prison for non-compliance on 5 July 2012, for breaching a non-association order. The breach leading to the recall appeared related to deteriorating engagement with his probation officer and his supporters and the resulting obscuring of two consecutive relationships with women perceived as vulnerable and with potential links to children."

13 Except for one condition relating to a three-month curfew. Release Decision at [12]. **COA, 201.0002.**

14 Release Decision at [17]. **COA, 201.0003**. These special conditions are pursuant to ss 15(3)(e) & (f).

15 Release Decision at [14], referring to "those places that Mr Grinder is not to go to without permission (such as parks, schools and other places where young people tend to congregate)." As to his risk to young people: "His most likely offending would be against male or female children known to him. This includes children only recently or briefly known to him. His other risk relates to befriending vulnerable adults (emotionally or intellectually vulnerable). They are seen as posing a risk as they are less likely to challenge or question Mr Grinder", so may assist him to interact with young people. Release Decision at [6]. **COA, 201.0002**.

16 Decision of Parole Board, 22 October 2019 at [9] (First Monitoring Decision). **COA, 201.0006.**

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of reoffending, especially given his earlier non-compliance on parole and resulting recall. The whereabouts condition was not previously a feature of his first parole, but necessary as further mitigation of risk to support his release.[17]

13. This connection between the special conditions and the release decision is apparent when viewed alongside Mr Grinder's risk at that time. Specifically, he was assessed as a "medium to high" risk of sexual reoffending on release in 2019.[18] Yet, the Board was satisfied Mr Grinder did not pose an undue risk to the safety of the community if paroled. This view was informed by "…the support and supervision that is available to Mr Grinder in the community and the special conditions mitigating risk which we will be imposing. Of course our view assumes strict compliance with those conditions."[19]

14. Matters then evolved, as is expected with indeterminate offenders on parole. On 25 January 2023, and following the High Court judgment under appeal, the Board reheard Mr Grinder's variation application.[20] By the time of the Court of Appeal hearing, the electronic monitoring conditions had been discharged. Accordingly, only the whereabouts condition remained at issue for the appeal, amongst a reduced total of 10 remaining special conditions.

15. On 20 December 2003, and subsequent to the Court of Appeal judgment,[21] the Board determined an application by Mr Grinder's probation officer under s 56(2) to reimpose the two prior electronic monitoring conditions. A member of the public reported Mr Grinder's presence at a recreational facility hosting a model train group. Children were present at the facility. This led to a charge of breaching his conditions by entering a recreational facility without approval.[22]

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17 First Monitoring Decision at [9]-[10].

18 Release Decision at [6]; Sarah Ellis, Registered Psychologist, Addendum Psychological Report to the New Zealand Parole Board, 20 September 2018 at [13], also recording re-offending risk to include "children only recently or briefly known to him'. (Ellis Addendum Report). **COA, 301.0028.**

19 Release Decision at [11], notwithstanding concern "This was serious offending, and it is clear that when released last time on parole, Mr Grinder did not appreciate the consequences of being a preventive detainee and the oversight that this will involve." **COA, 201.0002.**

20 Decision of the Parole Board, 25 January 2023 at [19]. **COA, 201.0026**. (Reconsideration Decision).

21 This summary is provided to update on the Court on the status of Mr Grinder's conditions. This Court does not need to and ought not undertake an assessment of these subsequent decisions. They have not been challenged in the High Court by Mr Grinder. The parties do not have access to, nor have they reviewed, the underlying evidence supporting the decisions. Mr Grinder's conditions and desire to vary them will again be reviewed by the Board next March, with potentially the benefit of this Court's views on the applicable statutory test it must adopt.

22 Decision of the Parole Board, 20 December 2023 at [2]. **COA, 202.0034;** Decision of the Parole Board, 28 March 2024 at [4]-[6]. **COA, 202.0038**.

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16. Given the pending charge, Mr Grinder's counsel said he would abide the Board's decision. Community Corrections also signalled the possibility of an application to continue Mr Grinder's special conditions beyond their 31 March 2024 expiry. In the interim, the Board reinstated the electronic monitoring conditions (above at [10.1]) until the 31 March 2024 expiry date to allow for prior resolution of the breach charge and to determine any application to extend prior to 31 March 2024.[23] This expanded the suite of special conditions remaining to 12.

17. On 6 March 2024 the breach charge was ultimately withdrawn.[24] Mr Grinder's probation officer then applied on 14 March 2024 for 7 of Mr Grinder's 12 remaining special conditions to be extended for a period to be determined by the Board, leaving the balance to expire. On 28 March 2024, the Board adjourned the application for 12 months in part to receive updated probation and psychological reports. Effectively as a holding measure, the Board extended only the 7 conditions sought (with some modification relating to victims and their families[25]) for those 12 months. The Board also reinstated (with Mr Grinder's consent) a prior condition to submit to psychological assessment, to now expire on 28 March 2025.[26]

18. For present purposes, it is the extended conditions relating to whereabouts and electronic monitoring only that are the subject of the application for judicial review.[27]

The first year post-release – two six-monthly monitoring hearings

19. Due to Mr Grinder's risks and the "special circumstances" of his earlier unsuccessful parole, two monitoring hearings were held by the Board at six and 12-month intervals following his release on 1 April 2019.[28]

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23 Decision of the Parole Board, 20 December 2023 at [4]-[7]. **COA, 202.0035.**

24 Decision of the Parole Board, 28 March 2024 at [5]. **COA, 202.0038.** The breach charge was withdrawn by consent, on the grounds of "evidential insufficiency": Review Decision, 24 May 2024 at [9]. **COA, 202.0043**.

25 With the exception of the condition relating to no contact with his victims/victims' families which is to remain in place for life. Mr Grinder consented to the lifetime duration of non-contact with his victims, but not relating to families. Decision of Parole Board, 28 March 2024 at [3], [9], [13]. **COA, 202.0038, 0039, 0040**.

26 Decision of Parole Board, 28 March 2024 at [13]-[14]. **COA, 202.0040.**

27 Above at [10]. Statement of Claim at [2.5], **COA, 101.0004**. The whereabouts condition is now narrowed from its original form by the addition of the words in bold: "Not to enter or loiter…..or other area specified in writing by a Probation Officer **where children under the age of 16 years gather**, unless…..". Previously it was not expressly limited in this way, although the intent was to capture areas children frequent. **COA, 202.0040** at [14(3)].

28 Release Decision at [16]. **COA, 201.0003**. "Special circumstances" are required under s29B(2)(1) for the Board to determine to monitor an offender's compliance with release conditions. The first monitoring hearing (held on 22 October 2019) was directed by the Board at its release hearing on 1 March 2019: see Release Decision at [16]. The second monitoring hearing (held on 12 March 2020) was directed by the Board at the conclusion of the first monitoring hearing: see First Monitoring Decision at [13]. **COA, 201.0007**.

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20. Pursuant to s 29B(5)(a), Mr Grinder unsuccessfully sought to vary or discharge the whereabouts and electronic monitoring conditions at both monitoring hearings. The Board's decisions elucidate the key protective features of these conditions and their continuing relevance.

21. At the first monitoring hearing on 22 October 2019, the Board found "good reason" to retain the whereabouts condition especially, and its monitoring. The whereabouts condition was a protective factor against Mr Grinder's known "opportunistic and manipulative" methods of locating potential victims.[29]

22. Overall, while acknowledging Mr Grinder's positive progress and compliance with conditions on his first six months of parole, the Board observed:[30]

> "We see no reason to adjust his release conditions having regard to the relatively short period since his release, the history and nature of his offending and his non-compliance when he was last subject to parole conditions. It is important so far as the Board is concerned that he maintains strict compliance with his release conditions so that he can safely remain in the community."

23. At the second and final monitoring hearing on 12 March 2020, the Board noted the reasonably permissive approach of Mr Grinder's probation officer to granting approvals relating to the whereabouts condition. Ms Quedley was granting him "plenty of opportunities to undertake recreation as part of a balanced life". This then provided no basis on which the Board would consider amending the whereabouts condition, imposed for "compelling reasons".[31]

24. This was not a situation then of Mr Grinder being managed in an overly restrictive way while on special conditions of parole. The evidence before the Board was to the contrary – that Community Corrections was taking a reasonable and supportive

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[29] First Monitoring Decision at [10]. **COA, 201.0006.** "It seems to us there is good reason to retain the condition. First, Justice Heath in imposing preventive detention noted the 'opportunistic and manipulative way' in which he located his victims. Moreover, he was satisfied that there were predatory elements in his conduct. Secondly, Mr Grinder's risky conduct and his duplicity and deceit towards both his probation officer and his Circle of Support when he was initially released reflect the comments of the sentencing Judge. Thirdly, Mr Grinder seemed to us to exhibit a self-focus towards his release conditions that overlooked his position as a life parolee who had previously been recalled and convicted for breaching a condition of his release that went directly to risk. The Board is of the view that the whereabouts condition remains both relevant and necessary until we can be satisfied that Mr Grinder is both established in the community and demonstrates sustained compliance with release conditions that mitigate his risk."

[30] First Monitoring Decision at [13]. **COA, 201.0007.**

[31] Second Monitoring Decision at [6]. **COA, 201.0011**. This included granting requests to use a mountain-bike, visits to the library and churches if he asks. "That prohibition was proposed by the Parole Board for compelling reasons. We noted that Mr Grinder was an opportunistic offender. We do not want to provide him with the opportunity to offend out in the community currently when he is not appropriately restricted from areas where children are likely to be. As we have said, Mr Grinder, with the permission of the Probation Officer has plenty of opportunity to exercise recreationally without creating risk."

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approach. No reasonable request by Mr Grinder for prior approval to visit a location subject to the whereabouts conditions had been turned down.

The two decisions under review and subject to this appeal

Decision of Parole Board on variation of special conditions, 14 October 2021

25. On 9 February 2021, Mr Grinder made his third application to vary his special conditions, this time directly under s 56(1), Parole Act. The matter was adjourned on 27 May 2021 due to insufficient information before the Board.[32] The Board reconvened the hearing on 14 October 2021 following provision of updated reports from Mr Riley (for Mr Grinder),[33] Community Corrections,[34] and Department of Corrections psychologist Dr Sheree Crump.[35] In summary:

25.1 Mr Riley agreed with the assessment of Dr Crump concerning Mr Grinder's dynamic risk factors, and considered him at that point to be at "low or below average risk of sexual recidivism". His risk will likely continue to diminish with increasing time offence-free."[36] The whereabouts condition potentially impacted "constructive and socially affirming aspects of his leisure activity…contributing to the assumption of a healthy and balanced lifestyle."[37] It is "doubtful" whether residual risk mitigation is achieved by the EM and whereabouts conditions, and their impact "may outweigh any perceived benefit" to them continuing.[38]

25.2 Probation Officer, Yi Le Jireh Chan advised Community Corrections continued to not oppose Mr Grinder's application.[39]

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32 Decision of the Parole Board, 27 May 2021 at [8] (Adjournment Decision). **COA, 201.0014**.

33 David Riley, Registered Psychologist and Forensic Specialist, Addendum Psychological Report, 27 September 2021 (Riley Addendum Report). **COA, 301.0059**.

34 Yi Le Jireh Chan, Probation Officer, Further Memorandum to the Parole Board, 29 September 2021. (Chan Memorandum). **COA, 301.0093.** Mr Grinder's then long-standing Probation Officer, Carmen Quedley was unavailable unexpectedly to complete the memorandum, see **COA, 301.0096**.

35 Dr Sheree Crump, Registered Psychologist, Addendum Psychological Report to the New Zealand Parole Board, 6 September 2021. (Crump Addendum Report). **COA, p 301.0046**.

36 Riley Addendum Report at [14]. **COA, 301.0062-63.** At "five years following release, the level of risk presumed to exist on discharge from his prison sentence would be expected to have halved."

37 Riley Addendum Report at [17]. **COA, 301.0063-64.**

38 Riley Addendum Report at [18]. **COA, 301.0064.** These comments should be viewed alongside Mr Riley's prior substantive report, in which he noted the rationale for the special conditions broadly: "Mr Grinder's sexual offending occurred over a lengthy period and involved multiple victims of both genders. I note that in sentencing it was described as "opportunistic", and the conditions which have been imposed on him by the New Zealand Parole Board clearly reflect a concern that all reasonable steps should be taken to ensure the safety of the public." Psychological Report: Brett David Grinder, 11 May 2021 at [28]. **COA, 301.0037.**

39 Chan Memorandum, p4. **COA, 301.0096**. That position had been advised by Community Corrections initially at the adjournment hearing. Adjournment Decision at [4]. **COA, 201.0014**. Ms Chan also noted his overall compliance

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25.3 Dr Crump assessed Mr Grinder overall as having a "low relative risk of reoffending sexually".[40] Dr Crump, as with Mr Riley, also considered Mr Grinder's risk using a predictive "years sexual offence-free" in the community model. This suggested after three years sexual-offence free in the community, Mr Grinder will fall into the Level II Below Average relative risk band.[41] His risk was most likely to male and female prepubescent or pubescent children "likely either known to him via a relationship or via association".[42] With respect to the electronic monitoring and whereabouts conditions, Dr Crump opined they "at this point in time are unlikely to contribute substantially to mitigating his risk and may in fact hinder prosocial opportunities and … healthy goals."[43]

26. In its decision, the Board first acknowledged Mr Grinder's clear progress on parole. He had secured "good employment", a promotion and independent housing.[44] The Board noted the information from Dr Crump that Mr Grinder's supporters all felt he made "significant progress over the years".[45] No negative factors about Mr Grinder's actions while on parole were raised or relied on by the Board.

27. The Board further accepted largely uncritically Mr Grinder's evidence about the difficulties he has experienced with electronic monitoring with respect to his employment, recreation, and prosocial activities and relationships. The Board noted the discussion of these factors between Mr Grinder and Dr Crump.[46]

28. Where the Board departed from Mr Grinder was in weighing up the impact of those difficulties relative to the risk of removing the electronic monitoring and

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with conditions and low chance of him habitually coming into contact with children given the limited routes of travel when employed as a truck driver. **COA, 301.0094-95.**

40 Crump Addendum Report at [36]. **COA, 301.0052.** See also at [33]: **"**using the multi-method approach to risk assessment, clinical opinion, and combining rules for the STATIC-99R and the STABLE 2007, Mr Grinder is assessed as being in the low risk range (relative to other individuals with similar offending) of committing further sexual offending while in the community over the next five years."

41 After eight years sexual-offence free, he will fall within the Level I Very Low Risk band. Crump Addendum Report at [35]. **COA, 301.0052**. See also Riley Addendum Report at [14]. **COA, 301.0062.**

42 Dr Crump considered "offending risk would likely be increased in the context of loneliness, sense of rejection, or emotional collapse. An unbalanced lifestyle, including over-work, may also have an impact in increasing his risk." Crump Addendum Report at [33]. **COA, 301.0052.**

43 Crump Addendum Report at [38]. **COA, 301.0053.**

44 Variation Decision at [6]. **COA, 201.0016**.

45 Variation Decision at [9].

46 Variation Decision at [7]-[8].

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whereabouts conditions. In declining Mr Grinder's application to remove those conditions, the Board reasoned:

28.1 Dr Crump assessed Mr Grinder as in the "low risk range" of committing further sexual offending in the community over the next five years.

28.2 Dr Crump's view was the risk to victims would most likely be prepubescent or pubescent male or female children "either known to him via relationship or via association". Mr Grinder's risk may increase in the context of loneliness, isolation, emotional collapse, or where he experiences an unbalanced lifestyle, such as overworking.[47]

28.3 Mr Grinder's evidence to the Board similarly reflected this at-risk group of children – those "known to him". The Board recorded:

> "[11] Mr Grinder stressed to us that his offending is very much related to children he spent time developing a relationship with. He worked very hard with his relationship with his children victims to ensure that he had such a relationship that he could sexually offend against them and they would not make any complaints. And [it] seems clear that for many years that was a successful strategy."

28.4 In addition, Mr Grinder's method of gaining access to children included manipulation of both child and caregivers:

> "[14] As Mr Grinder himself acknowledged and the offending illustrates this well, he was very clever at understanding children, how to get them onside to manipulate them and their parents feelings, how to approach and to maintain a relationship and how to undertake sexual offending when he felt the chance of complaint was modest. All of this while deceiving the parents and caregivers of the children."

28.5 The Board contrasted Dr Crump's description of the at-risk group of children with the broader description in the psychological assessments before the Board when it made its decision to release Mr Grinder. The Board noted the 2018 assessment stated Mr Grinder was then a "medium high risk" of sexual offending, and the likely sexual offending also included "children only recently or briefly known to [him]".[48]

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47 Variation Decision at [10]. See Crump Addendum Report, above fn [42].

48 Variation Decision at [12]. Ellis Addendum Report at [13]. **COA, 301.0028.** Note also before the Board was the opinion of Marilyn Farmer, Registered Psychologist, Addendum Psychological Report to the New Zealand Parole Board, 13 April 2017 at [35]: "If Mr Grinder were to reoffend sexually, victims would most likely be young male or female children who are known to him, even if very briefly or through another acquaintance (such as a child's caregiver or parent)" (Farmer Addendum Report). **COA, 301.0008-9.**

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28.6 The Board rejected children "known" to him was narrowly confined to only those he had established relationships or associations with. The Board referred to the fact of Mr Grinder's offending for which he was sentenced to preventive detention did include children who "he had only known relatively recently or briefly".[49] This factor, as part of Mr Grinder's extensive sexual offending history, was relevant in assessing whether to remove "what is a significant protective factor", namely the electronic monitoring and whereabouts conditions.

28.7 The Board stated as a *factual* not a legal finding, "whatever the current assessment of risk is, it is not no risk" with respect to Mr Grinder.[50]

28.8 The conditions were "a reasonable protection" against the risk of him "going to places where children on their own might congregate", creating "an opportunity of developing relationships with [them] out of sight of adults and out of contact with …those supervising him".[51]

28.9 The impact on prosocial opportunities from electronic monitoring was accepted but "modest", and "paled into insignificance" when viewed against the harm to which the conditions were directed to prevent.[52]

Review decision of Panel Convenor, 27 January 2022

29. Mr Grinder then sought a review under s 67, Parole Act of the Board's variation decision. He alleged error of law in failing to apply the "undue risk" threshold under s 7(3). At this point, it was still relatively early in Mr Grinder's parole: less than 3 years post-release, with more than 2 years remaining on the special conditions.

30. In dismissing the application for review, the Panel Convenor found:[53]

30.1 The Board is not required to consider whether an offender on parole poses an "undue risk" when determining s 56 applications to vary special conditions of parole imposed under s 15.[54]

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49 Variation Decision at [13].

50 Variation decision at [15].

51 Variation decision at [15].

52 Variation decision at [16].

53 s67 Review Decision. **COA, 201.0018**.

54 Noting the Board was not considering whether to grant parole. s67 Review Decision at [19], [30].

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30.2 Having considered the information before it, the Board concluded there was risk, and such risk was mitigated by the electronic monitoring and whereabouts conditions.[55] The Convenor explained:

> "[30] 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 risk mitigation for an offender who is already assessed as falling well below the undue risk threshold."

30.3 This approach, and the continuation of the conditions, was proportionate to the risk posed by Mr Grinder, in terms of the directive in s7(2)(a). Inherent in the Board's reasons was the assessment the conditions were not more onerous and not being imposed for longer than is consistent with the safety of the community .[56]

30.4 Caution was warranted in assessing the factors that might lead to risk escalation. The Board had before it release reports pointing to the need for care in identifying "sign[s] of increasing risk and not be misled by behaviour that is not related to risk. For example, Mr Grinder's work ethic and general prosocial attitude, while supportive of employment prospects and prosocial living, are not qualities that are indicative of reduced risk of sexual reoffending or successful reintegration *in his case. He demonstrated these qualities during the time he was offending*"[57] (emphasis added). The impact of the special conditions on these aspects of Mr Grinder's reintegration and prosocial opportunities was then comparatively "modest", as found by the Board, weighed against the risk of reoffending against young children.[58]

Analysing the statutory scheme – what is the purpose of the variation power?

31. The debate around whether a particular statutory threshold applies to the determination of a s 56 variation application does not arise through a problem in

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55 s67 Review Decision at [30], and at [32]: "the Board concluded that the conditions remained designed to reduce Mr Grinder's risk of reoffending." **COA, 201.0023-24**

56 Relying on [13]-[15] of the Variation Decision. s67 Review Decision at [32]-[33]. **COA, 201.0023-24.**

57 s67 Review Decision at [34(c)]. **COA, 201.0024-25**.

58 s67 Review Decision at [34(a)]; Variation Decision at [16], specifically with respect to accepted limits imposed by electronic monitoring on Mr Grinder's "prosocial opportunities" (**COA, 201.0017**), as identified in the Riley and Crump psychological reports.

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the Act's drafting. The provisions, when analysed objectively and holistically, taking account of protected rights to liberty under the NZBORA, should reveal on their face not just the availability of the interpretation sought by the appellant, but the correctness and appropriateness of it in this particular statutory context. The Attorney-General says they do not. Deploying comparisons in legislation such as the Bail Act 2000 does not assist the appellant; rather these elucidate how the proportionality exercise coherently operates without qualifiers such as undue risk.

32. The focus, the Attorney-General submitted below, is on the purpose of special conditions within the scheme of the Act and their continuing application post release.[59] The role and operation of the NZBORA is not diminished in this area. Rather, as the Court of Appeal concludes after examining the provisions in their totality, "an NZBORA consistent interpretation of the Parole Act does not require that the necessity of special conditions be tested against the undue risk threshold."[60] Counsel sets out below how the statutory scheme leads to that outcome with respect to variation applications.

The Parole Act 2002 and "undue risk"

33. The anchoring point is the "guiding principles" of the Act set out in s 7 of Part 1. Particularly relevant here are:

33.1 First, and foremost in all matters under the Act: s 7(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."

33.2 Second, the proportionality principle under s 7(2)(a) is key and "must guide the Board's decisions": "offenders must not be detained any longer than is consistent with the safety of the community, and … must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community".

33.3 Third, s 7(3) – "when any person *is required under* [Part 1] to assess whether an offender poses an undue risk, the person must consider both

[59] See particularly [44], Court of Appeal Judgment.

[60] Court of Appeal Judgment at [51].

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– (a) the likelihood of further offending; and (b) the nature and seriousness of any likely subsequent offending." (emphasis added)

34. References to "undue risk" and "risk" simpliciter are not words used interchangeably within the scheme of the Act. Their deployment is deliberate.[61]

35. "Undue risk" as a concept is expressly referred to in the following sections of Part 1, to which s 7(3) directly relates:[62]

35.1 Section 25(6)(a), when the Board decides whether to grant an offender early release on parole.

35.2 Section 28(2), when the Board decides whether to release an offender on parole.

35.3 Section 55(7), when the Minister decides whether to release an offender early for deportation.

35.4 Section 61(a), "undue risk" is a primary ground for recall from parole.

35.5 Section 62(1)(a), "undue risk" is one of the mandatory grounds for making an interim recall order.

36. Under Part 1A, "undue risk" appears once in the context of mental health orders in s 107P(3)(a).[63] A probation officer may reactivate any suspended condition of an extended supervision order required to ensure the offender does not pose an "undue risk" whilst the offender is compulsorily detained in a hospital or secure facility. Under s 107P(3)(c), any conditions not reactivated are so when the offender is released (suggesting two types of conditions, and only some relating to undue risk, may be in effect).

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[61] The Parole Act deploys concepts of "risk" simpliciter in s15(2)(a) and (3)(b) and "undue risk" in multiple sections in Part 1, and under Part 1A "high" or "very high risk" (particularly ss 107F, 107I, 107IAA, 107M, 107RA) and "undue risk" (at s 107P(3)(a)).

[62] See *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250 at [34]: "[the Parole Act] is explicit in respect of those who are required to assess the issue of undue risk and when they are required to do so"; Court of Appeal Judgment at [49]-[50]. Cf *Miller v New Zealand Parole Board* [2010] NZCA 600 at [129]; *Ryder v Parole Board* HC Christchurch CRI-2006-409-67, 7 April 2006 at [14]-[18].

[63] Section 107P appears in Part 1A, Extended Supervision Orders of the Act and was inserted in 2004. It appears an oversight that reference to "this Part", meaning Part 1 of the Act, in s7(3) was not consequentially amended to include Part 1A at the time. However, that omission is of no moment in this proceeding.

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37. These deliberate statutory expressions reflect the terms of s 7(3) – they elucidate when any person **is required under Part 1** to assess whether an offender poses an "undue risk", and the considerations under s 7(3) that follow that assessment. The Attorney-General notes this relationship between the directive in s 7(3) and each of the above provisions explicitly mandating the undue risk assessment. Logically, the drafting of the statute this way reveals a clear connection between the direction in s 7(3) and the express statutory provisions referring to "undue risk" being applicable to the overall decision at issue.

38. This matters because it gives meaning to the express language of s 7(3). It signals s 7(3) is not a broad directive applying to all decision-making processes under Part 1, but rather it is a signal to those decisions it is relevant to. It does not say (when it easily could have) words to the effect of, "*In all decisions made under this Part*, undue risk must be assessed by considering both [ss 7(3)(a) and (b)]."

39. The above provisions also all have the same thing in common. The requirement to assess undue risk appears in the sections which govern the process for making decisions about either releasing an offender from prison or putting an offender back into prison (recall decisions). Section 107P(3)(a) is a slight misnomer because instead of prison and parole, it deals with ESO orders and subsequent compulsory detention in a hospital or secure facility due to the person's mental health. The linking feature to release/recall decisions however is detention in secure conditions, away from the community of the person released on an ESO.

40. So where is the concept of undue risk conspicuously absent? Where the Board is required to do something different within Part 1 of the Act: for example, s 41 compassionate release, s 18 setting of conditions on statutory release, and s 56 variation applications.

41. In terms of compassionate release:

    41.1 This is not a parole decision subject to the standard under s 28(2) – compassionate release is not parole.[64] Rather, the Board may "direct that an offender be released on compassionate release", if: "the offender has given birth to a child" or "the offender is seriously ill and is unlikely to

[64] Parole Act 2002, s 6(3).

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recover".[65] It is however a "release decision" and the s 7(1) paramount consideration of "the safety of the community" applies.

41.2 It is not difficult to see how immovably tethering a higher "undue risk" threshold to s 41 decisions, or reading that into the operation of s 7(1) in this instance, could actively thwart the wellbeing and best interests of a qualifying offender whose risk (where it is not low) is not materially changed by their circumstances necessitating release. That is particularly so for the first category, where the offender has given birth to a child. Here a clear policy decision in s 41 is given to primacy of parental needs, and those of a vulnerable child, in sufficiently meritorious case. An example might be a child born under serious disability, or life-threatening illness with no appropriate whānau or caregivers in the community and cannot be appropriately housed in a "Mothers with Babies Unit".[66]

41.3 Section 7(3) is not deployed here to narrow the availability of s 41. This is a discretionary and highly fact-specific individualised decision. A high-risk offender, who has been declined parole because their release *in that context* creates "an undue risk", is not disqualified under s 41, so long as the safety of the community in terms of s 7(1) can be managed. This may be done through the setting of conditions (see s 41(3)). Plainly the decision must factor in risk assessments; the presence of undue risk is not irrelevant. What the Act does not do is set a brightline for that assessment at a particular risk level – that would disqualify a range of offenders and hamstring the Board. Rather, the Act ensures all offenders, even if they would be considered an undue risk for parole, can be at least considered for compassionate release. Looking back to the wording of s 7(3) and its signal to those decisions it is relevant to, this must be correct.

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65 *Vincent v New Zealand Parole Board* [2020] NZHC 3316 at [109], the High Court considered the phrase in s41(1)(b) but did not consider the role of s7(3) and an "undue risk" assessment in the context of s41. See PA41.03, Adams on Criminal Law commentary: "The overarching consideration remains the safety of the community: see s 7(1). Unless the Board can be satisfied that the safety of the community can be managed through the support and supervision available to the offender coupled with appropriate release conditions, it will be unable to exercise its discretion on compassionate grounds. Apart from the other guiding principles in s 7, the discretion is not subject to statutory constraint. Ultimately, it is suggested that considerations of disproportionality will influence the decision – whether continued detention is so disproportionately severe that the Board should direct the offender's compassionate release."

66 https://www.corrections.govt.nz/resources/information_brochures/mothers_with_babies_unit

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42. Similarly, statutory release under s 17 of the Act, is not a parole decision. A long-term sentence offender must be released at their statutory release date, notwithstanding all prior refusals of parole for the very reason they represent an undue risk to the safety of the community. Such offenders can be made subject to special conditions under s 15 by the Board with the clear objective of managing a risk level known to be undue at release.[67] In this context, reducing *any* risk for such an offender would be a sufficient purpose purely as mitigation following statutory release. Again, s 7(3) has no function with respect to such decisions.

43. At the centre of this appeal is s 56. When the Board's powers under a s 56 application to vary or discharge conditions of release are examined, it is the absence of any reference to "undue risk" as the applicable legal threshold to vary conditions that stands out.

44. Sections 56–58 establish the jurisdiction. Relevantly, the sections confer a wide ability to seek a variation/discharge and broad discretion on the Board:

44.1 Section 56(1) and (2): Either an offender or a probation officer may "at any time" apply to the Board for the variation or discharge of any release condition applying to an offender.

44.2 Section 57(1): "Before determining an application for variation or discharge, the Board may seek information from anyone it considers has, or may have, an interest in the application, such as (without limitation) the Police or any victim of the offender."

44.3 Section 57(3): Oral hearings will be held if the offender wishes to be heard in person or the Board wishes to hear from any person orally.

44.4 Section 58(1): "On an application under section 56, the Board may direct the variation or discharge of any release condition imposed by the Board that applies to an offender." Compare here, for example, the difference in language, and express reference to undue risk, in the Board's power to direct early release on parole in s 25(6).[68]

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[67] Parole Act 2002, s 18(2).

[68] Parole Act 2002, s 25 (Early referral and consideration for parole), at 25(6): "The Board may direct the release on parole of an offender considered under this section if— (a) the Board 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 person or class

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45. Tracking backwards then, when looking at the originating powers relating to conditions of parole and statutory monitoring hearings post release, any express statutory requirement to assess "undue risk" is further absent:[69]

45.1 The power to set special release conditions under s 29AA is broad. Subsections (1) and (2) are relevant: "(1) In releasing an offender on parole, the Board may impose any special conditions on that offender that the Board specifies. (2) Special conditions imposed under subsection (1) are in force for the period that the Board specifies."

45.2 The Board has a further broad power with respect to overseeing conditions at monitoring hearings under s 29B(2), which were applicable to Mr Grinder. Section 29B(4)(a) makes such hearings and attendance at them a special condition themselves. At these hearings, the Board "may, if it considers it appropriate to do so… vary any special conditions previously imposed on the offender", or "impose new special conditions on the offender": s 29B(5)(a) and (b).[70]

45.3 Finally, s 15 itself, governing the setting of special conditions, does not prescribe "undue risk" as the threshold for imposition of conditions.[71] Rather, special conditions must not be imposed other than for one of the purposes set out in s 15(2):

> (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 victims of the offender; or
> (d) comply, in the case of an offender subject to an extended supervision order, with an order of the court, made under section 107IAC, to impose an intensive monitoring condition.

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of persons within the term of the sentence, having regard to the matters set out in section 28(2)(a) and (b); and (b) in the Board's opinion, the interests of justice require that the offender be released before his or her parole eligibility date."

69 Court of Appeal Judgment at [40]: "Importantly an undue risk assessment is not specified in relation to the special conditions that the Parole Board may impose (ss29AA and 15), nor when considering whether to discharge or vary conditions (ss29B and 57)."

70 Sections 57 and 58 (the procedure for variation applications), apply to actions taken under s29B(5)(a) and (b).

71 As the Court of Appeal says: none [of the kind of special conditions that may be imposed under s15(2)] are specifically stated to be to bring an offender's risk down from one that is an undue risk of reoffending to something less than that". Court of Appeal Judgment at [42].

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46. Section 15 is important for several reasons:

47. Subsection 2(a) refers to risk simpliciter and not undue risk. This is because it needs to account for different scenarios under the Act.

47.1 As noted above, the setting of conditions in the non-parole contexts of compassionate and statutory releases, where the Board must manage a risk level known to be undue at release.

47.2 It further applies to special conditions imposed by the Board under s 107K to offenders subject to extended supervision orders.[72] These are either "high risk" sexual offenders or "very high risk" violent offenders, with the fact of their ESO having been made by the Court indicating their risk of safety to the community on release is plainly undue. In this context, the Board cannot be (in terms of the directive in s 7(3)), in the position of assessing "whether an offender poses an undue risk" when determining conditions relevant to an ESO offender.

48. The alternative grounds in ss 15(2)(b) to (d) reveal the limits of s 7(3)'s reach. This cannot be set aside for another day as the appellant seeks in adopting a coherent interpretation to s 15(2).[73]

48.1 Conditions can be imposed for one or more of the purposes under s 15(2)(a)-(d). In practice, the suite of conditions will reflect many of these different but often intersecting purposes. This is especially obvious with respect to conditions directed towards the risk of reoffending under s 15(2)(a) and those advancing reintegration and rehabilitation interests under s 15(2)(b). These will invariably, if not always, go hand in hand.[74] So long as there is a rational nexus between the reintegration conditions, the offending, and the offender's circumstances and needs, and the condition set is proportionate in terms of s 7(2)(a), what assistance does supplanting an undue risk threshold add to enabling an offender to

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72 Parole Act 2002, s 107K(1), (4).

73 Appellant's submissions at [71].

74 Indeed, the Court of Appeal referred in *Patterson v R* [2017] NZCA 66 at [22], in examining the purposes of conditions, to the need to prevent reoffending while reintegrating.

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qualify for helpful programmes? Why add a barrier to access a scarce resource with long waiting lists and entry requirements?

48.2 Section 7(2)(a)'s proportionality assessment applies across the board here. Any condition imposed for any purpose under s 15(2), as part of a package of conditions, must respect the principle of minimum restriction. That includes any condition directed towards the interests of victims. This in no way mandates an undue risk assessment via s 7(3) to set the conditions directed towards victims' interests.[75]

48.3 In terms of s 7(1), victims are a subset of the "community" and their interests reflect a societal interest in victim protection within that community to keep it safe. Further, in the context of release decisions under s 28(2), the Board is directed towards both the safety of the community or "any person or class of persons" – namely, victims – "within the term of the sentence" of the released offender. When looked at through the lens of applications to vary under ss 56 – 58, it is apparent many applications relating to victims' interests will have little to no connection to an offender's actual risk of direct reoffending against them. However, from the victims' perspective, any contact, association, or being in close proximity to the offender causes them deep harm (from a psychological perspective). The directive in s 7(3) concerning undue risk of reoffending is entirely inept as a tool to guide the proportionality assessment s 7(2)(a) mandates of the Board in this context. Knowing there is no risk of reoffending at issue, what the Board must weigh is the offender's liberty interests on parole against the known harm presented to the victim of, for example, being in close proximity to the offender.

Bail and Sentencing Acts: no analogous qualifier of risk

49. The appellant relies on the analogous contexts relating to the operation of restrictive conditions under the Bail Act 2000 and Sentencing Act 2002. Yet in both statutory contexts, assessing risk as to whether it is or isn't "undue" (or some other like threshold) is not the yardstick by which to measure the proposed conditions, or their variation. Rather, a broad proportionality assessment, balancing the rights

[75] Contrary to the appellant's assertion in his submissions at [71].

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of the offender and the societal interests promoted in the legislation is deployed, akin to the role the Court of Appeal held s 7(2)(a) forms within the Parole Act.

50. Starting with bail conditions under the Bail Act, some caution with this analogy to parole conditions is needed. Here the starting point is very different to parole. At the front end, the Bail Act recognises the presumption of innocence. The effect of which is a presumption as to bail enshrined in the Bail Act and s 24(b), NZBORA. A defendant, if not bailable as of right,[76] "must be released by a court on reasonable terms and conditions unless the court is satisfied that there is just cause for continued detention."[77] Conversely, no similar presumption operates with respect to parole, leading to the imposition of conditions. The offender is convicted and sentenced. Broadly, s/he has no entitlement to parole; it is privilege,[78] subject to protecting against arbitrary detention under s 22, NZBORA.

51. This matters when considering the proportionality, reasonableness, and gravity of restriction caused by bail conditions on a person not yet convicted of an offence (compared to what may be reasonable for a sentenced offender relative to their risk), and the degree of imposition on that person's liberty as a result.[79]

52. But still the Bail Act does not reach for a test akin to "undue risk" in s 7(3), Parole Act to guide its proportionality analysis and impose a higher barrier to calibrate in a defendant's favour any adjustments to bail conditions. In particular, s 8(1)(a) refers to three attendant risks relevant to "just cause for continued detention" or release on "reasonable terms and conditions"[80], namely: flight/failing to appear; interference with witnesses; and reoffending on bail. In all categories, risk is expressed as risk-simpliciter. None of the cases cited by the appellant in the bail context suggest any threshold of risk must be established to maintain bail

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76 Bail Act 2000, s 7(1)-(2).

77 Bail Act 2000, s 7(5).

78 Parole Act 2002, s 28(1AA).

79 This comparison was recently made by the High Court of Northern Island in *Mackle, Re Application for Judicial Review* [2023] NIKB 13 (17 February 2023) at [41], [43], in which the applicant sought the removal of restrictive travel conditions of his release on licence, applicable to terrorist-related offenders: "In his submissions, the applicant drew a comparison between his position and that of persons subject to bail; but that ignores the fundamental point that the latter enjoy the presumption of innocence. …The applicant's analogy with an individual on bail was designed to emphasise his point that it would be inconceivable that bail conditions would be tightened or amplified if the individual had been complying with his conditions up to that point. However, I accept the respondent's submission that that is a false comparison because it adopts the wrong starting point as its premise."

80 Bail Act 2000, s 7(5); New Zealand Bill of Rights Act 1990, s 24(b). Variations of bail conditions are made via s 33.

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conditions.[81] Rather, the assessment again involves proportionately applying the principle of minimum restriction, as the Court of Appeal summarised in *R v Keefe*:[82]

> [20] In determining what terms of bail are "reasonable" the Court must balance the likely restrictions on an alleged offender's liberty (on the one hand) against the interests of the community in ensuring that alleged offenders do not flee, interfere with evidence or re-offend while awaiting trial (on the other). Viewed in that way "reasonable terms and conditions" of bail can be seen as part of a process of managing the risks of flight, interference with evidence and re-offending. Terms of bail should reflect the least restrictive outcome possible consistent with the community's expectation that adherence to bail terms will be properly monitored.

53. In the Sentencing Act context, this Court held in *Woods v Police* the provisions of s 15, Parole Act "are co-opted by the Sentencing Act to define the special conditions that can be imposed by the sentencing court" in relation to short term imprisonment.[83] This can be seen both in the identical purposes for the setting of special conditions in s 93(3), Sentencing Act to those in s 15(2)(a)-(c), Parole Act[84] and the importing of the types of conditions described in s 15(3).[85] Powers to vary special conditions on application by an offender or probation officer are then set out in s 94. Importantly, no concept of "undue risk" was similarly co-opted into the Sentencing Act, nor does it inform the Court's approach to setting or varying special conditions for those released under short term sentences of imprisonment.

54. The type of proportionality analysis utilised under the identical and related provisions of s 93, and the principle of minimum restriction under s 8(g) "to impose

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81 Cases such as *R v Fatu* (2005) 22 CRNZ 524 (CA) at [8], [10], and the Court's reminder "of the need to analyse the need for the justification for, and efficacy of, unusual terms of bail" reflecting NZBORA considerations, does not assist the appellant. First, Mr Grinder's whereabouts and monitoring conditions are not "unusual" or akin to the kind of restriction imposed in Fatu. Here Mr Grinder's conditions are expressly contemplated under s 15(3), not recrafted in unique ways by the Board needing further justification as to why – there is a rational nexus to Mr Grinder's offending risk against children (rather the issue in Mr Grinder's case is about the level of such risk to support the conditions). Second, the issue in Fatu was not resolved by reference to qualifying levels of risk to justify the condition, the problem was there was "no rational link between the curfew and the apprehension of risk". Ultimately the condition was varied through imposition of a different, less restrictive reporting condition.

82 *Keefe v R* [2004] NZCA 155 (22 July 2004); CA162/04 & CA187/04 at [20]. See application of curfews relating to sexual offending, "sufficient nexus between the curfew and the identified risk", the presumption of innocence and application of principle of minimum restriction in the balancing exercise for bail conditions: *Wanoa v Police* [2021] NZHC 2967 at [40], [42]-[46].

83 *Woods v Police* [2020] NZSC 141; [2020] 1 NZLR 743 at [21].

84 Sentencing Act 2002, s93(3): "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 victims of the offender."

85 Sentencing Act 2002, s 93(2B), "other than a residential restriction condition referred to in section 15(3)(ab) of [the Parole Act]".

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the least restrictive outcome that is appropriate in the circumstances",[86] is instructive. Viewed through the lens of s 7(2)(a)'s proportionality assessment, it reveals how a decision under ss 56-58 to vary special conditions set for the purpose of reducing the risk of reoffending by a paroled offender under s 15(2)(a), has no direct connection to the threshold set by s 7(3) relating to undue risk.

55. The Attorney-General submits the High Court did correctly identify, when drawing on the Sentencing Act's methodology, the test applicable under s 7(2)(a):[87]

> "[51] I accept Mr Ewen's submission that assessment of risk must be sufficient to ensure that the special conditions imposed (or retained) have a rational nexus to the s 15(2) purposes and are reasonably necessary and proportionate. The combined effect of s 8(g) of the Sentencing Act 2002 and s 15 of the Parole Act is—as Justice Williams put it in *Patterson v R*[88]—similar to that which a Bill of Rights approach would require. That is, a rational nexus to the legislative purpose and to be reasonably necessary and proportional when considered with other conditions to be imposed."

56. This rational nexus requirement illustrates the test to impose or vary conditions under the Sentencing Act is not focused on gradients or qualifying thresholds of risk per se. Rather, the proportionality assessment asks whether the condition is sufficiently connected to reducing that identified risk (at whatever level it may be) and is both reasonable and proportional. In this way, the Attorney-General submits the point of allowing special conditions to be varied is to ensure they are always serving the right purpose (so they do not become too onerous or last too long), and less so about identifying the precise level of risk posed. This is desirable to avoid an overly formulaic approach on qualifying levels of risk in highly individualised cases before the Board.

57. The Court of Appeal in *Patterson* neatly encapsulates such method within a proportionality analysis, drawing on the principles identified in *R v Jannsen.*[89] While the power under s 93(3) confers a broad discretion and is expressly limited only by the requirement a special condition be designed to serve one or more of the

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86 Sentencing Act, s 8(g): "In sentencing or otherwise dealing with an offender the court—(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A".

87 High Court Judgment at [51]. **COA, 05.0044**.

88 *Patterson v R* [2017] NZCA 66 at [15]-[18]; *Patterson v R* [2017] NZHC 49 at [38].

89 *R v Jannsen* [2007] NZCA 450 at [15]-[17], analysed and applied in *Patterson v R* [2017] NZCA 66 at [15]-[18].

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purposes in s 93(3) – meaning there must be a rational nexus with one of those purposes, the power is nonetheless subject to "implicit limits":[90]

57.1 Special conditions must be "tailored to the offender's circumstances; [and] must address his[/her] *particular* risk of reoffending, or prospects of rehabilitation, or victims." (emphasis added)

57.2 The discretion must be exercised consistently with s 8, Sentencing Act, particularly ss8(a)-(e) requiring any condition imposed relate clearly to "the precise criminality", and that must include an assessment of the effect of the offence on any victim (s 8(f)).

57.3 The "least restrictive sentence" principle,[91] or "least restrictive outcome appropriate", applies to special conditions (s8(g)). "Account must be taken of any factor personal to the offender that would make a usual sentence disproportionately severe" (s8(h)). "Personal, family, whanau, community and cultural factors can be no less relevant" (s 8(i)), given "one of the purposes of conditions on release is… to rehabilitate and to assist the offender reintegrate."

57.4 Because the special conditions able to be imposed derive from s15(3), Parole Act, s 7(2)(a) has "implicit and helpful place" to ensure conditions are not "more onerous, or last longer, than is consistent with the safety of the community".

58. The Attorney-General submits a similar coherent approach to a proportionality analysis grounded in the Act's purposes, to borrow this Court's phrase in *Woods v Police*, can be "co-opted" back into the Parole Act via s 7(2)(a). And in doing so, there is nothing to suggest the demands and rigour of a s 6 NZBORA analysis to interpret and apply the variation power in s 58 consistently with an offender's protected rights to liberty are in conflict by the singular absence of an "undue risk" mandatory threshold. Demonstrable and justified limitations must be shown through the application of the principle of minimum restriction. That is achieved through the deployment of the proportionality analysis required of the Board by

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90 *Patterson v R* [2017] NZCA 66 at [16]-[17].

91 Akin to and based on the principle of minimum restriction, or minimal impairment, within the proportionality exercise required for justified limitations under s 5, NZBORA.

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s 7(2)(a). The Court of Appeal below is therefore correct that here, when properly applied and without more, an "NZBORA consistent approach to conditions is therefore already inbuilt into the Parole Act scheme."[92]

Looking wider –"undue risk" relevant to parole in Canada

59. The closest international comparator to the Parole Act is Canada's Corrections and Conditional Release Act 1992 (CCRA).

60. While there is no equivalent to s 7(3) as an interpretative tool, the concept of "undue risk" similarly filters through the CCRA with respect to release and recall decisions. For instance:

60.1 First, parole may be granted if "the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving" (s 102(a)).

60.2 Other release decisions for the purposes of "temporary release" or "temporary absence" (ss 17, 17.1); "(un)escorted temporary absence" (s 116); "work release" (s 18(2)(a)), are possible where the offender "will not, by reoffending, present an undue risk to society" during the authorised absence.

60.3 On the other side are recall decisions. If the Board is satisfied "the offender will, by reoffending before the expiration of their sentence according to law, present an undue risk to society", the Board may terminate/revoke the parole of the offender (s 135(5),(7)).

60.4 In contrast, the provisions relating to "conditions of release" (s 133), and variations or applications for "relief from conditions" (s 133(6),(7)),[93] are then silent as to undue risk.[94]

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92 Court of Appeal Judgment at [51]. **COA, 05.0029**.

93 Few cases relating to variation of conditions, relevant to the issues in this appeal, exist. In *Tozzi v Canada (Attorney General)* [2007] ACF no 1085, 2007 CF 825, the applicant sought variation of his travel prohibition and argued the Board, at [20] "applied the wrong test, that is, an absence of risk rather than an undue risk or a significant increase in risk or an unacceptable risk to public safety". In rejecting that proposition, the Federal Court held: "[43] The Act and the Regulations do not provide any specific test to be applied during an assessment under subsection 133(6) of the Act. This is a discretionary decision. Naturally, the NPB must be guided at all times in carrying out its mandate by the principles set out in sections 100 and 101 of the Act. In this respect, the Court notes that, in its Manual, the NPB indicates that it must take into account "any factor that is relevant in determining whether the travel might result in any increase in the offender's risk to society".

94 Section 133(6), CCRA provides: The releasing authority may, in accordance with the regulations, before or after the release of an offender, (a) in respect of conditions referred to in subsection (2), relieve the offender from

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60.5 Further, s 101(c) imports the principle of minimum restriction, akin to s 7(2)(a): "parole boards make the least restrictive determinations that are consistent with the protection of society".

61. What can be seen is a similar link between release and recall decisions with respect to the standard of risk – undue risk – to be applied, and its noticeable absence in variation powers (discussed further below). However, the absence of an equivalent to the Parole Act's s7(3), may limit the CCRA's utility as a true comparator.

Release vs variation decisions linked but not synonymous

62. On the High Court approach the Board is required to apply the undue risk test to all decisions relating to conditions of parole – from their imposition at release, long into their continuation, variation and discharge for the length of an offender's parole. The Court of Appeal rightly rejected this and held "decisions on release and special conditions (or their discharge and variation) are linked but different."[95]

63. Conversely, there is synergy between release and recall. They are "counterparts to one another".[96] The United Kingdom Supreme Court recently noted this in *Hilland*,[97] stating: "The practice in relation to revocation and recall to prison has symmetry with the practice in relation to release on licence."[98] As such, it makes coherent sense release and recall would be subject to the same threshold, as directed by s 7(3).[99]

64. This can be seen when considering the difference in purpose between release on parole (and the undue risk assessment required by s28(2) to permit release) and a subsequent application to vary conditions set at the time of release. The release decision will have factored in the setting of necessary conditions in concluding

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compliance with any such condition or vary the application to the offender of any such condition; or (b) in respect of conditions imposed under subsection (3), (4) or (4.1), remove or vary any such condition.

95 Court of Appeal Judgment at [44].

96 Court of Appeal Judgment at [40], [43], [48] "release and recall should be subject to the same threshold because they are counterparts to one another", [52].

97 *Hilland, Re Application for Judicial Review (Northern Ireland) (Rev1)* [2024] UKSC 4.

98 *Hilland* at [80]. The Supreme Court explained further at [79], in the context of Northern Ireland: "The test for revocation of the licence of a mandatory life sentence prisoner and their recall to prison is consistent with the practice in relation to the release of a mandatory life sentence prisoner on licence. It would be incongruous if a prisoner who had been released on licence because the risk of serious harm which they pose can be safely managed in the community was subject to recall based on their posing a risk of harm. If the revocation and recall practice depended on a risk of harm, then the practice in relation to release on licence would be undermined by the practice in relation to revocation and recall." Thus a lower threshold of "risk of harm" could not be applied to recall decisions if an offender is released on licence while still a risk of "serious harm" that could be safely managed in the community.

99 Court of Appeal Judgment at [48], discussing *Miller v New Zealand Parole Board* [2010] NZCA 600 at [129].

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release of the offender will not pose an undue risk to the safety of the community or any person as at that date. That is what happened for Mr Grinder.[100] Post-release, and over time – especially for a person on life parole – the issue of risk can be expected to evolve and change.

65. What is the Board's purpose here? The overriding direction in s 28(2) requires the Board to be satisfied when releasing an offender on parole they will not pose an undue risk "within the term of the sentence". That means when releasing an offender on preventive detention, the Board must be satisfied for the whole of that offender's life on parole they will not pose an undue risk to the safety of the community or any person/class of persons. That is a heavy duty indeed.

66. How is such a duty to be meaningfully achieved? This is where the supervision by an offender's probation officer over time of special conditions plays a vital role, alongside the power of a probation officer to support or apply for variations of conditions under s 56(2) to make sure they are always achieving their purpose – for those under s 15(2)(a) particularly, to prevent an offender's risk rising to the level of undue, and thereby prevent the risk of recall for that offender. For a probation officer, the objective is to keep an offender as far away from the risk of recall as reasonably possible when managing them on parole, as part of a safe and effective reintegration strategy to ensure a successful parole.

67. If the Board and Community Corrections are permitted to only manage an offender just below the level of undue throughout their parole to avoid restrictive impacts of conditions on low-risk offenders, then that is a very constrained eye of the needle they must thread. And one which is inherently unscientific and fraught to measure risk in such a precise way when managing conditions. The Attorney-General submits this is a poor reintegration strategy to allow an offender to teeter on the brink of this threshold if conditions cannot be imposed, varied or discharged with the purpose of bringing an offender's risk as low as reasonably possible, in a proportionate manner required by s 7(2)(a).

68. This invites the suggestion if a paroled offender poses no undue risk on a s 7(3) analysis (which by definition they must if they are living in the community on

[100] Decision of the Board, 1 March 2019 (Release decision) at [11]: "…we are satisfied … Mr Grinder does not pose an undue risk to the safety of the community. This view takes account of the support and supervision that is available to Mr Grinder in the community and the special conditions mitigating risk which we will be imposing. Of course our view assumes strict compliance with those conditions."

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parole), then the parolee is *entitled* to have their special conditions removed. Beyond accepting a more than *de minimis* risk must exist so it can be reasonably measured, it is not logical on a variation application by a serious indeterminate sentence offender, such as Mr Grinder (who may be considered a low risk of reoffending), that the Board is estopped up front from continuing conditions tailored to the very risk level (undue risk) the conditions are intended to prevent or manage.

69. It is equally logical to conclude those conditions sought to be removed are succeeding, along with other factors, in creating that outcome and ought not yet be tinkered with (bearing in mind how dynamic risk, vs static risk, responds to changing circumstances) – at least until such time as it is apparent the condition is not in fact needed, and no longer serving a legitimate purpose. The answer to that question may lead to the condition remaining in place, balanced against the requirements of s 7(2)(a), while the offender is a low risk for a reasonable precautionary period. This should not prevent other reasonable accommodations being made for the offender in such circumstances to lessen the impact proportionately of the suite of conditions as a whole.

A bird's eye view for Mr Grinder – test delivers proportionality and NZBORA compliance

70. The variation of the sort at issue in this appeal is one made by Mr Grinder to remove a primary condition (compared to one thought as supplementary) imposed explicitly to reduce risk; to achieve something less onerous than considered warranted at release. The application is predicated on the basis Mr Grinder was deemed not an undue risk at release and remains so on parole.

71. It was not an application by his probation officer to add to or vary conditions to further restrict him on parole to address emerging risk. Such should necessarily be met with evidence showing risk is likely to materially increase without the variation sought. In the latter context, the probation officer makes the variation application *to avoid* the parolee reaching the level of undue risk that might lead to breach of conditions or otherwise warrant an application for recall under s 61(a): "the offender poses an undue risk to the safety of the community." Even here, the application to vary must necessarily assume the offender is still not yet an undue risk. If s/he were, then recall would be sought. It may even be the offender is teetering on the brink of undue risk and a variation application is urgently made as

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a last throw of the dice to avoid recall. Here undue risk is not irrelevant and may well be considered. In other contexts, it may play no role. This points to the statutory rationale for not including an express and *mandatory* requirement on the Board to assess undue risk when determining an application to vary.

72. It also indicates the purposes of special conditions, and their monitoring over the period of their duration, is not to police an offender based solely on are they/aren't they an undue risk – that assessment has been pre-made at release. It is to stabilise an offender on release, mitigate their risk level so it does not rise to the level provoking recall, and then continues to decrease over time allowing greater alleviation of restrictions on liberty for an offender as circumstances permit.[101] One should expect the longer an indeterminate sentence offender spends successfully on parole, there will be a commensurate and proportionate decrease in restrictions on liberty.

73. For Mr Grinder, the evidence emerging at the time of his application was he was on the right path and his risk was decreasing. In this context what does an undue risk analysis achieve on his variation application? The Board accepts he is not an undue risk. The purpose of the whereabouts condition at this stage was essentially as the Board stated: to not provide him with an opportunity of developing relationships with children out of sight of adults or those supervising him. This was imposed, and continued to be considered as, "a significant protective factor".[102] So here Mr Grinder, while assessed as low risk, was asking for something that struck at the heart of his long-assessed risk to children: to go places unsupervised or unmonitored where he could have access to them. Allowing such, even though he may not have been an undue risk when he applied, may also prospectively create the conditions for such risk to occur relatively early in his parole.[103] It is not consistent with the scheme of the Act for such to be discarded in the methodology

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[101] This especially is picked up by the Court of Appeal at [44]: "That is because [the special conditions, or variation of them] may assist with stabilising the offender so that their risk level does not rise to an undue one and so trigger a recall. Conditions directed at the offender's rehabilitation and reintegration may even assist to reduce an offender's risk to a negligible or de minimis level, and conditions with this purpose may still be imposed as consistent with the ongoing safety of the community."

[102] Variation Decision at [13]-[15]. See Court of Appeal Judgment at [45] as to factors broadly relevant to Mr Grinder's risk, beyond an undue risk assessment vis-à-vis the whereabouts condition. See also description in Court of Appeal Judgment at [21], [30]-[33].

[103] This gives context to the Panel Convenor's comment at [30], which was rejected by Gwyn J: "Special conditions mitigate risk. Sometimes they are necessary to ensure that an offender is no longer an undue risk. Sometimes they simply enhance risk mitigation for an offender who is already assessed as falling well below the undue risk threshold." Review Decision of Panel Convenor under s67, Parole Act 2002, 27 January 2022.

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relevant to determining a variation application by an offender, in deference to a threshold set at "undue risk".

74. This is where a proportionality analysis under s 7(2)(a), not an undue risk analysis, is most instructive when considering variation applications compared to the issues affecting release decisions. There is no vagueness, need for further precision, or yardstick of "undue risk" required to measure that assessment by. Its value is in its flexible simplicity, and clear tethering to the interpretative principles of ss 6 and 5 of the NZBORA. It is essentially demanding the least rights-impinging conditions are adopted by Board, maintained, or necessarily varied so an offender is not subjected to more onerous or too lengthy special conditions of parole, as concluded by the Court of Appeal.[104]

Relief and costs

75. For the reasons above, the Attorney-General submits the Court of Appeal decision is correct and should be upheld.

76. In terms of costs, irrespective of the outcome and consistent with the Court of Appeal's costs decision, it is appropriate for costs to lie where they fall in all the circumstances of this proceeding. Further, if the Attorney-General succeeds on this appeal, she does not seek to disturb the costs order made in the High Court in favour of the appellant. [105]

7 October 2024

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Charlotte Griffin / Tommy Zhang
Counsel for the first respondent

TO: The Registrar of the Supreme Court of New Zealand
AND TO: The appellant, second respondent, the interveners.

[104] At [51] on the application and role of the NZBORA, ss6 and 5.

[105] *Grinder v New Zealand Parole Board* [2022] NZHC 3188 at [131]; Minute of Gwyn J (costs), 16 February 2023.

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