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** First respondent
AND	**NEW ZEALAND PAROLE BOARD** Second respondent

SUBMISSIONS FOR NEW ZEALAND PAROLE BOARD

Dated: 2 October 2024

Counsel for the New Zealand Parole Board certify that these submissions contain no suppressed information and are suitable for publication

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TABLE OF CONTENTS

TĒNĀ, E TE KŌTI | MAY IT PLEASE THE COURT:

OVERVIEW AND SUMMARY

1. The question for this Court is "whether 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". This question concerns the powers of the New Zealand Parole Board (the **Board**) under ss 29AA and 58 of the Parole Act 2002 (the **Act**) to impose, vary (including by addition)[1] or discharge "release conditions", which are "the standard release conditions and any special conditions imposed by the Board or the sentencing court and that apply to an offender released from detention".[2] These submissions refer to the power in s 58 as the "**fine-tuning power**" and they refer to the outcome of the Board's exercise of the fine-tuning power as the Board's "**fine-tuning decision**". These defined terms are chosen because they reflect the nature of the task that the Board undertakes pursuant to s 58: to fine-tune the release conditions of offenders who are in the community through the grant of parole.

2. The question for this appeal is whether the "undue risk" test applies to the exercise by the Board of the fine-tuning power. The High Court answered this question in the affirmative, holding that the "undue risk" test must be applied by the Board in exercising the fine-tuning power,[3] with the consequence that release conditions have to be justified under s 58 as taking the offender "from undue risk to something less than that".[4] The Board took the unusual step of appealing to the Court of Appeal to ensure that precedential legal issues of concern to it were able to be clarified through the appellate courts.[5] The Board's

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1 "Variation" is defined in s 4(1) of the Parole Act 2002: in relation to release conditions it "includes the suspension and addition of conditions, and the variation of their duration".

2 Section 4(1) definition of "release conditions".

3 *Grinder v New Zealand Parole Board* [2022] NZHC 3188 at [47]–[50].

4 At [47].

5 Relevantly discussed in *Attorney-General v* Grinder [2023] NZCA 596, [2023] 3 NZLR 760 [**CA Judgment**] at [2]; and Board notice of appeal at [1]; **[101.0034]**. The parties through a 7 February 2023 joint memorandum agreed that a priority fixture was appropriate on account of the precedential implications of the High Court's

position, which the Court of Appeal agreed with, was that the "undue risk" test did not apply to the exercise by the Board of the fine-tuning power.[6]

3. On this approach, *every* decision under the Act in respect of special conditions is constrained by ss 7 and 15 of the Act. Together, those provisions identify the requirements that must be met, and the policies and objects that must be served, in order for special conditions to lawfully be in place. By that means, the Board's special conditions discretions (including but not limited to the fine-tuning power) are 'tethered' (i.e. fettered) in the usual interpretive way.[7]

4. As the Court of Appeal held[8] (in line with a number of earlier High Court decisions[9]), the fettering of ss 29AA and 58 takes this form: s 15(2) prescribes lawful purposes for which special conditions may be imposed. Provided that special conditions (i) fall within the scope of one or more of those purposes, (ii) have a rational nexus to the risks the offender is assessed to pose; (iii) are consistent with the safety of the community (s 7(1)); and (iv) are reasonably necessary and proportionate (s 7(2)(a)),[10] the special conditions will be lawful.

SIGNIFICANCE OF THE ISSUE

5. The correct test for the exercise of the fine-tuning power is a question of law.

6. The significance for the Board of the answer to that legal question explains why the Board is presenting submissions on points of law as a party in this Court (as it did in the Court of Appeal below). The Board does, however, not address

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decision, and the public interest in timely confirming the correct legal approach to a power that the Board must and does exercise very frequently. The joint memorandum also proposed the Attorney-General as the lead appellant. Goddard J agreed in a resulting minute and made directions to urgently determine the appeal accordingly.

6 In the Court of Appeal the Board was also concerned about the conceptual approach the High Court appeared to require for assessing special conditions (see CA Judgment, above n 5, at [38]). Based on the appellant's submissions at [85], this issue is no longer a live one.

7 *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42 at [50]: a decision-maker "must act within the scope of the authority conferred by Parliament and for the purposes for which those powers were conferred".

8 CA Judgment, above n 5, at [41] and [51]–[52].

9 See, for example, *Pengelly v Parole Board* [2023] NZHC 3768 at [74]–[76]; *Polyblank v Parole Board* [2019] NZHC 3425 at [56]–[57] and [61]; *Smith v Parole Board* [2018] NZHC 955 at [16] and [33]–[46]; and *Wilson v Parole Board* [2012] NZHC 2247 at [63]–[65] (Mr Wilson's appeal was dismissed as moot: [2013] NZCA 190 at [9]).

10 Being an assessment that requires consideration of the conditions *as a suite*: see CA Judgment, above n 5, at [46].

factual matters that are specific to the appellant.[11] Contrary to the appellant's submission, the Board's presence as an appeal party is not unorthodox. It not uncommonly appears through counsel to explain how it understands the Act to apply and why.[12] Notably, the United Kingdom's Parole Board takes the same approach.[13] Further, it is not uncommon for quasi-judicial bodies to appear and be heard on appeal even when the Crown is appearing (as it is here).[14] There is, of course, a very important limit to this: a statutory body like the Board has no role to advocate the merits of its past decisions. The Board respects that important limit in this Court (as it did in the Court of Appeal).

7. The Board has taken this approach through the appeal process because the test that applies to the exercise of the fine-tuning power is a matter of significance for its day-to-day operations.[15] That is for three overlapping reasons: (i) the High Court articulated a different and more constrained legal approach to the fine-tuning power than the long-standing approach the Board had been applying to that power; (ii) the approach to be taken will impact offenders' reintegration and rehabilitation within the community, which goes to why parole exists as a component of sentencing; and (iii) from a practical perspective the Board's

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11 One consequence of this approach is that the Board has not sought to deprive the appellant of the fruits of his High Court success — as the Board explained in its leave submissions at [2]–[3]. This reflects the fact that the Board's interest is in clarifying the law. The Board notes that the appellant's submissions put in issue some of its more recent decisions concerning the appellant. Those decisions post-date the judgment under appeal, and were identified by the appellant as irrelevant in the case on appeal, one consequence of which was that the appellant refused to include in the case on appeal associated documents from the Board's record of proceedings that informed and as such must be read alongside those Board decisions.

12 See, for example, *Miller v Parole Board* [2010] NZCA 600 (leave refused: [2011] NZSC 26); *Harriman v Attorney-General* [2014] NZCA 544 (leave refused: [2015] NZSC 37); and *Pitceathly v Parole Board* [2018] NZCA 454, [2019] 2 NZLR 613.

13 See, for example, *R (o.a.o. Pearce) v Parole Board* [2023] UKSC 13, [2023] AC 807; *R (o.a.o. Sturnham) v Parole Board (No 2)* [2013] UKSC 47, [2013] 2 AC 254; *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738; and *R (o.a.o. Smith) v Parole Board* [2005] UKHL 1, [2005] WLR 350.

14 See, for example, *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [180] (Ms Casey KC, for the Environmental Protection Authority) and *Skerret-White v Minister for Children* [2024] NZCA 160, [2024] 2 NZLR 493 at [54] and [116] (Mr Mahuika, for the Waitangi Tribunal).

15 See also **[101.0034]** at [1]. Goddard J's minute of 8 February 2023 entering the appeal on the Fast Track in the Court of Appeal recorded at [7]: "There is a significant public interest in the prompt determination of this appeal, because of the implications of the High Court decision for future Board decision-making processes".

workload means the response given by this Court may set a significant precedent with substantive operational impacts.

8. The Board's workload is summarised in its annual reports. The most recent of those reports, for the period 2023–2024, relevantly records that the Board in that reporting period received 167 applications to vary parole conditions (excluding compassionate release), held 180 hearings as a result, and ultimately granted 157 applications. In the same period the Board received 129 applications to discharge parole conditions, 138 hearings were held as a result, ultimately leading to 118 applications being granted.[16] These statistics are highlighted because they illustrate the likely operational implications of the outcome of this appeal for the Board. Anticipating that the issues raised will be dealt with as a matter of principle, this Court's decision will have wide implications for how the fine-tuning power is exercised, and in turn how the Board discharges a significant role it has in the criminal justice system.

9. Its fine-tuning decisions are, of course, only a subset of the Board's workload. The Board deals with over 7,000 hearings per year.[17] For determinate sentences, each individual Board typically deals with around 10 hearings per day, each of approximately 35 minutes' duration. The hearing time includes a period of deliberation, following which a decision is dictated. Hearings for indeterminate sentences are longer. At present, they tend to be scheduled for approximately 55 minutes, reflecting the higher stakes for offenders, and the more difficult risk assessment issues that commonly arise for this category of offenders.

10. Preventive detention offenders who apply for a variation[18] of their release conditions are also first referred to the Board's chairperson for consideration of which Board should consider the application. If the application is for a minor change and is consented to by all parties, it can go before any Board that is

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16 The 2023–2024 annual report is not yet published online. But earlier annual reports are: see at < https://www.paroleboard.govt.nz/about_us/publications >.

17 In the 2023–2024 period, the number was 7,698. These included 5,517 parole hearings, of which 549 (or 10%) were for offenders on indeterminate sentences.

18 The focus of this paragraph is on applications to vary special conditions for indeterminate sentence offenders who are on parole. At the release stage, the Board commonly imposes s 29B conditions on indeterminate sentence offenders, which enables it to more closely monitor initial reintegrative progress in the community.

sitting. Applications not meeting those criteria are directed by the chairperson to be heard by a panel that is almost always chaired by the chairperson (or, failing that, an experienced panel convenor) and that includes a psychiatrist and/or a psychologist member and often a fourth lay member. Having a psychiatrist and/or a psychologist on the panel that considers the application is important for these applications because they often raise difficult issues of risk assessment that is assisted by discussions by the panel with the offender. Discussions with psychiatrists and psychologists often bring important insights to the hearing because of their knowledge of (for instance) child sex offender treatment programmes and the insights, and ongoing behavioural lessons, related to such programmes. If the application potentially effects victim interests and there is a VNR (registered victim notification entry), the chairperson as part of this process will refer the application to the victim for any comments to the Board and to the offender (subject to any existing confidentiality orders under the Act[19]). If the chairperson considers that the application to vary parole conditions is potentially contentious, the chairperson will also invite Corrections to instruct counsel.

11. Against that background, these submissions proceed in two main steps. First, they provide an overview of the regime for parole. This is important to understanding the circumstances that commonly trigger the exercise of the fine-tuning power, which helps in turn to identify the important purposes that this power serves within the criminal justice system. With that focus, the submissions then address the issue of whether, as a matter of law, the "undue risk" test should apply to the Board's exercise of the fine-tuning power.

THE PAROLE REGIME UNDER THE PAROLE ACT 2002

An overview of the system

12. Parole applies to offenders serving a long-term sentence, that is offenders serving a determinate sentence of imprisonment of more than 24 months, or offenders serving an indeterminate sentence.[20] Parole is the release of an

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19 Sections 13(3) and 13AB.

20 Parole Act, s 4(1) definition of "long-term sentence".

offender from prison to serve the remainder of their term of imprisonment in the community subject to conditions and supervision.[21] As such, parole is a component of an offender's sentence of imprisonment. That is to say, all offenders on parole are still serving their sentence, but are simply serving a portion of the term of imprisonment in the community instead of in prison.

13. As will be elaborated below, parole as a component of sentencing is designed to support the reintegration and rehabilitation of offenders, as the best means to reduce the risk to the community of re-offending. This is reflected in s 7(1) of the Act, which identifies the "paramount consideration" for the Board to be "the safety of the community" when the Board is making decisions about, or in any way relating to, the release of an offender into the community. This rationale has a grounding in empirical research, which suggests that paroled offenders are less likely to re-offend than offenders released without parole.[22]

14. Offenders subject to a long-term sentence will generally[23] be eligible to be considered for parole after serving one third of their sentence,[24] unless a sentencing court has set a minimum non-parole period[25] (in which case that will be the parole eligibility date)[26] or the offender has been sentenced to imprisonment for life (in which case there is a 10 year non-parole period).[27]

15. Actual release on parole is ultimately determined by the Board on the basis of the undue risk to the community that the Board assesses the offender to pose:[28]

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21 Parole Act, ss 6(4) and 32. Simon France J in *A (Victim) v New Zealand Parole Board* [2008] NZAR 703 (HC) at [2]–[4] gives a helpful overview of how parole works.

22 See, for example, Law Commission *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at [170]; Bronwyn Naylor and Johannes Schmidt "Do Prisoners Have a Right to Fairness before the Parole Board" (2010) 32 Syd L Rev 437 at 450; New South Wales Law Reform Commission *Parole* (R142, 2015) at 19–24; and David Mather *Parole in New Zealand: Law and Practice* (Thomson Reuters, 2016) at v.

23 Noting the potential for early referral and consideration for parole under s 25.

24 Parole Act, s 84(1). While today the non-parole period is set at 1/3 of a sentence, it has in the past been set at 1/2 or 2/3 of a sentence: *Hall's Sentencing* (online ed) at [PA1.1].

25 For offenders like the appellant, who have been sentenced to preventive detention, the sentencing court will have fixed a minimum period of imprisonment, which must be at least five years: see Sentencing Act 2002, ss 87 and 89.

26 Parole Act, s 84(2).

27 Parole Act, s 84(3).

28 Predictive risk assessment is not unique to the parole system, but plays a pivotal role in a number of other areas within the criminal justice system, for example, the grant of bail and the security classification of offenders within the prison estate.

> **28 Direction for release on parole**
> …
> (2) The Board may give a direction [that the offender be released on parole] only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—
>
> (a) the support and supervision available to the offender following release; and
>
> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

Role of the New Zealand Parole Board

16. The Board is an independent statutory body[29] comprised of judicial officers, legally qualified members and appropriately qualified community representatives.[30] Its functions are listed in s 109 and include to consider offenders for parole and, if appropriate, to direct offenders to be released on parole;[31] to set conditions for offenders released on parole;[32] to consider and determine applications to vary and discharge release conditions;[33] and to consider and determine applications for interim and final recall from parole.[34]

17. The Board additionally has responsibilities under the Act for monitoring the compliance of offenders with their conditions of parole;[35] considering applications for release on compassionate grounds;[36] setting conditions for offenders released at their statutory release date;[37] making postponement orders;[38] making and reviewing non-release orders;[39] reviewing specified

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29 Parole Act, s 108(1).

30 The Board's chairperson must be a current or former judge of either the High Court or the District Court: ss 111(2)(a) and 112(1). In addition, the Board must include at least nine panel convenors (s 111(2)(b)), who must all be legally qualified (s 114). Generally applicable qualifications for membership to the Board are set out in s 111(3). The Board has no representation from the Department of Corrections, but that Department provides administrative and training support to the Board: ss 108(2) and 110.

31 Section 109(1)(a). Section 28(1) confers the power to discharge this function.

32 Section 109(1)(d)(ii). Sections 29–29A confer the powers to discharge this function.

33 Section 109(1)(e)(i). Section 58 confers the power to discharge this function.

34 Section 109(1)(e)(ii). Sections 62 and 66 confer the powers to discharge this function.

35 Section 29B.

36 Section 41.

37 Section 18.

38 Section 27. Section 27 empowers the Board to postpone specified offenders' parole hearings for up to five years. Unless a postponement order is made, the Board is required to conduct a parole hearing at least once every two years after the offender's last parole hearing: s 21.

39 Section 107. The Chief Executive of the Department of Corrections may apply to the Board for an order that an offender prisoner be kept in prison beyond his or her final

decisions;[40] imposing special conditions on extended supervision order (**ESO**) offenders;[41] and considering variations or discharges of ESO conditions.[42]

18. The Board is required in discharging its statutory responsibilities to observe a number of "guiding principles". These principles are specified in s 7, which begins in subs (1) by identifying the "paramount consideration" as the "safety of the community". Subsection (2) then outlines a number of other principles that must guide the Board's decisions. They include that offenders must not be detained any longer than is consistent with the safety of the community;[43] that offenders are not subject to release conditions that are more onerous or last longer than is consistent with the safety of the community;[44] that victims'[45] rights are upheld;[46] and that victims' submissions are given due weight.[47]

19. As noted, the Board is a very busy body, and the decisions required of it are not simple.[48] They commonly involve complex decision-making that requires an understanding of actuarial tools[49] and offender case management with all the

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release date. Offenders subject to orders under s 107 (or s 105 of the Criminal Justice Act 1985) must have the order reviewed at least once every six months.

40 Section 67.

41 Section 107K.

42 Section 107O.

43 Section 7(2)(a).

44 Section 7(2)(a).

45 Victims fall into two categories: those registered as part of the victim notification system (who are entitled to receive notice of and have input into Board hearings) and those who, while not registered, can still make submissions and be informed of Board decisions.

46 Section 7(2)(d).

47 Section 7(2)(d). It is possible that a victim's interests will have a human rights dimension: see *Roberts v Parole Board*, above n 13, at [80]; and *R (o.a.o. Craven) v Parole Board* [2001] EWHC Admin 850 at [35]–[36] and [43]–[45]. While the reasoning in *Craven* concerned the right to family life under art 8 of the European Convention on Human Rights (**ECHR**), it is capable of application by analogy to the right to freedom of movement affirmed in s 18 of the NZBORA.

48 See, for example, New South Wales Law Reform Commission, above n 22, at 77, [4.66]: "Risk assessment in the parole context is a very difficult and complex task". The individual and social cost of 'false positives' (i.e. offenders who could safely have been released but were not, or could have safely remained in the community but did not) and 'false negatives' (i.e. offenders thought safe who went on to re-offend or cause harm) can be very high.

49 For discussions of the value of, and limitations to, actuarial risk assessment tools, see, for example, Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post-sentence orders* (NZLC IP51, 2023) at 118, [9.13]–[9.26]; and New South Wales Law Reform Commission, above n 22, at 74, [4.55]–[4.61].

obvious difficulties in predicting human behaviour. The resulting risk assessments involve exercises of judgement[50] on all the information before it.

20. In the United Kingdom, its Parole Board's assessment of risk of future behaviour has been characterised as "an inherently imprecise exercise",[51] with it being observed that United Kingdom Parole Board risk assessments in complex cases are "multi-factorial, multi-dimensional and at the end of the day quintessentially a matter of judgment for the panel itself".[52] Those observations — which are equally apt to the Board's role under the Act — reflect that risk assessments call for observation and assessment of those who commit the particular type of offence and a detailed knowledge of the types of factors, both personal and environmental, which increase or reduce the risk of further offending. The necessary expertise therefore combines the ability to make a qualitative assessment of the offender and the ability to utilise the available quantitative risk-assessment instruments and reports relevant to evaluating levels of risk.

Importance of release conditions

21. An important feature of New Zealand's discretionary parole regime is that it enables — and requires — a risk-management approach to the release of offenders. The Board is entrusted with a responsibility not to release offenders who pose an undue risk to community safety, but (i) to release offenders who it is satisfied will not pose an undue risk if released, and (ii) to manage through release conditions the presence of released offenders in the community. It follows that release conditions are critical to the efficacy of parole as a

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50 The exercise of that judgement has been recognised in the United Kingdom to arise from a process that is more inquisitorial than adjudicative (see, for example, *R (o.a.o. Pearce) v Parole Board*, above n 13, at [57]), with the consequence that the burden of proof has no real part to play in risk assessments (see, for example, *R (o.a.o. Brooks) v Parole Board* [2004] EWCA Civ 80 at [28]; *R (o.a.o. Sim) v Parole Board* [2004] QB 1288 at [49]–[50]; and *Re McClean* [2005] UKHL 46 at [26] and [73]–[74]).

51 *R (o.a.o. Pearce) v Parole Board*, above n 13, at [65(iv)].

52 *R (D) v Parole Board* [2018] EWHC 694 (Admin), [2018] 3 WLR 829 at [133]. See also at [117]: "The individual members of a panel, through their training and experience, possess or have acquired particular skills and expertise in the complex realm of risk assessment". In New Zealand, Board members' expertise will include, expertise in psychology or psychiatry. The Board presently has two forensic psychiatrist members: Associate Professor Philip Brinded and Dr Jeremy Skipworth. For member biographies, see at: < https://www.paroleboard.govt.nz/about_us/who >.

component of sentencing.[53] Reflecting that, they are identified amongst the key characteristics of parole in the overview in s 6(4) of the Act, with the key provisions on release conditions set out in ss 14–16E. They are also critical to decisions first to release (s 29AA) then to fine-tune release conditions (s 58).

22. As noted, release conditions take two forms:[54] standard release conditions and any special conditions imposed by the Board or the sentencing court[55] and that apply to an offender released from detention. Section 14 sets out the standard release conditions that apply to every offender released on parole or released at his statutory release date. These are the same as the standard conditions of supervision provided for in s 49 of the Sentencing Act 2002.[56] The standard release conditions are to be treated as if the Board imposed them.

23. The special release conditions are described in s 15 of the Act. Section 15(2) requires any special condition to be designed to meet one of four specified purposes. Section 15(3) then sets out, in a non-exhaustive way, the kinds of conditions that may be imposed by the Board as special conditions.[57] The seven sections that follow s 15 then specifically deal with special conditions relating to electronic monitoring (s 15A); attendance at programmes (s 16); and drug or alcohol testing and monitoring (ss 16A–16E).

24. Release conditions play a vital role in mitigating risk. The statutory scheme and case law[58] recognise this. It is also recognised in s 28(2): the Board can only order release if it is satisfied that the offender "will not pose an undue risk to the safety of the community … within the term of the sentence, having regard to the *support and supervision* available to the offender following release". A special condition such as requiring an offender to participate in a programme[59] is an example of the "support and supervision" that is available

53 See also *Hall v Parole Board* [2015] EWHC 252 (Admin) at [39].
54 Parole Act, s 4(1) definition of "release conditions".
55 Parole Act, ss 107IAC and 107K(3A)(c).
56 The one exception being s 14(1)(fa) of the Parole Act, which is not replicated in s 49(1) of the Sentencing Act.
57 Set out in **Appendix 1** are examples of special conditions (noting that there is an inclusive list in s 15(3) of the kinds of special conditions that may be imposed).
58 CA Judgment, above n 5, at [52]; *Isherwood v Parole Board* [2022] NZHC 2031 at [63] and [68]; and *Ericson v Parole Board* [2017] NZHC 536 at [33]–[34].
59 Parole Act, s 15(3)(b).

post-release and is relevant to that. In practice, the special conditions that the Board imposes under s 29AA will often be interrelated and/or can have a collective impact on overall risk. This applies when the Board is considering not only the imposition of special conditions at the point of release (under s 29AA) but also both the addition and the removal of a special condition (under s 58). Any proposed special condition would not be considered individually but in tandem with the continuing existing special conditions.[60] That is because the Board cannot assess individual special conditions without understanding how they fit in with the other conditions and operate as a whole, in relation to the overall risk that the offender is considered to pose.[61]

25. Getting the suite of release conditions right for an individual offender is important for managing the offender throughout their time on parole. What is required to keep the community safe, whilst simultaneously progressing the offender's reintegration and rehabilitation, has the potential to change over time — and, in the experience of the Board, it generally does.[62]

26. The changes over time to an offender's risk profile relate to what are referred to as "**dynamic risks**" (in contrast to "**static risks**").[63] Static risks refer to factors that are unchangeable by individual effort, such as the age of first offending, an offender's past convictions, the time that they have spent in the corrections system, and any failures upon their prior release. Dynamic risks, in contrast, are amenable to change.[64] Risk factors in this category include substance abuse, pro-criminal attitudes and values, stability of relationships, mental illness and poor financial management — factors that share in common

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60 The target of the risk assessment when considering release is not the same as the target when considering discharging a special condition. When considering release, what is assessed is the risk of the offender *with* special conditions imposed. When considering discharging a special condition, what must be assessed is the risk of the offender *without the special condition sought to be discharged*.

61 As Dunningham J once described it, special conditions are considered as a "suite": *Ericson v New Zealand Parole Board*, above n 58, at [33] and [40]. See also at [42]: "in totality". Similarly **[201.0031]** at [17]: "framework of conditions".

62 See also *Hall v Parole Board*, above n 53, at [67]: "As a matter of logic, the assessment of risk will change with time".

63 Relevantly discussed in Mather, above n 22, at 305–309; New South Wales Law Reform Commission, above n 22, at 72, [4.48]–[4.49].

64 Illustrating this, the CA Judgment, above n 5, records at [20](b) the assessment that the appellant's dynamic risk could be increased in the context of loneliness, rejection, emotional collapse and potentially also through an unbalanced lifestyle including overworking.

the fact that the risks the offender poses to the safety of the community are capable of changing over time in response to changes to those matters.

27. As an example, take a situation where a paroled offender is being closely supported in the community by a longstanding friend and support person. Their support would be a pro-social protective factor for the offender. Suppose that the friend and support person has to unexpectedly relocate overseas. Their move might change the dynamic risks that are posed by the offender to the safety of the community, by removing an important source of pro-social support (i.e. the friend) who the offender had until then relied on to regulate their behaviour. Suppose further that the same offender in short succession lost previously stable accommodation,[65] disrupting healthy routines the offender had come to rely on for their stability each day. This too might change the dynamic risks posed by the offender, particularly in combination with their friend's move overseas.

28. Parliament was alive to changes like this potentially impacting the risk profile of an offender on parole.[66] It provided statutory machinery to address such changes. That machinery includes the power of the Board to recall offenders and, less drastically, the fine-tuning power. The latter provides a mechanism to keep offenders in the community — with its attendant reintegrative and rehabilitative benefits — by recalibrating the supervision and support in place for offenders through release conditions. It is within this context that the threshold for the Board to exercise the fine-tuning power falls to be considered.

REACH OF THE "UNDUE RISK" TEST

29. The Board's position is that, for the reasons that follow, the "undue risk" test does not apply to the exercise of the fine-tuning power.

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65 Controlling where an offender lives on parole is also important to ensure, for example, that offenders do not reside near victims, child sex offenders keep away from schools, and offenders are not in close contact with known criminal associates or co-offenders: New South Wales Law Reform Commission, above n 22, at 204, [9.46].

66 Similarly, New South Wales Law Reform Commission, above n 22, at 63, [4.16] states: "Whether or not the benefits (the chance of reducing reoffending) are likely to outweigh the risks (the increased risk created by release) will depend on the circumstances of each offender. *The answer to this question may change over time depending on an offender's attitude, behaviour and many other factors*".

Deliberately omitted text

30. The Act very clearly distinguishes "undue risk" from the (wider) concept of the "safety of the community". And it deliberately distinguishes between "risk of reoffending" in s 15(2)(a) and "undue risk". In that context, it is notable that the "undue risk" test is not expressly included in the text of either s 15(2)(a) or s 58 of the Act. In this respect, s 15(2)(a) and s 58 can be contrasted with a number of other powers in the Act whose exercise *is* expressly subject to the "undue risk" test. If Parliament meant to include the "undue risk" test in s 15(2)(a) and s 58, it would have expressly said so.[67]

Coherent statutory scheme

31. It is on occasion possible to infer that Parliament's omission of a statutory test from one section was an inadvertent oversight. Not so here. The provisions where Parliament has included the "undue risk" test — and, correspondingly, those where it has not done so — provide an understandable explanation as to why an "undue risk" test applies only where it has been expressly stated.

32. To elaborate, as the Court of Appeal recognised,[68] all the provisions in Part 1[69] — which the definition of "undue risk" in s 7(3) of the Act applies to — that provide for an "undue risk" test are decisions having custodial detention as a possible outcome in terms of release from[70] or return to custody.[71]

33. Continuing custodial detention is a possible outcome in release decisions under s 28. On that basis, the "undue risk" test clearly applies to these decisions.[72] Custodial detention is also a possible outcome for recall decisions under s 61. On that basis, the "undue risk" test clearly applies to these decisions too.[73]

34. In contrast, custodial detention is not a possible outcome in an application to vary or discharge release conditions under s 58. Instead the issue is on what

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67 See, by analogy, *Pitceathly v Parole Board*, above n 12, at [23].
68 CA Judgment, above n 5, at [43].
69 Sections 3–107Z.
70 Sections 25, 28 and 55.
71 Sections 61, 62 and 107P (the custody under s 107P being detention in a hospital or secure facility under a compulsory care order or under a compulsory treatment order).
72 CA Judgment, above n 5, at [40].
73 CA Judgment, above n 5, at [40]; and *Miller v New Zealand Parole Board*, above n 12.

basis — that is, subject to what release conditions — the offender should *remain* in the community. Subjecting such decisions to an "undue risk" test does not fit naturally in this statutory setting.[74] This explains why ss 56–58 (providing for release conditions variations) and ss 15 and 29AA (prescribing what special conditions can be imposed) do *not* refer to an "undue risk" test.[75]

35. Section 29B reinforces that analysis. It confers a power on the Board to monitor for a specified period an offender's compliance with their release conditions. The Board as part of that monitoring process is given powers to vary the special conditions to which the offender is subject,[76] as well as powers to make an order in the nature of an interim recall order.[77] Exercise of the first set of powers is cross-referenced to ss 56–58, which as noted are *not* expressly subject to an "undue risk" test. Exercise of the second set of powers is cross-referenced to ss 62–63 and 65–65A, which *are* expressly subject to an "undue risk" test. This is relevant for present purposes in reinforcing the clear distinction that the Act has drawn between when an "undue risk" test applies (i.e. when custodial detention is a possible outcome of the exercise of Board powers) and when it does not apply (i.e. when custodial detention is not a possible outcome).

Wider statutory dissonance

36. While they are primarily addressed through Part 1A of the Act, rather than Part 1, offenders who are subject to ESOs are also likely to be adversely impacted by the logic of the appellant's analysis. The Board has the power to

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74 CA Judgment, above n 5, at [41] and [43]. As the Court of Appeal reasoned at [48], this distinguishes its earlier decision in *Miller v New Zealand Parole Board*, above n 12. The analysis in *Miller* was clearly influenced by the fact that the situation was one of recall to custody, which raised human rights considerations as to the potential arbitrariness of detention in those circumstances: see at [129]. That is a materially different situation to the one in the present case, where a person has been released from custody and his conditions of release are being reconsidered. *Miller* was also concerned with s 61, whose text expressly refers to "undue risk", not just "risk" (simpliciter) as in s 15(2)(a). That wording was a clear factor in the Court of Appeal's interpretation of the rest of s 61 in *Miller* (consistent with the noscitur a sociis canon of interpretation).

75 CA Judgment, above n 5, at [40]–[41] and [43]. See also, by analogy, *R (o.a.o. Sturnham) v Parole Board (No 2)*, above n 13, at [44] and [48] (no incongruity, or rights inconsistency, in different risk thresholds applying to different decisions).

76 Parole Act, s 29B(5)(a)-(b).

77 Section 29B(5)(c).

impose special conditions on ESO offenders in accordance with s 15.[78] Such offenders by definition pose a "high" or a "very high" risk,[79] which can be assumed to mean something more than "undue". On the appellant's approach — which is that the test in s 15(2)(a) is not 'does the special condition reduce the risk of reoffending?' (that is, the words as written in the subsection), but is rather 'does it reduce that risk to below undue?' — ESO offenders may never fall below the "undue risk" threshold even on a full range of special conditions, including those special conditions that are only available for ESO offenders). Such an outcome sits uncomfortably with Parliament's intention that ESO offenders would be released subject to an appropriate suite of special conditions. If nothing else, this underscores that careful consideration appears to be reflected in where an "undue risk" test has been expressly stated and, by implication, where it is not appropriate.

37. Sections 18(2)(b) and 41(3) are to the same effect. They respectively enable special release conditions to be imposed for six months past the statutory release date of an offender who is subject to a determinate sentence (s 18(2)(b)) and in compassionate release decisions (as s 41(3) allows). These provisions support the interpretation of s 15(2)(a) that special conditions must be designed to reduce the risk of reoffending *generally* rather than reading in "undue risk" to those words, as they envisage that offenders may be released on special conditions despite possibly still posing an "undue risk" to safety.

38. There are further problems of statutory 'fit' on the appellant's approach.

39. Section 15(2) specifies four alternate[80] grounds to impose special conditions. Of those, only the first, s 15(2)(a), refers to "risk". The effect of the appellant's approach is not only to add the "undue" gloss to that reference to "risk" in s 15(2)(a), but in effect to superimpose that gloss over all four limbs of s 15(2).

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78 Section 107K(1). Section 107K(4) provides that subss (2) and (4) of s 15 apply in respect of special conditions imposed under s 107K.

79 Section 107I(2)(b)(ii).

80 As is signalled by the disjunctive "or" separating the four sub-paragraphs of s 15(2).

But that clearly does not fit with the text and scheme of s 15(2), as the Court of Appeal explained in the judgment under appeal:[81]

> … the kind of special conditions that may be imposed is set out in s 15(2). None of them 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:
>
> > (a) Of them, only s 15(2)(a) relates directly to reducing the offender's risk of reoffending on parole. It does not, however, specify that any such condition must reduce the risk of offending from one that is undue to something less than that.
> >
> > (b) Section 15(2)(b) (facilitating or promoting the offender's rehabilitation and reintegration) is indirectly about the offender's risk, but is more directed to stabilising the offender for the ongoing safety of the community (rather than reducing an offender's risk of reoffending from one that is undue to something less than that).
> >
> > (c) Section 15(2)(c) (providing for the reasonable concerns of victims of the offender) is directed to victim concerns rather than directly about the offender's risk of offending and whether any such risk is undue.
> >
> > (d) Section 15(2)(d), relating to the imposition of intensive monitoring conditions where an offender is subject to an extended supervision order under a different part of the Parole Act, is not relevant here.

40. In other words, the imposition of special conditions sometimes operates to bring risk below undue but that does not mean that the risk referred to in s 15(2)(a) needs to always be read as reducing risk below undue: reference to reducing risk in s 15(2)(a) is sufficient — and appropriate — for both purposes.

41. Section 15(2)(b), like s 15(2)(c) (which is discussed further below), does not expressly refer to a risk assessment but instead is focused on conditions designed to facilitate or promote the rehabilitation and reintegration of the offender. Conditions promoting those purposes are important to ensuring the safety in the community of offenders subject to determinate and indeterminate sentences.

42. Section 15(2)(c) is also significant. It contemplates special conditions that provide for the reasonable concerns of victims, and as noted earlier s 7(2)(d) requires victims' submissions to be given due weight. Consistent with that, it is common practice for the Board to impose a special whereabouts condition preventing an offender from entering the town or suburb where a victim resides

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81 CA Judgment, above n 5, at [42].

(absent probation approval). In some cases this may not be due to any concern about reoffending against the victim, but to enhance the victim's personal sense of safety and peace of mind, and to minimise the prospects of a highly distressing encounter between the victim and the offender.[82] Such a condition is difficult to justify on the appellant's approach. Indeed, even a 'non-contact with victim' special condition may fail to qualify on this basis. It is unclear what function s 15(2)(c) has on the appellant's approach.

43. The appellant asks this Court to avoid these difficult points by reading s 15(2)(a) in isolation and leaving for another day the question of how ss 15(2)(b)–(c) are to be interpreted and applied in this context. The Board opposes that approach. The s 15(2) provisions identify purposes, not kinds of conditions. It is therefore possible, and in practice it is common, for special conditions to be justified on more than one s 15(2) ground. This can be illustrated briefly. Building on the dynamic risk example at [**27**] above, a special condition requiring the offender to reside at a specified address that they are to share with their main support person might be justified under both s 15(2)(a) and s 15(2)(b). If that accommodation was also enabling the offender to live in the community in a city far from where the victims live, the condition could also be justified under s 15(2)(c). It follows that conditions *if viewed individually* cannot easily be siloed into just one s 15(2) purpose.

44. Conditions *as a group* can also together be justified on multiple grounds.

45. For these reasons it would not be appropriate in terms of the scheme of the Act, and nor would it be workable in practice, to ignore ss 15(2)(b)–(c) here.

Promoting sound objects

46. In addition to reflecting the statutory text and scheme, there are sound policy reasons why the "undue risk" test does not apply to the fine-tuning power.

47. An important benefit of having relatively greater flexibility to discharge or vary special conditions is that it enables graduated management of offenders *within the community*, in response to (i) changes to dynamic risks, including (ii)

[82] See, for example, *Wilson v Parole Board*, above n 9, at [31].

breaches of release conditions not at a level to justify recall to prison. In a variation application seeking the addition of a new special condition, this would enable the Board (by way of example) to add an electronic-monitoring condition not previously present to address an assessed increase in risk. This 'fine-tuning' flexibility is important in terms of managing an offender's risk.

48. The ability to use the fine-tuning power in response to changes of that kind to an offender's risk profile helps to support the reintegrative and rehabilitative purposes that special conditions play an important role in promoting. These are purposes that offenders, and society at large, have a shared interest in realising, subject to the safety of the community, in terms of the s 7(1) paramount purpose. Reflecting this, the Court of Appeal relevantly held that:[83]

> … decisions on release and special conditions (or their discharge and variation) are linked but different. Release on parole can only be directed if the offender will not pose an undue risk to the safety of the community. While special conditions may in some cases bring a high-risk offender down from a level of undue risk to a risk that is not undue (so that they may be released), they may also be imposed and maintained when an offender is considered a low risk of reoffending and is not considered an undue risk, having regard to the nature and seriousness of any likely subsequent offending. That is because they 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.

49. Standing back and looking at the parole regime at a structural level,[84] if the Board has relatively greater flexibility to discharge or vary special conditions under s 58 due to a perceived escalation in risk (falling below undue), offenders

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83 CA Judgment, above n 5, at [44].

84 Noting *Kennedy v The Charities Commission* [2014] UKSC 20, [2015] 1 AC 455 at [225] per Lord Carnwath: "There is no need to read down a single provision, if the legislation as a whole can be read and applied in a [ECHR rights] compatible way". *Kennedy* illustrates the need for careful consideration of what the appropriate statutory 'hook', or 'vehicle', is to use to achieve rights consistency. There the United Kingdom Supreme Court split on whether s 32(2) of the Freedom of Information Act 2000 should be read down in order to comply with the right to freedom of expression guaranteed by art 10 of the ECHR. The minority held that it should be. The majority held that it should not, because s 32(2) was not the appropriate vehicle to use to secure art 10 consistency. The majority opinion was that an art 10 consistent interpretation of the Charities Act 1993 was a better vehicle to use: refer, for instance, to [34]–[36], [39], [131], [135]–[136], [140], [200]–[202], [225]–[233] and [244]–[247].

are relatively better placed to avoid recall under s 61. This is notable because of the practical consequences if offenders are recalled to prison.

50. Those consequences take two main forms. The first is the adverse impact upon the offender's reintegration into the community. As Hale LJ once observed: "recall has very serious consequences for the person recalled".[85] That is because return to prison can be expected to seriously disrupt the progress an offender has made in the community on parole, isolating the offender from family and friends, severing employment and housing arrangements,[86] and separating the offender from rehabilitation-service providers. When the offender is later released back into the community[87] it is likely that they will be in a worse position than before the suspension of parole and the risks of the offender lapsing back into further offending behaviour (particularly because of unaddressed drug addictions and/or mental health issues) may be intensified. In addition, for offenders whose parole has been suspended, like prisoners on remand and prisoners sentenced to short prison sentences, there may be less access to rehabilitation programmes in custody.

51. In that context, observations by Lord Bingham deserve quotation:[88]

> All or almost all, determinate sentence prisoners are expected to return to the community on release from prison after serving their sentences. It is in the interests of society that they should, after release, live law-abiding, orderly and useful lives. For a host of practical, psychological and social reasons, the process of transition from custody to freedom is often very difficult for the prisoner. *It is accordingly very desirable that the process of transition should be professionally supervised, to maximise the changes of the ex-prisoner's successful reintegration into the community and minimise the chances of his relapse into criminal activity*.

52. A second consequence of recall is the adverse effect on the prison system and the cost to the State, as suspending parole increases prisoner numbers.

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85 *Rodgers v Governor of HMP Brixton* [2003] EWHC 1923 (Admin) at [29].

86 Recall to prison may result in the offender losing private rental accommodation, or it may detrimentally affect their position in, or put them on a waitlist for, public housing.

87 This might not occur for a number of years: see, for example, **[202.0042]** at [2]–[4].

88 *R (o.a.o. Smith) v Parole Board*, above n 13, at [25] (emphasis added).

Further policy considerations

53. If an offender's risk is considered by the Board to be borderline undue, this can be seen not as a desirable outcome but a reason for concern calling for enhanced supervision and support. If one of the important purposes of parole is to promote successful rehabilitation and reintegration of offenders as law-abiding citizens (s 15(2)(b); s 28(2)(b)), it seems inconsistent with those aims to limit conditions on release to the 'bare minimum' required to avoid recall to prison within the term of the sentence.

54. As a corollary, low risk offenders who are already below the "undue risk" threshold in the absence of special conditions, cannot in terms of the appellant's approach be the subject of any special conditions under either s 29AA or s 58. As a result, these offenders will be without the formal machinery of support that special conditions can provide, in relation to rehabilitative and reintegration activities (including funding of the same). A special condition to attend a reintegration meeting is unlikely to be critical to avoiding "undue risk", though it may be very important in maintaining a smooth transition into the community, and enhancing an offender's relationship with their supporters and probation.

55. The appellant's approach also sits uncomfortably with special conditions:

    55.1 that are imposed, not on the basis of immediate need, but as a 'safety net' in the event things change. Special conditions allowing for 'refresher' treatment are examples of such conditions. The need to activate special conditions such as a treatment condition at a point in time *after* release can be important where an offender is on parole for a long time (e.g. life, in the case of preventive detention offenders); and

    55.2 that are designed to reduce the risk of reoffending (s 15(2)(a)), and to provide for victims' reasonable concerns (s 15(2)(c)). For example, child sex offenders are commonly assessed as low risk of reoffending. The appellant's approach to the Act would preclude the Board from imposing a special condition on a child sex offender that they not have unsupervised contact with a person under 16. The Board views this

condition as necessary to avoid residual risk, noting the very significant impacts this offending has on young victims.

A fettered discretion that fits

56. A coherently fettered ss 29AA and 58 discretion flows out of this analysis.

57. As noted at [**3**] above, in addition to satisfying s 15 *all* decisions to impose special conditions are constrained by s 7. Together, ss 7 and 15 structure the necessary proportionality assessment that has been summarised at [**4**] above.

58. Importantly, the application of that proportionality assessment means that any special conditions will also be NZBORA-consistent:[89] see also at [**62**] below.

59. On this approach to the fine-tuning power, recall is *relatively* easier to avoid, and therefore *less* common (all else being equal). To that extent, there is at a *structural* level a better promotion of liberty rights than would be achieved by an approach to the fine-tuning power that gives the Board less discretion to exercise its s 58 power to avoid a descent into "undue risk" and thus recall.

60. Standing back and looking across the current statute book, it can also be noted that a "risk" assessment that is not tethered to "undue" is not unique to criminal justice statutes more generally. This can be seen in s 8 of the Bail Act 2000 and in s 93 of the Sentencing Act 2002.[90] Relevantly, both provisions require an assessment of "risk" unqualified by "undue" (or similar terms).

61. Seen in that light, the fine-tuning power is not problematically 'untethered' on the approach that the Court of Appeal has endorsed for s 29AA and s 58.

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89 The High Court recognised in *Polyblank v Parole Board*, above n 9, at [61] that this approach does not prevent special conditions that are fairly restrictive, provided that is justified on the offender's facts and taking into account the safety of the community as the paramount consideration. In practice, a proviso (which is not uncommon) permitting a probation officer to approve action that will otherwise contravene the condition may be important to achieve NZBORA compliance: see, for example, *Pengelly v Parole Board*, above n 9, at [89]–[90]. See also **[201.0030]** at [15].

90 The approach taken to NZBORA in the application of s 93 (see *Manuel v Police* [2019] NZHC 816 at [26]–[27]) is materially the same as that which is taken to release conditions under the Act — an approach that is discussed further below.

NZBORA compliance achieved

62. The Board accepts that liberty rights have the potential to be impacted by special conditions set in fine-tuning decisions. Those rights are reflected in the NZBORA rights of association (s 17), movement (s 18), and liberty (s 22).[91]

63. As this Court confirmed in *Fitzgerald*, words can be read into a statute to secure NZBORA consistency.[92] But not where to do so is contrary to the legislation, either expressly or by necessary implication.[93] In other words, NZBORA-consistent statutory interpretation must remain faithful to the fundamental features of the statutory scheme; the Court would no longer be engaging in statutory *interpretation* were it otherwise. This important qualification applies here: it would be contrary to the text and scheme of the Act to read the "undue risk" test into exercise of the fine-tuning power.

64. While NZBORA does not operate to read an "undue risk" test into s 29AA and s 58, it does affect the discretionary exercise of the fine-tuning power. It does so in the manner this Court recently articulated in *A*:[94] if statutory grounds for imposing special release conditions are made out, a fine-tuning decision will be a justified limit on relevant NZBORA rights, in terms of s 5 of NZBORA. In other words, application of the proportionality framework at **[4]** above ensures Board fine-tuning decisions are NZBORA-compliant.

65. Where the offender is serving an indeterminate sentence (in this case, preventive detention), there is a need for a "close examination"[95] of the basis

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91 See *Woods v Police* [2020] NZSC 141, [2020] 1 NZLR 743 at [61]–[62]. But compare *R (o.a.o. Latif) v Secretary of State for Justice* [2021] EWHC 892 (Admin), [2021] 4 WLR 61 at [27] (artificial to regard the setting of licence conditions as falling within the ambit of art 5 of the ECHR).

92 See *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 at [62]–[65], [112], [131], [135] and [182].

93 See *Fitzgerald v R*, above n 92, at [53], [66], [207], [218] (n 313) and [251]. See also *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at [59].

94 See *A v Minister of Internal Affairs* [2024] NZSC 63 at [140]. See, to a similar effect, *Commissioner of Police v G* [2023] NZCA 93 at [179]; and *Williams v The Supervisory Authority (Antigua and Barbuda)* [2020] UKPC 15 at [97].

95 See, by analogy, *R v Fatu* (2005) 22 CRNZ 524 (CA) at [8] (concerning bail conditions); and *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289 at [19]–[20] and [34] (in the context of whether to make an ESO).

for their special conditions. The United Kingdom Supreme Court recently put it this way:[96]

> When making a risk assessment in relation to a person which might result in seriously adverse consequences to him, a decision-maker must have in mind the consequences to that person of an adverse decision against him. This can be seen as a question of fairness… It can also be seen as a relevant and necessary component of the evaluation which the decision-maker is mandated to make… Sir Thomas Bingham MR took the latter view, describing the role of the Board in making its decision whether to direct the release of a prisoner serving a discretionary life sentence as a balancing exercise in which preponderant weight is to be given to the need to protect members of the public. He stated … :
>
> > "In exercising its practical judgment the board is bound to approach its task … balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury. In other than a clear case this is bound to be a difficult and very anxious judgment. But in the final balance the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury."
>
> We view the prisoner's interest as a component in the evaluation but would question whether it is correct to describe the task as a balancing exercise. In our view the Board's task is to apply the statutory test of asking whether it is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined. In carrying out that difficult task the Board must bear in mind the risk of injustice to the prisoner of which Sir Thomas Bingham spoke.

66. The Board's practices for offenders serving indeterminate as compared to determinate sentences (refer to **[9]** and **[10]** above) reflect its appreciation that a close examination of the circumstances is necessary where the Board is considering imposing or maintaining special conditions for such offenders.

COSTS OF THE APPEAL

67. Given the nature of the issues the Board does not seek any order as to costs.

Dated: 2 October 2024

Counsel for the Board
M S Smith / V Owen

[96] *R (o.a.o. Pearce) v Parole Board*, above n 13, at [69]. See, to a similar effect, *Parole Board for Scotland v Dolan* [2023] CSIH 26 at [27]–[30].

Appendix 1 — Common special conditions[97]

Residence

To reside at [specified address] or any other address approved in writing by a probation officer and not move from that address unless you have the prior written approval of a probation officer.

Programmes/counselling

To attend an [alcohol and drug/psychological/Departmental programme] assessment and attend, participate in and complete any treatment or counselling directed by a probation officer.

To attend a [specified residential programme] as directed by a probation officer and comply with the rules of the programme.

Reintegration meeting

To attend a reintegration meeting as directed by a probation officer.

Alcohol and drugs

Not to possess, use or consume alcohol, controlled drugs or psychoactive substances except controlled drugs prescribed for you by a health professional.

Relationships

To disclose to a probation officer at the earliest opportunity details of any intimate relationship which commences, resumes or terminates.

Employment

To obtain the written approval of a probation officer before starting or changing your position and/or place of employment (including voluntary and unpaid work). To notify a probation officer if you leave your position of employment.

97 The list is non-exhaustive and the wording may of course be tailored to the case.

Victim

Not to have contact or otherwise associate with any victim of your offending (including previous offending) directly or indirectly, unless you have the prior written approval of a probation officer.

Gangs

Not to communicate or associate, directly or indirectly, with any person known to you to associate with [specified gang] unless you have the prior written approval of a probation officer.

Co-offender

Not to communicate or associate with your co-offender [name] directly or indirectly unless you have the prior written approval of a probation officer.

Residential restrictions

[See s 33 of the Act. These may be partial (that is, a curfew, that may be electronically monitored) or, much less commonly, full restrictions.]

Whereabouts

Not to enter [a particular location(s)] as defined in writing by a probation officer unless you have the prior written approval of a probation officer.

[This may also be electronically monitored.]

Sex offender

Not to enter or loiter near any place where children under 16 are congregating unless you have the prior written approval of a probation officer, or unless an adult approved by a probation officer in writing, is present.

Not to enter or loiter near any school, early childhood education 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 approved in writing by a probation officer, is present.

Not to have contact, or otherwise associate, with a person under the age of 16 years, directly or indirectly, unless you have the prior written approval of a probation officer, or unless you are under the supervision and in the presence of an adult approved in writing by a probation officer.

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6. *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760.
7. *Commissioner of Police v G* [2023] NZCA 93.
8. *Ericson v Parole Board* [2017] NZHC 536.
9. *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551.
10. *Grinder v New Zealand Parole Board* [2022] NZHC 3188.
11. *Harriman v Attorney-General* [2014] NZCA 544 (leave judgment: [2015] NZSC 37).
12. *Isherwood v Parole Board* [2022] NZHC 2031.
13. *Manuel v Police* [2019] NZHC 816.
14. *Miller v Parole Board* [2010] NZCA 600 (leave judgment: [2011] NZSC 26).
15. *Pengelly v Parole Board* [2023] NZHC 3768.

16. *Pitceathly v Parole Board* [2018] NZCA 454, [2019] 2 NZLR 613.

17. *Polyblank v Parole Board* [2019] NZHC 3425.

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19. *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801.

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22. *Wilson v Chief Executive of the Department of Corrections* [2022] NZCA 289.

23. *Wilson v Parole Board* [2012] NZHC 2247 (appeal: [2013] NZCA 190).

24. *Woods v Police* [2020] NZSC 141, [2020] 1 NZLR 743.

Overseas

25. *Hall v Parole Board* [2015] EWHC 252 (Admin).

26. *Kennedy v The Charities Commission* [2014] UKSC 20, [2015] 1 AC 455.

27. *Parole Board for Scotland v Dolan* [2023] CSIH 26.

28. *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837.

29. *R (o.a.o. Brooks) v Parole Board* [2004] EWCA Civ 80.

30. *R (o.a.o. Craven) v Parole Board* [2001] EWHC Admin 850.

31. *R (D) v Parole Board* [2018] EWHC 694 (Admin), [2018] 3 WLR 829.

32. *R (o.a.o. Latif) v Secretary of State for Justice* [2021] EWHC 892 (Admin), [2021] 4 WLR 61.

33. *R (o.a.o. Pearce) v Parole Board* [2023] UKSC 13, [2023] AC 807.

34. *R (o.a.o. Sim) v Parole Board* [2004] QB 1288.

35. *R (o.a.o. Smith) v Parole Board* [2005] UKHL 1, [2005] WLR 350.

36. *R (o.a.o. Sturnham) v Parole Board (No 2)* [2013] UKSC 47, [2013] 2 AC 254.

37. *Re McClean* [2005] UKHL 46.

38. *Roberts v Parole Board* [2005] UKHL 45, [2005] 2 AC 738.

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