

BETWEEN                      BRETT DAVID GRINDER

AND                              ATTORNEY-GENERAL OF NEW ZEALAND (FOR AND ON  
BEHALF OF THE DEPARTMENT OF CORRECTIONS)

AND                              NEW ZEALAND PAROLE BOARD

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**SUBMISSIONS ON BEHALF OF THE NEW ZEALAND CRIMINAL BAR ASSOCIATION**

Dated: 23 September 2024

Date of hearing: 22 October 2024

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Counsel for the New Zealand Criminal Bar Association certify that these submissions  
contain no suppressed information and are suitable for publication



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## SUBMISSIONS ON BEHALF OF THE NEW ZEALAND CRIMINAL BAR ASSOCIATION

E TE KŌTI TĒNĀ KOE:

MAY IT PLEASE THE COURT:

### INTRODUCTION

1. Decisions as to whether an offender is to be released are judged against a standard of whether they pose an “undue risk” to the community.<sup>1</sup> Similarly, decisions as to whether an offender is to be recalled to prison are judged against a standard of whether they pose an “undue risk” to the community.<sup>2</sup> In both situations, the necessity and effectiveness of any special release conditions are relevant to the determination as to whether the offender poses an undue risk to the community.<sup>3</sup>
2. Section 58(1) of the Parole Act 2002 confers a discretion to the Parole Board vary or discharge any release condition imposed by the Board on an offender. The imposition of such conditions will occur when the determination that the offender no longer poses an undue risk to the community is made and they are released. However, s 58 does not contain a standard by which the variation or discharge of such conditions is deemed appropriate at a later date when an offender’s risk profile changes.
3. This appeal concerns an issue of interpretation: is the Parole Board required to assess if an offender poses an undue risk if a special condition of release is varied or discharged under s 58(1)?
4. The appellant argues that the undue risk threshold is implied into the decision-making process under s 58 as it provides continuity with other decisions relating to an offender’s release. The Court of Appeal held that continuing a special condition will be justified when they address an offender’s risk of reoffending even when that risk is no longer undue (provided that the condition is not more onerous, or last longer, than is consistent with the safety of the community).<sup>4</sup>
5. For the reasons set out below, the New Zealand Criminal Bar Association favours the appellant’s interpretation as it is best calculated to provide certainty in the decision-making process and will better protect guaranteed rights of those who are subject to special release conditions.

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<sup>1</sup> Parole Act 2002, s 28(2)

<sup>2</sup> Parole Act 2002, s 61(a); *Miller v New Zealand Parole Board* [2010] NZCA 600

<sup>3</sup> Parole Act 2002, s 28(2)(a)

<sup>4</sup> *Attorney-General v Grinder* [2023] NZCA 596, at [51]

6. Mindful of the need not to repeat arguments, these submissions focus on one passage of the Court of Appeal's decision which bears on the application of the New Zealand Bill of Rights Act 1990 ("NZBORA"). At [51], the Court of Appeal held that a "NZBORA-consistent approach is already inbuilt into the Parole Act scheme" by virtue of s 7(2)(a) – that special conditions must not be "more onerous, or last longer, than is consistent with the safety of the community."<sup>5</sup>
7. It is respectfully submitted that the Court of Appeal erred in this respect, and that the correct interpretation is one which utilizes the undue risk threshold to protect against arbitrary decisions that impinge on guaranteed rights. While s 7(2)(a) does contain a balance between competing interests, its utility as a suitable proportionality enquiry is undercut if a low risk threshold is used as the counterweight against guaranteed rights. In order to be compliant with s 5 of the NZBORA, it is necessary to adopt the undue risk threshold to guide the exercise of the s 58(1) discretion.

#### **INTERPRETATION CONSISTENT WITH THE RIGHTS CONTAINED IN THE NEW ZEALAND BILL OF RIGHTS ACT 1990**

8. Special release conditions operate to limit certain rights detailed in the NZBORA, including: the right to freedom of movement,<sup>6</sup> the right to freedom of association,<sup>7</sup> and those rights affirmed by New Zealand's commitment to International Covenant on Civil and Political Rights.<sup>8</sup>
9. The Court of Appeal found that a NZBORA compliant interpretation of the Parole Act does not require the necessity of special conditions be tested against the undue risk threshold. It held that the limitation of rights is reasonable, as is required by s 5 of the NZBORA, given that the imposition and continuation of special conditions is subject to a proportionality enquiry in s 7(2)(a). That is to say, so long as the conditions address some risk (there being a connection between the condition and the risk presented by the offender), and that they are not too onerous (in proportion to some risk), their imposition and continuation will be compliant with the NZBORA.

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<sup>5</sup> *Attorney-General v Grinder* [2023] NZCA 596, at [51]

<sup>6</sup> New Zealand Bill of Rights Act 1990, s 18

<sup>7</sup> New Zealand Bill of Rights Act 1990, s 17

<sup>8</sup> See, for example: Article 9(1) of the ICCPR: Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law; Article 17(1) of the ICCPR: No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation; Article 10(1) of the ICCPR: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

10. The New Zealand Criminal Bar Association submits that this interpretation is not consistent with the NZBORA as it presupposes a justified limitation whenever condition addresses some risk, rather than one that is undue to the safety of the community. A low risk threshold will operate to readily displace individual rights because it can scarcely be stated that a condition will be more onerous in comparison to the need to avoid a non-zero risk to the safety of the community. In essence, the Court of Appeal's approach to continuing special conditions will be readily met whenever there is some connection between the condition and a risk to the community, but it is not apt to ensure that there is a proper balance between the limitation and an individual's guaranteed rights.<sup>9</sup>
11. While the approach adopted by the Court of Appeal has the veneer of a rights-based analysis, it lacks the substance necessary to give proper meaning to those rights. Section 7(2)(a) creates a balance between the necessity of conditions that impinge on an individual's rights and the safety of the community, but if the safety of the community is to be judged by reference to a low threshold there is too little room to uphold the individual's rights. The value of a proportionality enquiry to vindicating rights will be dependent on the relative counterweight. Section 7(2)(a) provides the mechanism by which a balancing may be achieved, but it is not compliant with the NZBORA if its content is unable to strike the right balance between competing interests.
12. The undue risk threshold is the appropriate counterweight. It is applicable at the stage when an offender is released, and it dictates the circumstances when an offender is liable for recall. It is the linear standard by which decisions concerning an offender's release are to be determined, and it should apply to decisions relating to the continuation of the conditions that were imposed at the time of release. Consistent with the threshold applicable to decisions at the time of release and recall, the undue risk threshold carries sufficient substance to operate as a counterweight to accord meaning to an individual's rights.
13. Faced with a choice between two risk thresholds, and in the absence of clear guidance as to which threshold should guide the s 58(1) discretion, it is submitted that an interpretation that is more consistent (or at least less inconsistent) with affirmed rights should be preferred.<sup>10</sup> Section 6 of the NZBORA provides:

**Interpretation consistent with Bill of Rights to be preferred**

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

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<sup>9</sup> *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 at [104]

<sup>10</sup> *D v New Zealand Police* [2021] NZSC 2, (2021) 29 CRNZ 552 at [101]–[102] per Winkelmann CJ and O'Regan J and [259]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91].

14. In *Fitzgerald v R*,<sup>11</sup> Winkelmann CJ explained:

[48] Taken on its own, in a case such as this, s 6 is naturally read as creating a starting presumption that a rights-consistent meaning should be given to enactments where the application of that enactment to a particular case engages the affirmed rights and freedoms, in the sense that it touches upon those rights and freedoms. And it makes clear that a rights-infringing interpretation is to be avoided where possible. This construction of s 6 is consistent with the rights-affirming and promoting purpose of the Bill of Rights, placing Bill of Rights-consistency at the heart of the statutory interpretation process. For this reason, I see s 6 as the central provision and the starting point for the interpretive task where the application of an enactment to a particular case engages the affirmed rights and freedoms.

[...]

[56] But the s 6 direction is not simply a statutory embodiment of the principle of legality. It requires that when the courts undertake the interpretive exercise, they must presume a rights-consistent purpose. Section 6 therefore mandates a more proactive approach to interpretation – proactively seeking a rights-consistent meaning.

15. In *Dotcom v Attorney-General*,<sup>12</sup> this Court stated:

[100] The Bill of Rights Act plays an important role in the interpretation of the scope of powers affecting protected rights that are expressed in broad or general terms. Legislative provisions conferring discretions and powers are, like all statutory provisions, to be read in accordance with s 6 of the Bill of Rights Act [...].

16. And in *Woods v Police*,<sup>13</sup> this Court also explained:

[64] Relevant also to the task of statutory interpretation is the principle of legality — the principle that fundamental rights cannot be overridden by general or ambiguous language. The matter was put in the following way by Lord Hoffmann in the case of *R v Secretary of State for the Home Department*, ex parte Simms:

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<sup>11</sup> *Fitzgerald v R* [2021] NZSC 131; [2021] 1 NZLR 551

<sup>12</sup> *Dotcom v Attorney-General* [2014] NZSC 199, [2015] 1 NZLR 745

<sup>13</sup> *Woods v Police* [2020] NZSC 141; [2020] 1 NZLR 743

“ ... the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.”

17. Applied to the interpretation of the Parole Board’s discretionary power conveyed by s 58, it is submitted that a rights-based interpretation should be preferred when determining the applicable risk threshold. The approach advocated by the appellant - that the continuation of special conditions must be judged by reference to the undue risk threshold – upholds an individual’s rights in that it limits the extent of intrusion to that which is required to respond to their risk profile in a way that is consistent with the safety of the community.
18. To the extent that s 7(2)(a) contains the structure of a proportionality enquiry that is capable of balancing guaranteed rights against limitations imposed by way of special conditions, an interpretation that utilises a lower risk threshold is insufficient to give proper meaning to an individual’s rights. And, where a less inconsistent interpretation is available (by implying the undue risk threshold), that interpretation should be preferred.

## **CONCLUSION**

19. For the reasons set out above, the New Zealand Criminal Bar Association respectfully submits:
  - That the “undue risk” threshold informs the Parole Board’s assessment at the time of the imposition of special conditions and also their variation or discharge; and
  - That special conditions are designed to take an offender from “undue risk to something less than that.”

20. As outlined in the appellant's submissions, that result can be reached by way of incorporating the undue risk threshold as a necessary feature of the s 58(1) discretion in a manner that is consistent with the scheme of the Parole Act. Such an approach, the New Zealand Criminal Bar Association submits, is best calculated to provide certainty in the decision-making process and will better protect fundamental rights of those who are subject to special release conditions.

Dated this 23rd day of September 2024

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**Sumudu Thode / Justin Wall**

Counsel appearing on behalf of the New Zealand Criminal Bar Association