IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 147/2023
[2025] NZSC 165

BETWEEN		BRETT DAVID GRINDER Appellant
AND		ATTORNEY-GENERAL First Respondent
		NEW ZEALAND PAROLE BOARD Second Respondent

Hearing:	22 October 2024
Court:	Winkelmann CJ, Ellen France, Williams, Kós and Miller JJ
Counsel:	V E Casey KC and I J G Hensman for Appellant C A Griffin and T Zhang for First Respondent M S Smith and V J Owen for Second Respondent E P Priest and J J Jackson for The Law Association of New Zealand Inc as Intervener S Thode and J W Wall for Criminal Bar Association of New Zealand Inc as Intervener
Judgment:	18 November 2025

JUDGMENT OF THE COURT

A **The appeal is allowed. The decision of the Court of Appeal is set aside. The finding of the High Court that the issue for the Board on any reconsideration of the appellant's conditions is as set out in the decision of Gwyn J at [130(a)–(b)] is reinstated.**

B **The respondents must pay the appellant one set of costs of $30,000 plus usual disbursements, provided that the amount does not exceed the amount paid by the Legal Services Commissioner for the appellant to bring this appeal. We allow for second counsel. If the amount paid by the Legal Services Commissioner is less than $30,000 plus usual disbursements, the respondents must pay the appellant one set of costs equal to that lesser amount.**

REASONS

Winkelmann CJ, Ellen France and Williams JJ [1]
Kós and Miller JJ [71]

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Winkelmann CJ)

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Introduction

[1] The appellant was sentenced to preventive detention in 2003 for a lengthy history of sexual offending against children and young people. He will remain subject to that sentence, and at risk of recall to continue serving it, for life.[1] In April 2019, the appellant was released on parole, subject to a variety of conditions. Section 58 of the Parole Act 2002 gives the New Zealand Parole Board (the Board) the power to discharge or vary any of an offender's release conditions following release. The appellant has applied unsuccessfully for an order discharging conditions limiting his freedom of movement (a whereabouts condition) and requiring that he be electronically monitored.[2] This appeal raises issues of statutory interpretation in

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1 Parole Act 2002, s 4(1) definition of "indeterminate sentence" and s 60(1)(a). See also s 6(4)(d).
2 Section 56(1).

relation to s 58: what risk threshold should the Board have applied when deciding the application for discharge? In particular, was the Board required to discharge those conditions unless satisfied that, without them, the appellant would pose an undue risk to the safety of the community? Issues also arise as to the effect of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

Background

[2] The appellant was convicted of serious sexual offending against children and young people between 1976 and 2001. The sentencing notes of Heath J are not before us. We take the following summary of the offending from a report by David Riley, a psychologist who reviewed the sentencing notes when preparing a report for the appellant in connection with his application to discharge the whereabouts and monitoring conditions. Mr Riley recorded that:

> [The appellant]'s sexual offending has occurred over an extended period of his adolescence and adult life. The judge's sentencing notes indicate that there were 13 victims in three main periods of his life before he was arrested. The first period was when [the appellant] was aged between 14 and 19, and involved indecent assault on males under 12 and from 12 to 16, and also his indecently assaulting a female under the age of 12. The second group of offences involved the indecent assault of females under 12 when he was aged 24–28. The third group consisted of assaulting females under 12 and males between the ages of 12 and 16, which occurred when he was aged between 34 and 39. Many of these offences were representative charges, and His Honour noted that they were "the tip of the iceberg" as far as his total number of offences were concerned.
>
> [The appellant]'s sexual offending was extensive, intrusive, and varied. He offended against both males and females, and his victims were of varying ages …

[3] It appears that the appellant willingly undertook treatment programmes and responded positively to them, appearing to make good progress. He was first paroled in August 2011 but was then recalled to prison in July 2012 for breaching a non-association order. The appellant had deceived his probation officer and members of his support group about relationships he had formed with two vulnerable adults, failing to terminate those relationships when instructed to do so.

[4] He was again paroled in April 2019, at the age of 57, and has remained on parole since. At the time of release, the appellant's risk of sexual reoffending was

assessed as medium to high. The Board said that his most likely offending would be against male or female children known to him. This would include children only briefly or recently known to him. His other risk related to befriending vulnerable adults who were seen as posing a risk because they would be less likely to question or challenge him. But the Board was satisfied that with the support available to him in the community, and with the imposition of special conditions mitigating risk, the appellant did not represent an undue risk to the safety of the community.[3]

[5] The special conditions included a whereabouts condition, and electronic monitoring conditions to support that.[4] The whereabouts condition required that he not enter or loiter near specified places where children might congregate, such as schools or recreation facilities, without a probation officer's prior approval or unless accompanied by an approved adult.[5] The electronic monitoring conditions were imposed to monitor his compliance with the whereabouts condition.[6] With one exception, all special conditions were stated to expire five years from the date of his release, on 31 March 2024.[7] The Board scheduled two monitoring hearings, at six-month intervals during the initial period of release.[8]

[6] On the information we have before us, it seems that the appellant's release has largely been a success. He quickly moved to secure employment and developed an effective support network. For the most part, he has responded well to supervision by his probation officer.[9]

[7] At the first and second monitoring hearings, the appellant sought variation of his conditions. At the first hearing, in October 2019, he applied for discharge of the whereabouts and electronic monitoring conditions. His lawyer argued the electronic monitoring was limiting the appellant's employment opportunities, and that

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3 Section 28(2).
4 Sections 15(3)(e)–(f) and 15A(1).
5 The Board has since amended this condition: see below at [23].
6 There are two conditions relating to electronic monitoring. One requires that the appellant submit to electronic monitoring, and the other that he permit access to his home for the purpose of maintaining the monitoring equipment.
7 The exception was a condition imposing a curfew, which would expire after the first three months following release.
8 Parole Act, s 29B(1) and (2)(b).
9 Subject to the incidents discussed below at [19]–[21].

employment was a protective factor for him. At the second hearing, in March 2020, the appellant sought variation of the whereabouts condition to narrow the list of prohibited places. On each occasion the application was declined.

[8] The appellant renewed the application for discharge of both conditions in early 2021. He said that there was no reason for him to be electronically monitored nor for there to be a prohibition on him going places where those aged under 16 years might gather. He said that GPS monitoring limited his recreation and created difficulties regarding his employment from time to time. On this occasion, the application was supported by a report from a psychologist, Mr Riley, recording his assessment that he would have "considerable difficulty regarding [the appellant]'s risk currently as being any greater than average". The appellant had secured full-time employment and had been promoted in that role. He had long-term accommodation and was engaging appropriately with his probation officer.

[9] Based on the appellant's offending pathway, his record of compliance and the latest risk assessments, Community Corrections did not oppose the application. The Board was, however, concerned that the latest reports did not address the appellant's dynamic risk factors or the risks associated with his employment, and so adjourned the hearing to October 2021 to obtain an additional report.

[10] When the hearing reconvened in October, the updating report from psychologist Dr Sheree Crump recorded an assessment of the appellant as being at a low risk (relative to other individuals with similar offending) of committing further sexual offending in the community over the next five years. Nevertheless, the application was declined. The Board took into account that while some of the appellant's offending was against children well known to him, some of it was against children he had only known relatively recently or briefly. It noted that he was a manipulative offender. The Board said:

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

[11] As to the nature of the restriction upon the appellant, it said:

> While we appreciate that the presence of the monitoring device may limit some of [the appellant]'s prosocial opportunities we consider that is modest. In the circumstances we do not consider that changes our assessment of risk to any significant degree. While we acknowledge the inconveniences of having a GPS monitoring device, that inconvenience in our view pales into insignificance when compared with the potential risk that [the appellant] has toward young children.

[12] The appellant utilised his right of review under s 67 of the Parole Act. The reviewer (a panel convenor appointed by the chairperson of the Board) upheld the decision, noting that the test under the legislation when deciding an application for discharge was not undue risk. Rather, the Board had to consider whether the special conditions remained designed to reduce the appellant's risk of reoffending, while having regard to the paramount consideration of community safety and the principle that conditions must not be more onerous, or last longer, than is consistent with community safety. Some conditions are necessary to ensure that the offender no longer presents an undue risk, and some to "enhance risk mitigation for an offender who is already assessed as falling well below the undue risk threshold". The reviewer said that inherent in the reasons provided by the Board was an assessment that the special conditions were not more onerous and were not being imposed for longer than was consistent with the safety of the community.

[13] The appellant commenced the present proceedings in the High Court, seeking to judicially review both the Board's decision of October 2021 and the decision of the reviewer upholding that decision.

High Court

[14] The decisions were challenged on the basis that the Parole Board (both the Board and the reviewer) had applied the wrong test, in substance applying a "no risk" threshold rather than an "undue risk" threshold.[10] It was argued that a "no risk" threshold is not a rights-compliant interpretation of the legislation under the Bill of Rights because, in the result, the two types of conditions at issue constrained the appellant's liberty unnecessarily.

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[10] *Grinder v New Zealand Parole Board* [2022] NZHC 3188 (Gwyn J) [HC judgment] at [19]–[23].

[15] Gwyn J found for the appellant, holding that the "undue risk" test applied not just to release and recall decisions but also to special conditions of release.[11] She directed the Board to reconsider the application for discharge of the conditions and further directed that the question for the Board on that reconsideration, taking into account contemporary evidence as to the likelihood of further offending and the nature and seriousness of any likely further offending, was as follows: "Is the continuation of the special conditions a reasonable, necessary and proportionate means of ensuring the applicant does not represent an undue risk to the community?"[12]

Board reconsideration

[16] On the directed reconsideration, and by decision of 25 January 2023, the Board discharged the electronic monitoring conditions but maintained the whereabouts condition. The Board said that the reason for the whereabouts condition was to limit the opportunities for contact with adults accompanying their child or children in places where children are gathered, noting that the appellant's pattern of offending largely involved his befriending the parents or caregivers of victims. While the Board accepted that other conditions addressed the risk of association with children more directly, it said that it could not address risk management on a condition-by-condition basis. Rather, it said it must approach the application for discharge of the whereabouts condition on the basis of whether it is a reasonably necessary part of the framework of conditions directed at ensuring that the appellant's presence in the community will not present an undue risk.

Court of Appeal

[17] The Board and the Attorney-General each appealed the High Court decision. In allowing the appeal, the Court of Appeal held that the statutory wording does not require an undue risk assessment in relation to the imposition or continuation of special conditions.[13] Nor does it require a condition-by-condition analysis. The Board's power to impose special conditions, or to vary or discharge them, is subject to the paramount consideration of community safety, and the requirement that they not be

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11 At [47]–[48].
12 At [130].
13 *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 (Collins, Mallon and Wylie JJ) [CA judgment] at [39].

more onerous or last longer than is consistent with the safety of the community.[14] The Court continued:[15]

> 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.

[18] Finally, the Court said that an analysis under the Bill of Rights did not require that the necessity of special conditions be tested against the undue risk threshold.[16] While special conditions such as the whereabouts condition may have Bill of Rights implications, a rights-consistent outcome is built into the provisions of the Parole Act — the conditions must not be "more onerous, or last longer, than is consistent with the safety of the community".[17]

Subsequent consideration of the issue by the Board

[19] In December 2023, the appellant's probation officer applied to reimpose the electronic monitoring conditions after a member of the public complained that the appellant had been seen at a model train group's open day where children were present. The appellant was charged with a breach of his conditions. Community Corrections advised at that time that consideration was being given to an application to extend the appellant's special conditions, which were due to expire in March 2024. The Board reimposed the electronic monitoring conditions in the interim.

[20] In March 2024, prior to the expiry of the special conditions, the Board heard an application to extend some of the appellant's special conditions, including the whereabouts and electronic monitoring conditions. By the time of that hearing leave had been granted to withdraw the charge of breach of conditions. But other issues had

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14 At [41].
15 At [44].
16 At [51].
17 Parole Act, s 7(2)(a).

arisen. Although the appellant had disclosed an intimate relationship to his probation officer, he refused to supply his partner's contact details. The probation officer wanted to contact the partner to verify that they were aware of the appellant's offending and to assess whether, as in the past, such a relationship might form a pathway to offending. The appellant resisted on the grounds of his partner's privacy.

[21] In considering the application to extend the conditions, the Board took into account the attendance at the model train event, and also the Board's view that the appellant was not as open with his probation officer as he needed to be — noting both his failure to discuss the visit to the model train event with them and his reluctance to provide the probation officer with details of his present partner. The Board extended the whereabouts and electronic monitoring conditions for a further 12 months.

[22] The appellant sought to review the decision. The reviewer directed herself to the Court of Appeal decision, noting that it established that special conditions may be imposed and maintained when an offender is considered at low risk of reoffending, having regard to the nature and seriousness of any likely subsequent offending. The reviewer upheld the Board's decision.

[23] Following the Board and review hearings, therefore, the special conditions were as follows:[18]

> (1) ~~To attend a reintegration meeting as directed by a Probation Officer~~.
>
> (2) To attend a psychological assessment and attend, participate in and complete any recommended treatment as directed by a Probation Officer.
>
> (3) ~~To attend, participate in and adhere to the rules of a relapse prevention group to the satisfaction of your Probation Officer and group facilitators~~.
>
> (4) ~~To reside at **[REDACTED]**, 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~~.
>
> (5) ~~To be at your approved address between the hours of 10:00pm and 6:00am daily for the first three months following release, unless you have the prior written approval of a Probation Officer~~.

[18] Conditions that have been discharged or amended are respectively shown as struck out or underlined.

(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.

(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.

(8) 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.

(9) To disclose to a Probation Officer, at the earliest opportunity, details of any intimate relationship which commences, resumes, or terminates.

(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 <u>where children under the age of 16 years gather</u>, 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) 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.

(12) Not to have contact or otherwise associate, with any victim of your offending, <u>or any family members of a victim who are known to you</u>, ~~including previous offending~~, directly or indirectly, unless you have the prior written approval of a Probation Officer.[19]

(13) ~~Upon request, to make available to a Probation Officer, or his or her agent, any electronic device capable of accessing the internet that is used by you, or is in your possession or control, for the purpose of monitoring your use of the device~~.

(14) ~~To comply with any direction made under section 29B(2)(b) of the Parole Act 2002 to attend a hearing at a time and place to be notified to you~~.

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19 For completeness we note that the probation officer has approved without limitation the appellant's association with certain specified people.

The relevant legislation

[24] The Parole Act was enacted to reform the law relating to the release of offenders serving sentences of imprisonment.[20] It establishes a set of guiding principles for the Board:[21]

> **7 Guiding principles**
>
> (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
>
> (2) Other principles that must guide the Board's decisions are—
>
> (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and
>
> (b) that offenders must, subject to any of sections 13 to 13AE, be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and
>
> (c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and
>
> (d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.
>
> (3) When any person is required under this Part to assess whether an offender poses an **undue risk**, the person must consider both—
>
> (a) the likelihood of further offending; and
>
> (b) the nature and seriousness of any likely subsequent offending.

[25] Offenders such as the appellant, who are serving long-term sentences, become eligible for parole when they have served their non-parole period.[22] The Board must consider them for release on parole as soon as practicable after that date and thereafter (with certain exceptions) at intervals of not more than two years.[23]

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20 Section 3.
21 Emphasis in original.
22 Section 20(1)(a).
23 Section 21. The principal exception is that the Board may make a postponement order under s 27 in certain circumstances.

[26] Section 28 governs directions for release on parole. In deciding whether to release an offender on parole, the Board must bear in mind that the offender has no entitlement to be released on parole.[24] The Board may direct an offender's release on parole only if satisfied on reasonable grounds that the offender "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:[25]

> (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.

[27] If paroled from an indeterminate sentence, an offender remains subject to recall for life.[26] Such offenders are released on parole subject to standard release conditions, which continue for life unless the Board varies or discharges them.[27] The standard conditions include meeting reporting requirements, obtaining consent before moving to a new address in another probation area, complying with their probation officer's directions as to non-association, and taking part in rehabilitative and reintegrative needs assessments if required to do so by their probation officer.[28]

[28] Under s 29AA, the Board in releasing an offender on parole may also impose "any special conditions on that offender that the Board specifies". In the case of an offender subject to an indeterminate sentence of imprisonment, those conditions may subsist for such period as the Board specifies.[29] Section 15(2) stipulates that a special condition must not be imposed unless it is designed to achieve one (or more) of several prescribed purposes:

> (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

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24 Section 28(1AA).
25 Section 28(2).
26 Section 6(4)(d).
27 Section 29(1) and (4)(b).
28 Section 14(1).
29 Section 29AA(2)–(3).

(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.

[29] A non-exhaustive list of special conditions that may be imposed is found in s 15(3). It includes residential restrictions, non-association conditions, requirements to undertake rehabilitation programmes, whereabouts conditions and electronic monitoring. The purpose of an electronic monitoring condition imposed under s 15(3)(f) is "to deter the offender from breaching conditions that relate to his or her whereabouts, and to monitor compliance with those conditions".[30]

[30] The right to seek variation or discharge of release conditions is found in s 56:

56 Application for variation or discharge of conditions

(1) An offender who is subject to release conditions imposed by the Board may apply to the Board at any time for the variation or discharge of any of those conditions.

(2) A probation officer may at any time apply to the Board for the variation or discharge of any release condition imposed by the Board that applies to an offender.

(3) An application under this section must indicate whether or not the offender wishes to appear before the Board to state his or her case.

…

[31] Section 58(1) provides simply that on an application under s 56 the Board "may direct the variation or discharge of any release condition" that applies to an offender.

[32] The Act also provides for recall to prison of an offender who has been released on parole.[31] The principal grounds for recall are that the offender poses an undue risk to the safety of the community or other persons, has breached release conditions or has committed an offence punishable by imprisonment.[32]

[33] The overall purpose of parole is not stated expressly in the Act. In a 2006 report on sentencing and parole reform, Te Aka Matua o te Ture | the Law Commission identified two rationales for its availability: it is a method of administering sentences

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30 Section 15A(1).
31 Sections 59–66.
32 Section 61(a)–(c). There are other grounds, but they are not material to this appeal.

with a view to reducing the risk of reoffending; and it is a means of mitigating the social and fiscal costs of severe prison sentences.[33] In the Commission's view, parole contributes to the former goal by incentivising prisoners to participate in prison treatment programmes, building flexibility into the system to identify and manage high-risk prisoners, and providing a tool for managing the release and reintegration of prisoners in a way that postpones recidivism.[34] The ultimately reintegrative purpose of parole is reflected in s 28(2)(b) of the Act, which requires the Board to consider the "public interest in the reintegration of the offender into society as a law-abiding citizen" when deciding whether to release an offender on parole.

[34] It is also a particular feature of the Act that it does not define "undue risk", although providing the mandatory considerations set out in s 7(3) — namely, the likelihood of further offending and the nature and seriousness of any likely subsequent offending. This makes clear that the assessment of undue risk responds to the individual and to their offending history. The absence of a definition perhaps also emphasises the difficulty in precisely defining such a standard and, related to this, the importance of the Board's expertise, gained through experience, in undertaking this assessment.

The argument

[35] The appellant contends that, properly construed, the Parole Act provides important "guard rails" constraining the Board's powers to impose, vary and discharge special conditions. Those special conditions that are directed to the risk of reoffending must always satisfy the threshold of being a reasonable, necessary and proportionate means of ensuring the applicant does not represent an undue risk to the community, when considered with the other conditions imposed. On this analysis, the relevant threshold to which the Board must direct itself when considering an application under s 58 is "undue risk". It is not, as the Court of Appeal held, "the safety of the community", which is in reality the "not no risk" threshold applied by the Board when

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33 Law Commission | Te Aka Matua o te Ture *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at [123]–[124].

34 At [15] and [123]. There is some empirical support for the claim that parole reduces the risk of, or at least postpones, recidivism: at [164]–[170]; and New South Wales Law Reform Commission *Parole* (Report No 142, June 2015) at [2.21]–[2.30].

declining the application.[35] It is submitted for the appellant that the methodology the High Court Judge directed the Board to apply is necessary to secure compliance with the requirements of the Bill of Rights. The Law Association of New Zealand Inc and the Criminal Bar Association of New Zealand Inc, which were each granted leave to intervene, support the appellant's position.

[36] The Attorney-General's position is that 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 recall an offender. That is 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 eligible for parole remains undue. But that is not the question for the Board when it considers applications to vary or discharge special conditions post-release. Here the statutory purpose is designed to look earlier, to capture risk before it rises to the level of undue risk 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. The scheme of the Act secures that outcome through its requirement in s 7(2)(a) that offenders not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community. Evidence of undue risk, while not irrelevant to s 56 applications, is not the filtering mechanism by which those applications are to be determined. The Attorney-General says the absence of reference to undue risk in the provisions dealing with the imposition and continuation of special conditions is deliberate and important, citing the Court of Appeal's decision in *Gilmour v Chief Executive of the Department of Corrections*.[36]

[37] The Board supports the Attorney-General's position. It stresses that it must have flexibility in the imposition of conditions to manage the multiplicity of circumstances in which it is required to assess and manage risk, reintegration and rehabilitation. The Board deals with over 7,000 hearings per year. For determinate sentences these are of about 35 minutes' duration, but considerably longer for those subject to indeterminate sentences. In cases concerning applications for more than

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35 See above at [10].

36 *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250 at [34].

minor variation or discharge of release conditions by offenders subject to a sentence of preventive detention, applications are referred to a panel comprising the chairperson of the Board (as chair), a psychiatrist and/or a psychologist, and often a fourth lay member. The presence of a psychiatrist or psychologist is important as such applications can raise important issues of risk assessment. If the application potentially affects victims' interests, and there is a registered victim notification entry, the Board will refer the application to the victim for comment. The Board says that applying the test as formulated by the High Court Judge, with its substantive content, will have operational implications for the Board, which already has a heavy workload. Moreover, the Board says that offenders are ultimately better placed to avoid recall to prison if the Board is given greater flexibility to vary conditions under s 58 for the purposes of graduated risk management.

[38] The Board argues that there are other policy implications that also weigh against the High Court approach. Sometimes a condition will be important for an offender who is already below the undue risk threshold. The Board contends that if the interpretation of s 58 formulated by the High Court Judge is applied, those offenders will be without the formal machinery of support that special conditions can provide, in relation to rehabilitative and reintegrative activities. A special condition to attend a reintegration meeting is unlikely to be critical to avoiding undue risk, though it would be very important in maintaining a smooth transition into the community.

The issues

[39] The issues on this appeal are as follows:

(a) Is undue risk the measure to be applied by the Board when deciding on the imposition, variation and removal of special conditions that are principally concerned with managing risk?

(b) How must the Board decide whether to continue special conditions? In particular:

(i) Is it necessary for the Board to undertake a proportionality analysis under s 5 of the Bill of Rights in respect of the conditions?

(ii) Is the Board required to address the question of imposition or continuation on a condition-by-condition basis?

(c) Did the Board err in its approach?

Issue one: Is undue risk the measure?

[40] It is helpful to identify just what is at issue in this appeal. The conditions which were the subject of the appellant's repeated applications for discharge were the whereabouts and associated electronic monitoring conditions. Putting the matter in s 15(2) terms, these are conditions imposed to reduce the risk of reoffending by the offender.[37]

[41] It will be seen from the review of the Act above that there is no express prescription of undue risk as the threshold for the imposition or continuation of restrictive special conditions designed to manage risk of reoffending. Nevertheless, we consider that an interpretation of the Act which requires the Board to address undue risk when considering the imposition and continuation of restrictive special conditions is consistent with the scheme and purpose of the Act.

[42] First, undue risk is the criterion against which release on parole and recall from parole are assessed.[38] In other words, a person may be paroled, and may remain in the community, if they will not pose an undue risk to the community. The close connection between the undue risk assessment and the imposition of conditions emerges from the requirement in s 28(2)(a) that the Board have regard to the "support and supervision available to the offender following release" when assessing undue risk for the purposes of release. It is implicit that conditions of release are included within the support and supervision referred to. It is a logical reading of the Act, consistent

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37 Parole Act, s 15(2)(a).

38 Sections 28(2) and 61(a). As to the relevance of "undue risk" to other grounds for recall, see *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [129].

with the undue risk assessment for release and for recall from parole, that special conditions should be designed to manage undue risk. But it is not a requirement of the Act that conditions be imposed to eliminate risk altogether.

[43] It is particularly of note that while, under s 7(1), community safety is the paramount consideration for the Board, s 28(2) of the Act allows offenders to be released and to be managed in the community so long as they will not present an undue risk. Parliament has therefore treated the release and management in the community of offenders who will not pose an undue risk as consistent with the safety of the community for the purposes of s 7.

[44] Second, this interpretation is consistent with the proportionality that underlies the Act's provisions. The Board is given power to substantially restrict the rights and freedoms of offenders in the interests of community safety. It will be remembered that s 7(2)(a) provides that conditions must not be more onerous, or last longer, than is consistent with the safety of the community. This is a concept of proportionality which finds further statutory expression in the notion of undue risk as described in s 7(3). We do not think it appropriate to attempt to define undue risk more closely than does the Act itself — noting again the absence of any definition.[39] However, as we come to in more detail below, it is at least clear that "undue" is a concept that inherently involves an assessment of proportionality.[40]

[45] Third, we consider that this interpretation is consistent with the rehabilitative purpose of the Act. It allows rehabilitation to continue in the community where there is a risk to the community but not an undue risk, thereby supporting successful reintegration. It is of note that s 28(2) requires the Board, when deciding whether it is satisfied that the offender will not pose an undue risk to the safety of the community, to address not just the support and supervision available to the offender following release but also the public interest in the reintegration of the offender into society as a law-abiding citizen.

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39 See above at [34].

40 *Smith v The New Zealand Parole Board* [2018] NZHC 955 at [37]–[38]. See also *Clarke v Parole Board* HC Christchurch CRI-2005-409-111, 22 July 2005 at [35]; and *Edmonds v The New Zealand Parole Board* [2015] NZHC 386 at [33]–[34]. See below at [52].

[46] As noted, the Attorney-General relies on *Gilmour* for the proposition that "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".[41] It is true that statement appears in the judgment, but it was made in the context of a dispute as to whether Ara Poutama Aotearoa | the Department of Corrections, in the preparation of parole assessment reports for the Board under s 43(1)(c) of the Act, was required to address the issue of undue risk. The Court observed of the Parole Act scheme that "the assessment of risk lies at the heart of the task the Board must undertake", but "it is the Board, and not the Department and certainly not any individual parole officer or case manager, whose task it is to undertake that risk assessment".[42] Seen in that context, we consider the comment relied upon is concerned with the respective roles of the Board and other actors under the Act; it does not attempt to define the circumstances in which the Board is itself required to address undue risk.

[47] Moreover, the notion that undue risk is only relevant under the Act where explicitly referred to is inconsistent with the Court of Appeal's earlier decision in *Miller v The New Zealand Parole Board*, where the Court found that the standard of undue risk applies to all recall decisions under s 66 of the Act, notwithstanding that only one ground for recall explicitly uses that term.[43] Therefore, as the courts have previously held, even where undue risk is not referred to in the Act, its relevance may be necessarily implicit.

[48] It follows that we agree with Gwyn J that nothing turns on the absence of a reference to undue risk in the provisions relating to the imposition and continuation of special conditions.[44] As Gwyn J said, those provisions "do not arise, and are not to be interpreted, in a vacuum".[45] We consider it to be a matter of inescapable logic, in light of the overall statutory scheme, that the standard of undue risk is relevant to the imposition *and* continuation of special conditions.

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41 *Gilmour*, above n 36, at [34].
42 At [33].
43 *Miller*, above n 38, at [129]. See Parole Act, s 61(a).
44 HC judgment, above n 10, at [44] and [47].
45 At [47].

[49] This interpretation is further supported by the Bill of Rights. The special conditions with which we are concerned — the whereabouts and electronic monitoring conditions — engage and limit rights affirmed under the Bill of Rights, particularly the rights to freedom of association, freedom of movement and, potentially, the right not to be arbitrarily detained.[46] The Bill of Rights therefore has implications for the interpretation and application of the statutory provisions empowering such conditions.

[50] Section 5 of the Bill of Rights requires that limitations on rights be reasonable, prescribed by law and demonstrably justified in a free and democratic society.[47] Justification for these purposes has been held to require an assessment of whether the limit is in due proportion to the importance of the objective.[48] In addition, s 6 requires that statutory provisions empowering the imposition of such limitations be interpreted as rights-consistent, if they can be.[49] Section 58 of the Parole Act confers a broad discretion. To interpret the Act as requiring the Board to exercise that discretion in accordance with the justification requirements of s 5 of the Bill of Rights is to give s 58 a rights-consistent interpretation.[50] That was not disputed in the hearing before us.

[51] But does this require that the Board utilise "undue risk" in that assessment? The respondents argue that the requirement that conditions be no more onerous or long-lasting than is consistent with the safety of the community (what we call the "community safety" standard) captures the necessary proportionality enquiry. The appellant and interveners argue that an assessment of "undue risk" is necessary.

[52] We consider that requiring an assessment of "undue risk" is the most rights-consistent approach, as that expression most accurately captures the concept of proportionality which decision makers must apply under s 5 of the Bill of Rights.

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46 New Zealand Bill of Rights Act 1990, ss 17–18 and 22.

47 Subject to s 4.

48 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and [104] per Tipping J.

49 *Cropp v Judicial Committee* [2008] NZSC 46, [2008] 3 NZLR 774 at [25]; and *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289 at [90]–[91].

50 See, to similar effect, *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101] per Winkelmann CJ and O'Regan J. The matter is not directly before us, but logic suggests that this analysis applies in the same way to the imposition of conditions at the time of release under s 29AA of the Parole Act. That provision also confers a broad discretion and appears capable of being interpreted in this way.

As the facts of this case show, the difficulty with the "community safety" standard is that it easily becomes a "no risk" standard, when the parole model is not a "no risk" model. It cannot be a "no risk" model given the cohort it is applied to, and in light of the standard for release and recall. The concept of undue risk enables the Board to undertake a case-specific assessment, weighing up all the factors that are relevant to risk, rehabilitation and reintegration, and applying its specific expertise with the assistance of expert advice as appropriate. The undue risk assessment also provides the evaluative transparency that is expected of decision makers undertaking the proportionality assessment contemplated by the Bill of Rights.

[53] Utilising the concept of undue risk in this way does not dilute the ability of the Board to manage offenders consistently with the objective of community safety. As is apparent in s 7(3), undue risk contains within it the concept that, for some offenders, there must be less tolerance of risk, given their history of offending and the seriousness of the offences they have committed in the past. But it also provides the Board with the ability to manage the offender in the community to move them towards rehabilitation and reintegration, thus achieving community safety.

[54] The Board argues that the appellant's interpretation involves imposing a narrower legal test than the statute itself provides, which will reduce its flexibility and add to its substantial workload. We do not accept that the appellant's proposed interpretation reads something new into the statute. The Parole Act itself requires this proportionality analysis. When the issue before a decision maker involves limiting affirmed rights, substantive consideration is also required by the terms of the Bill of Rights.[51] Moreover, as we come to, we do not see the proportionality assessment as unduly onerous.

[55] The Board also says that undue risk would not work for other conditions, such as those addressing rehabilitation and reintegration or providing for the reasonable concerns of victims.[52] We agree that the test does not apply to s 15(2)(c) conditions (those relating to victims' concerns). However, the Board must still consider issues of proportionality, as is made plain by s 7(2)(a) and, indeed, by the use of the word

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51 *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372 at [138].
52 Parole Act, s 15(2)(b)–(c).

"reasonable" in s 15(2)(c). As to conditions addressing rehabilitation and reintegration, we do consider that undue risk remains the measure. Conditions imposed for the purposes of rehabilitation and reintegration do address the risk of reoffending, and therefore the risk to the community, but the proportionality assessment is likely to be different than that for conditions of the type with which we are presently concerned. Conditions imposed for rehabilitative and reintegrative purposes are likely to be less rights-limiting. In fact, they may be dignity-enhancing for the offender in that they increase the prospects of long-term reintegration.

[56] Kós and Miller JJ say that, on the approach we have set out, a different, lesser standard would be used as the measure for conditions that do not engage protected rights or which serve some predominantly victim-centric purpose.[53] They say that is contrary to the legislation, given that s 7(2)(a) provides that the same standard is to be used for all conditions. It is of course true that s 7(2)(a) articulates a single standard, and as we have set out above it applies in all cases. But it is inevitable that its application will vary depending on the nature of the risk and the nature of the restriction. Kós and Miller JJ themselves acknowledge that where a condition engages a protected right in a material way, the Board must be satisfied that it is demonstrably justified.[54]

Issue two: How must the Board decide whether to continue special conditions?

(i) Is it necessary for the Board to undertake a s 5 proportionality analysis?

[57] In *Attorney-General v Chisnall*, this Court said that when considering the imposition of special conditions, the Board must use ss 5 and 6 of the Bill of Rights to ensure orders made, and conditions imposed, are as rights-consistent as possible.[55] The approach in *R v Hansen* entails a stepped proportionality assessment.[56] However, as this Court has acknowledged on several occasions, that formal stepped assessment may not be appropriate given the nature of the decision and decision maker,[57] or given

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53 Below at [123].
54 Below at [126].
55 *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [104] per Winkelmann CJ, O'Regan, Williams and Kós JJ.
56 *Hansen*, above n 48, at [64] per Blanchard J and [104] per Tipping J.
57 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [89]–[92].

the statutory framework.[58] Whatever methodology is applied, however, the application must be consistent with the requirements of s 5.

[58] In this case, as we have explained, the Parole Act has built into it a proportionality analysis. It requires that conditions not be more restrictive, or imposed for longer, than is consistent with the safety of the community.[59] And, as explained, the Act in our view contemplates the Board using the measure of "undue risk" in making this assessment. This requires the decision maker to assess the proportionality between the risk and the restriction on the offender's rights. It contemplates that special conditions imposed primarily for the purpose of risk reduction are justified if necessary to manage undue risk. But it also requires the Board to weigh up the impact of overly restrictive conditions on the offender's rehabilitation and reintegration, as the offender's rehabilitation and reintegration also address risk.

[59] The direction given by Gwyn J was therefore consistent with the requirements of the Act, and the requirements of s 5 of the Bill of Rights — the latter directing that particular attention be paid to the reasonableness of the condition and its necessity, measured against the consideration of "undue risk". As Gwyn J directed, the Board was required, using contemporary information as to the likelihood of further offending and the nature and seriousness of any likely further offending, to ask itself whether the continuation of the special conditions was a reasonable, necessary and proportionate means of ensuring that the appellant does not represent an undue risk to the community.[60] Kós and Miller JJ describe this as requiring "a full proportionality analysis".[61] We clarify that what is required is no more than an application of the test as set out by Gwyn J.

(ii) Is the Board required to address the question of imposition or continuation on a condition-by-condition basis?

[60] It would be artificial to require assessment of conditions in isolation from the others. While the Board may only impose special conditions to serve the s 15(2) purposes, in determining those conditions the Board must consider how they will work

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58 *D (SC 31/2019)*, above n 50, at [100]–[101] per Winkelmann CJ and O'Regan J.
59 Parole Act, s 7(2)(a).
60 HC judgment, above n 10, at [130].
61 Below at [122].

together and how they will work with the standard conditions. Nevertheless, that pragmatic reality does not remove the obligation to undertake the proportionality assessment in respect of each condition. That is a requirement of the Act and of s 5 of the Bill of Rights. The fact that conditions are interconnected and work together must not prevent the Board from assessing the marginal utility of rights-limiting individual conditions. Rather, such an approach will make the assessment more transparent.

[61] We make it clear that, in assessing proportionality, the Board is entitled to consider the work that the condition does within the broader framework of conditions, including the extent to which it also serves the interests of rehabilitation and reintegration, and the extent to which it meets the reasonable concerns of victims.

[62] We do not agree, for the reasons given, that our approach creates a disconnect between the overall approach when deciding to release an offender on parole and the condition-by-condition approach on a s 56 application for variation or discharge, as Kós and Miller JJ say.[62] Nor do we accept that it will effectively alter the standard for release in the first place such that the appellant himself might not have been granted parole in 2019 had this approach been applied.[63]

[63] Rather, as we have explained, our approach reflects an orthodox application of the statutory scheme. The Board must comply with the obligations imposed upon it by s 7 of the Parole Act and s 5 of the Bill of Rights both when imposing conditions of release *and* when considering an application for variation or discharge. The Board must also exercise its discretion in accordance with the purpose of the Parole Act, which includes not only community safety but also rehabilitation and reintegration. Whilst, as we make clear, the Board is entitled to make an overall assessment of conditions, it is not by that fact freed of its obligation to ensure each condition meets the standards which the legislation sets.

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62 Below at [138].
63 Below at [138]–[139].

Issue three: Mr Grinder's appeal

[64] The Board did not undertake the proportionality analysis as set out above. The Board failed to properly identify and assess the extent of the limitation on the appellant's rights entailed in the continuation of electronic monitoring in particular, accepting that it would impact on the appellant's opportunities for positive social behaviour but referring to it as an "inconvenience". The Board did identify a justification for the restrictive conditions. It said that the whereabouts condition, justifying the electronic monitoring, limited the appellant's ability to go to places where he might meet children without their parents. However, it did not weigh his recent risk assessments and his time on parole without offending.

[65] The Board failed to grapple with the substantive reasons for the conclusions reached by the two psychologists. Of course, the Board is perfectly entitled to disagree with those expert assessments of risk, but it must explain why in terms consistent with the Act's requirements. Its statement that whatever the risk the appellant presented, it was "not no risk", suggests that it did not itself identify the risk as significant. The same issue was present on review; the reviewer expressly stated that the Board "did not have to form a view about whether [the appellant's risk] was a low risk or the higher risk" contained in earlier reports.

[66] As Gwyn J found, therefore, neither the Board nor the reviewer undertook the required proportionality assessment.

Disposition

[67] For these reasons, the appeal should be allowed.

[68] The appellant seeks the setting aside of the Court of Appeal judgment and the reinstatement of the High Court judgment in full. As Ms Casey KC clarified during the hearing, the appellant also seeks an order remitting the application to the Board for further reconsideration on the terms set out in the decision of Gwyn J at [130(a)–(b)]. However, as we have described above, the Board did undertake the ordered reconsideration as directed by Gwyn J, and that reconsideration is not itself before us. Further, events have moved on since that time. In light of these circumstances, the

appropriate relief is to set aside the decision of the Court of Appeal and reinstate the finding of the High Court that the issue for the Board on any reconsideration of these conditions is as set out in the decision of Gwyn J at [130(a)–(b)].

[69] This Court also needs to decide the admissibility of the evidence of subsequent consideration of the issue by the Board referred to at [19]–[23] above. The appellant formally objected to the inclusion of this material on the ground that it is irrelevant to the issues on appeal. Nevertheless, the appellant ultimately relied on the evidence in his written submissions. The evidence is admitted.

[70] The appellant, who is legally aided, sought costs in the event his appeal succeeded. The Attorney-General submits that costs should lie where they fall. We consider costs should be granted in the usual way, provided that the amount does not exceed the amount paid by the Legal Services Commissioner for the appellant to bring this appeal.[64] If the amount paid by the Legal Services Commissioner is greater than $30,000 plus usual disbursements, the respondents must pay the appellant one set of costs of $30,000 plus usual disbursements. We allow for second counsel. If the amount paid by the Legal Services Commissioner is less than $30,000 plus usual disbursements, the respondents must pay the appellant one set of costs equal to that lesser amount.

KÓS AND MILLER JJ
(Given by Miller J)

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64 *Curtis v Commonwealth of Australia* [2019] NZCA 126 at [14]–[24].

[71] We consider that the Court of Appeal was correct that the "undue risk" standard applies to release and recall decisions, both of which require an overall risk assessment, and is not the measure for the imposition or maintenance of individual release conditions.[65]

[72] However, we differ from the Court of Appeal to the extent it held that the statutory framework itself ensures decisions of the New Zealand Parole Board (the Board) will comply with the New Zealand Bill of Rights Act 1990 (NZBORA).[66] We accept rather that a limit on those rights will likely be justified if, when deciding to grant parole with a special condition, the statutory criteria in ss 15, 15A, 28 and 7 of the Parole Act 2002 are correctly applied. The Board will have been guided by the principle that release conditions should not be more onerous, or last longer, than is necessary.[67] Necessity is a function of the condition's rational connection to the objects of parole and its efficacy. The Board must also undertake a simple proportionality analysis to weigh the condition's purpose and efficacy against its impact on the offender. If this is done correctly, release conditions will not result in the community or any part of it, including victims, being exposed to undue risk from offenders who have been paroled during the terms of their sentences.[68]

[73] The majority's approach sets a different and lower standard for the discharge or variation of individual release conditions than that which applies to both release on parole and recall.[69] We consider that this will be problematic for the Board in practice and likely counterproductive for offenders who are seeking parole and must satisfy the Board that they will not present an undue risk to community safety if released.

[74] The whereabouts condition was imposed on Mr Grinder for the purpose of reducing a real risk that he would seek out children and sexually offend against them, and the electronic monitoring conditions were imposed to deter him from breaching the whereabouts condition. The Board was required to consider whether these purposes might have been achieved in a less intrusive way. Having decided that was

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65 *Attorney-General v Grinder* [2023] NZCA 596, [2023] 3 NZLR 760 (Collins, Mallon and Wylie JJ) [CA judgment] at [52].
66 At [51].
67 Parole Act 2002, s 7(2)(a).
68 Section 28(2).
69 See, for example, below at [123].

not feasible, it had to weigh the benefits of the conditions against their impact on Mr Grinder, bearing in mind that the conditions engaged his protected rights to freedom of movement and association.

[75] The Board did not expressly undertake that simple proportionality assessment in the decision of 14 October 2021 which is the subject of this proceeding.[70] Nonetheless, we would dismiss the appeal for the reasons given below from [140].

Narrative

[76] Mr Grinder was sentenced to preventive detention in 2003 for extensive and serious sexual offending against children over a long period of time.[71] He was paroled in August 2011 following a positive response to treatment and reintegration programmes. However, after his release he formed relationships with two women who were considered unsuitable because they were vulnerable for intellectual disability and mental health reasons. It appears there was also concern that through them he would gain access to children. He deceived his probation officer and members of his support group about these relationships and failed to terminate them when directed to do so. For these reasons he was recalled to prison in July 2012.

[77] The record does not clearly explain why Mr Grinder was not again paroled until 2019. It appears from the incomplete materials before us that he was a compliant prisoner but his proposed addresses had not been assessed and reintegration plans had not been developed. By 2018 he was successfully running a bicycle refurbishment workshop. He had managed to maintain a support network outside prison, which is a significant achievement.

[78] He was released on parole on 1 April 2019. At that time, he posed a medium to high risk of sexual reoffending. His most likely offending would be against children known to him, but there was a concern he might also befriend vulnerable adults. He was accordingly subject to special conditions which, alongside other support and supervision available to him, satisfied the Board that he did not pose an undue risk.

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70 Alongside the panel convenor's review of that decision: see below at [82] and above at [10]–[12] per Winkelmann CJ, Ellen France and Williams JJ.

71 See above at [2] per Winkelmann CJ, Ellen France and Williams JJ.

[79] Two types of conditions are in issue. The first is a whereabouts condition requiring that he not enter or loiter near specified places where children might congregate, such as schools or recreation facilities, without a probation officer's prior approval or unless accompanied by an approved adult.[72] That condition was designed to mitigate the risk that he would form connections allowing him access to potential child victims. The second type is an electronic monitoring condition imposed to monitor his compliance with the whereabouts condition.[73]

[80] The Board also directed that a monitoring hearing be held six months after his release. At the first monitoring hearing on 22 October 2019, Mr Grinder asked the Board to discharge the whereabouts and monitoring conditions in light of his compliance with conditions. He explained that the conditions were intrusive and interfered with his ability to gain employment and freely maintain contact with his supporters. The Board declined, noting the sentencing Judge's description of his conduct in seeking out victims as opportunistic and manipulative, his admitted duplicity towards his probation officer and supporters when released in 2011, and what it described as his self-focus towards his release conditions. The Board acknowledged that electronic monitoring affected his employment opportunities but saw it as an essential condition supporting his transition from prison to the community.

[81] At a second monitoring hearing on 12 March 2020, the Board again declined to change the special conditions. The Board accepted that Mr Grinder was doing well on parole and had gained employment. It considered that the probation officer was giving Mr Grinder plenty of opportunities to undertake recreation as part of a balanced life, including use of a mountain bike and visiting libraries and churches. However, it reiterated that Mr Grinder had been an opportunistic offender and the whereabouts condition was imposed for good reason. Mr Grinder did not challenge the monitoring conditions at this hearing.

[82] In 2021 Mr Grinder again applied for the whereabouts and monitoring conditions to be discharged.[74] By that time, an updated psychological report assessed

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72 See above n 5 per Winkelmann CJ, Ellen France and Williams JJ.
73 See above n 6 per Winkelmann CJ, Ellen France and Williams JJ.
74 See also above at [8]–[11] per Winkelmann CJ, Ellen France and Williams JJ.

his reoffending risk as low. The Board accepted he was doing well on parole. But the Board described the whereabouts and monitoring conditions as a significant protective factor and took the view that their impact on his pro-social opportunities was modest. Having regard to Mr Grinder's extensive offending and capacity to manipulate children and their parents, it declined the application on 14 October 2021 in these terms:[75]

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

[83] Following the High Court decision upholding Mr Grinder's application for judicial review,[76] the Board reconsidered his application to vary the special conditions at a hearing on 25 January 2023.[77] Community Corrections did not oppose discharge of the monitoring conditions, but it wished to maintain the whereabouts condition. Two of the 13 victims of his past offending opposed discharge of the monitoring and whereabouts conditions.[78]

[84] The Board acknowledged that the monitoring conditions embarrassed Mr Grinder but stated that its concern was with the conditions' "statutory function", being monitoring compliance with the whereabouts condition.[79] However, he had fully complied with the monitoring conditions, and there was no indication that he had breached the whereabouts condition. For that reason, electronic monitoring was no longer necessary.

[85] The Board declined to discharge the whereabouts condition, saying that it raised "quite separate issues". There was no evidence that he had approached children in any of the prohibited areas, and his pattern of offending largely involved befriending

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75 A panel convenor's review of this decision was also unsuccessful: see above at [12] per Winkelmann CJ, Ellen France and Williams JJ.

76 *Grinder v New Zealand Parole Board* [2022] NZHC 3188 (Gwyn J).

77 See also above at [16] per Winkelmann CJ, Ellen France and Williams JJ.

78 No other victims made submissions. See also below at [97].

79 See Parole Act, s 15A(1).

parents or caregivers, grooming them as a precursor to offending against children. In his past offending the adults had come into contact with him in a range of ways. For these reasons, the Board accepted that if the purpose of the whereabouts condition was to limit opportunities for direct contact with children, it would no longer be justified. But it fulfilled the different purpose of limiting his opportunities to groom adults accompanying children in those areas, so restricting access to potential victims and reducing the risk of offending. The Board did not accept that the condition was unreasonable or disproportionate. Any future offending was likely to be serious. Although Mr Grinder was in a stable living situation and was open and engaging with his probation officer, that had not always been the case. His approach to managing his risk had changed significantly for the better, but the change was relatively recent. He had offended over a period of 25 years. For these reasons, a "relatively cautious and stepped" approach was warranted.

[86] The Board took the view that it was not required to take a condition-by-condition approach, inquiring whether without each condition Mr Grinder would pose an undue risk. Rather, the question was whether the whereabouts condition was a reasonably necessary part of a framework of conditions directed to ensuring he would not pose an undue risk to the safety of children.

[87] In December 2023, the Board reimposed the electronic monitoring conditions.[80] It does not appear that the decision was influenced by the Court of Appeal's judgment on 24 November 2023, which set aside the High Court's judgment. Rather, the Board was concerned by an incident in which Mr Grinder was seen in circumstances that "could have led to a situation of risk". Mr Grinder had attended an open day held by a model train group without seeking prior approval. Children were present. He admitted he had attended. It also appeared that he failed to disclose the event in a subsequent meeting with his probation officer. The Board therefore reimposed the electronic monitoring conditions until Mr Grinder's special conditions were set to expire on 31 March 2024.

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[80] See also above at [19] per Winkelmann CJ, Ellen France and Williams JJ.

[88] Other concerns then arose. Mr Grinder was not sufficiently forthcoming, as a life parolee, with his probation officer about a new intimate relationship. The Board found that Mr Grinder felt he could attend events where children were present without involving others who might assist his decision-making. His lack of transparency about his new relationship was another risk, given his previous breach relating to a former relationship that had created an opportunity for offending. For these reasons, upon an application by his probation officer, the Board extended Mr Grinder's whereabouts and monitoring conditions on 28 March 2024 for 12 months, shortly before they were due to expire.[81]

[89] We do not know the outcome of the Board's review which was planned to take place in March 2025. Nor do we have the updating report from Mr Grinder's probation officer or an updated psychological assessment, both of which were requested by the Board.

The legislation

[90] Section 7 of the Parole Act requires community safety to be the paramount consideration when the Board is making decisions relating to the release of an offender, but the Board must relevantly be guided by the principle that release conditions must not be more onerous, or last longer, than is consistent with community safety:[82]

> **7 Guiding principles**
>
> (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
>
> (2) Other principles that must guide the Board's decisions are—
>
> (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and

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81 See also above at [20]–[21] per Winkelmann CJ, Ellen France and Williams JJ. The panel convenor then declined Mr Grinder's application for review on 24 May 2024: see above at [22] per Winkelmann CJ, Ellen France and Williams JJ. The condition relating to non-association with victims and members of victims' families known to Mr Grinder is now in place for life, unless otherwise varied or discharged.

82 Emphasis in original.

(b) that offenders must, subject to any of sections 13 to 13AE, be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and

(c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and

(d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.

(3) When any person is required under this Part to assess whether an offender poses an **undue risk**, the person must consider both—

(a) the likelihood of further offending; and

(b) the nature and seriousness of any likely subsequent offending.

[91] The Act states that the Board must bear in mind that an offender has no right to be released on parole.[83] It further specifies that the Board may order an offender's release on parole only if satisfied on reasonable grounds that the offender "will not pose an undue risk to the safety of the community", having regard to the support and supervision available to the offender following release and the public interest in the offender's reintegration into the community.[84]

[92] Upon release, an offender released on parole is subject to standard release conditions as well as any special conditions imposed by the Board under s 29AA(1).[85] The standard conditions are:

14 Standard release conditions

(1) An offender who is subject to the standard release conditions must comply with the following conditions:

(a) the offender must report in person to a probation officer in the probation area in which the offender resides as soon as practicable, and not later than 72 hours, after release:

(b) the offender must report to a probation officer as and when required to do so by a probation officer, and must notify the probation officer of his or her residential address and the nature and place of his or her employment when asked to do so:

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83 Parole Act, s 28(1AA).
84 Section 28(1)–(2).
85 See also ss 15(1) and 29(1).

(c) the offender must not move to a new residential address in another probation area without the prior written consent of the probation officer:

(d) if consent is given under paragraph (c), the offender must report in person to a probation officer in the new probation area in which the offender is to reside as soon as practicable, and not later than 72 hours, after the offender's arrival in the new area:

(e) if an offender intends to change his or her residential address within a probation area, the offender must give the probation officer reasonable notice before moving from his or her residential address (unless notification is impossible in the circumstances) and must advise the probation officer of the new address:

(f) the offender must not reside at any address at which a probation officer has directed the offender not to reside:

(fa) the offender must not leave or attempt to leave New Zealand without the prior written consent of a probation officer:

(fb) the offender must, if a probation officer directs, allow the collection of biometric information:

(g) the offender must not engage, or continue to engage, in any employment or occupation in which the probation officer has directed the offender not to engage or continue to engage:

(h) the offender must not associate with any specified person, or with persons of any specified class, with whom the probation officer has, in writing, directed the offender not to associate:

(i) the offender must take part in a rehabilitative and reintegrative needs assessment if and when directed to do so by a probation officer.

[93] The power to impose special conditions is found in s 15, which states that a special condition must not be imposed unless it is designed to:[86]

(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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86 Section 15(2).

[94] A non-exhaustive list of special conditions that may be imposed is found in s 15(3):

> (3) The kinds of conditions that may be imposed as special conditions include, without limitation,—
>
> (a) conditions relating to the offender's place of residence (which may include a condition that the offender reside at a particular place), or his or her finances or earnings:
>
> (ab) residential restrictions:
>
> (b) conditions requiring the offender to participate in a programme (as defined in section 16) to reduce the risk of further offending by the offender through the rehabilitation and reintegration of the offender:
>
> (ba) conditions prohibiting the offender from doing 1 or more of the following:
>
> (i) using (as defined in section 4(1)) a controlled drug:
>
> (ii) using a psychoactive substance:
>
> (iii) consuming alcohol:
>
> (c) conditions that the offender not associate with any person, persons, or class of persons:
>
> (d) conditions requiring the offender to take prescription medication:
>
> (e) conditions prohibiting the offender from entering or remaining in specified places or areas, at specified times, or at all times:
>
> (f) conditions requiring the offender to submit to the electronic monitoring of compliance with any release conditions or conditions of an extended supervision order, imposed under paragraph (ab) or (e), that relate to the whereabouts of the offender:
>
> (g) an intensive monitoring condition, which must, and may only, be imposed if a court orders (under section 107IAC) the imposition of an intensive monitoring condition.

[95] It will be seen that special conditions may include residential restrictions, non-association conditions, conditions prohibiting being in specified places, and monitoring conditions. We draw attention to s 15(3)(f), which states that a special condition may require the offender to submit to electronic monitoring of compliance

with whereabouts conditions imposed under s 15(3)(ab) or (e).[87] Section 15A(1) states that the purpose of an electronic monitoring condition imposed under s 15(3)(f) is "to deter the offender from breaching conditions that relate to his or her whereabouts, and to monitor compliance with those conditions".

[96] Special conditions may subsist for such period as the Board specifies (so long as that period is not longer than the standard release conditions for an offender subject to a determinate sentence).[88] Under s 29B the Board may also monitor the offender's compliance with release conditions where that is desirable because of the offender's special circumstances. It did so in Mr Grinder's case.[89]

[97] The Board must take all reasonable steps to give victims notice of parole hearings,[90] and victims have a right to participate in the process by making written and oral submissions or supplying information.[91]

[98] Section 56 provides that a parolee, or their probation officer, may apply to the Board for the variation or discharge of any standard or special release condition:[92]

> **56 Application for variation or discharge of conditions**
>
> (1) An offender who is subject to release conditions imposed by the Board may apply to the Board at any time for the variation or discharge of any of those conditions.
>
> (2) A probation officer may at any time apply to the Board for the variation or discharge of any release condition imposed by the Board that applies to an offender.
>
> (3) An application under this section must indicate whether or not the offender wishes to appear before the Board to state his or her case.
>
> …

The Board may then under s 58 direct the variation or discharge of any condition.

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87 An offender on whom residential restrictions are imposed is required to submit to electronic monitoring of compliance with those restrictions, as directed by their probation officer: s 33(2)(d).

88 Section 29AA(2)–(3).

89 See above at [80]–[81].

90 Parole Act, s 43(2)(b) and (2A).

91 Sections 43(5) and 49(4)(a). See also s 50A(2)(a).

92 See also s 14(4), which clarifies that a s 56 application may be made in respect of a standard release condition.

[99] The Act provides in ss 59–66 for recall to prison of an offender who has been released on parole. In the case of an offender subject to an indeterminate sentence, such as Mr Grinder, the chief executive may apply for recall on grounds that the offender "poses an undue risk to the safety of the community or any person or class of persons", or has breached their release conditions, or has committed an offence punishable by imprisonment.[93]

The issues

[100] The question before us is what standard must the Board use as the measure when deciding whether to discharge or vary a release condition under s 58. In particular, may it maintain a release condition only if, without it, the offender would pose an undue risk to the safety of the community?

[101] We begin by examining the undue risk standard and the ways in which the legislation deploys it. In short, it applies to decisions to grant parole in the first place and is a primary ground for recalling paroled offenders to continue serving their sentences, and in those contexts it governs an overall risk assessment which takes account of all the circumstances and the collective effect of release conditions alongside other available support and supervision. It is not the measure for applications under s 56.[94]

Undue risk in the legislation

[102] Section 7(3) of the Parole Act provides that a person (relevantly, the Board members) must consider the likelihood of further offending and the nature and seriousness of any likely subsequent offending "[w]hen … *required*"[95] under pt 1 "to assess whether an offender poses an undue risk".[96]

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93 Sections 60(1) and (3) and 61(a)–(c). See also s 61(d)–(e). The Commissioner of Police may also make a recall application on the grounds that the offender poses an undue risk to community safety: s 60(2A).

94 Nor does it apply to s 29B(5), which allows the Board at a monitoring hearing to vary (or impose) special conditions, as Mr Grinder asked it to do soon after his release: see above at [80]–[81]. For our purposes it is sufficient to refer to s 56. See also s 29B(6).

95 Emphasis added.

96 Emphasis omitted.

[103] The term "undue risk" is not defined, but s 7(3) identifies considerations that must be taken into account by any person who is required to assess whether an offender poses an undue risk. Part 1 relevantly requires an undue risk assessment in two circumstances: when deciding under s 28(2) whether to release an offender on parole and when deciding whether to recall an offender to prison on the ground set out in s 61(a).[97]

Undue risk and decisions to grant or decline parole

[104] Accordingly, the first consideration when considering parole is how likely it is that the offender will commit further offences in the community. The second consideration is the nature and seriousness of any subsequent offending that the person thinks likely. Put another way, the person must consider both how likely it is that the offender will offend in any way and the nature and seriousness of any offending that the person thinks is likely.[98]

[105] We make two points about this. First, when used in connection with the risk of something happening in future, "likely" normally connotes a real and substantial possibility.[99] Second, the Act does not establish thresholds for the nature and seriousness of such offending, requiring rather that the person making the assessment must exercise judgement in all the circumstances. Such a judgement is required of the Board when deciding under s 28 whether to release an offender on parole.

[106] The Act does not provide that an undue risk assessment must be undertaken when deciding to impose any given special condition under s 29AA(1). That provision states rather that when releasing an offender on parole, the Board may impose any special condition that the Board specifies. Nor does the Act speak of undue risk in

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97 "Undue risk" is also a necessary criterion for decision in s 25(6)(a) (early release in exceptional circumstances) and s 55(7) (early release for deportation; in this case the assessment is made by the Minister of Immigration and is addressed to the safety of the community into which the offender will be released). Undue risk is also a ground for an interim recall order under s 62(1).

98 When reporting the Sentencing and Parole Reform Bill 2001 (148-2), the Justice and Electoral Committee recommended a new cl 169(3) clarifying that the "undue risk" assessment requires that the person consider the likelihood of offending and the nature and seriousness of "that subsequent" offending. The clause was then amended to read "any likely subsequent" offending before the committee of the whole House, without substantive explanation: see Supplementary Order Paper 2002 (262) Sentencing and Parole Reform Bill 2001 (148-2) at 20.

99 See, for example, *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554 (CA) at 562–563.

respect of other decisions relating to release conditions under pt 1. These include early release on compassionate grounds subject to release conditions (s 41), monitoring compliance and adjusting special conditions under s 29B (which applied to Mr Grinder), and discharging or varying release conditions under s 58.

[107] When imposing special conditions under s 29AA(1), including a whereabouts condition, the Board must act for one or more of the purposes in s 15(2); relevantly, to reduce the offender's reoffending risk, to facilitate or promote the offender's rehabilitation and reintegration, or to provide for the reasonable concerns of the offender's victims. Only the first of these purposes speaks of risk, and it does not say that the condition must reduce what would otherwise be an undue risk of reoffending to an acceptable level. It contemplates rather that a condition may be imposed for the purpose of reducing whatever risk the offender would otherwise pose in the community.

[108] The explanation for this is implicit in s 28(2)(a), which envisages that the offender's risk may be reduced from undue to acceptable by "the support and supervision available to the offender following release". This language recognises that support and supervision in the community may take a number of forms and it is their collective effect on community safety that must be gauged when deciding whether an offender may be paroled.

[109] Consistent with that, the Act does not envisage that only conditions imposed for the express purpose of reducing risk will have the effect of doing so. Conditions imposed for other purposes may have that effect too. For example, a condition that the offender take part in a rehabilitation programme will reduce risk if the programme is successful. A condition imposed to meet the reasonable concerns of victims may have the effect of reducing the risk of reoffending that involves them.

[110] What the Act accordingly requires of the Board is an overall judgement about risk: what kind of risk it is, how likely it is to materialise, and how it can be managed. The offender's personal characteristics and circumstances in the community may interact in complex ways. So far as possible, risk assessments should be guided by

tools which gauge dynamic and static risk factors, but risk is ultimately not susceptible to measurement.[100] It is an exercise in predicting and managing human behaviour.

[111] The Act does not require that any single condition, in isolation, must be likely to have the effect of reducing an undue community safety risk to a level that justifies release on parole. The "undue risk" question for the Board under s 28(2) is whether the proposed conditions, alongside other support and supervision available to the offender following release, collectively reduce risk to a level which is something less than that.

[112] It must follow, as a matter of construction, that every single condition need not meet the undue risk standard. Whereabouts and monitoring conditions are not in a special class in this regard. There are many others, including standard conditions about reporting, residence, employment, non-association and the collection of biometric information, that are also highly intrusive.[101] The difference is one of degree. Each such condition is readily classified as a "risk" condition notwithstanding that it may also have been imposed for pro-social reasons. For these reasons, we disagree with the majority's view that special conditions can be classified under the Act as being imposed principally to manage the risk of reoffending by the offender, as opposed to "those addressing rehabilitation and reintegration or providing for the reasonable concerns of victims".[102]

Undue risk and recall decisions

[113] The same overall undue risk standard applies to recall decisions that rely on s 61(a). In other words, the legislation contemplates that an offender may remain in the community on parole so long as, having regard to their conditions of release and support in the community, they do not pose an undue risk to the safety of the community or any part of it.

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100 *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [50]–[52]; New South Wales Law Reform Commission *Parole* (Report No 142, June 2015) at [4.48]; and Te Aka Matua o te Ture | Law Commission *Here ora: Preventive measures in a reformed law* (NZLC R149, 2025) at [11.30]–[11.34].

101 See above at [92].

102 Above at [39(a)] and [55] per Winkelmann CJ, Ellen France and Williams JJ.

The exercise of the Board's power to grant parole

[114] We turn to the exercise of the Board's power to set special conditions when granting parole. It is common ground that the power to impose special conditions under s 29AA must be exercised consistently with NZBORA to the extent possible. In particular, a decision to impose whereabouts and electronic monitoring conditions directly engages the protected rights to freedom of association and freedom of movement.[103] It is also capable of engaging the right to be free from arbitrary detention,[104] and potentially other rights depending on the circumstances.[105]

[115] A proportionality analysis is accordingly required.[106] As this Court recently explained in *Attorney-General v Chisnall*, that requires (in appropriate cases) a four-step analysis:[107]

(a) Does the limiting measure (in this case, the whereabouts and electronic monitoring conditions) serve a purpose sufficiently important to justify curtailment of the right or freedom?

(b) Is the limiting measure rationally connected with its purpose?

(c) Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?

(d) Is the limit in due proportion to the importance of the objective?

[116] The first of these requirements is not in issue in this appeal. As we have explained, a special release condition may serve several purposes: it may reduce the

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103 New Zealand Bill of Rights Act 1990 [NZBORA], ss 17–18. See also Christopher Finlayson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electronic Monitoring of Offenders Legislation Bill* (4 May 2015) at [5].

104 NZBORA, s 22. See also *Attorney-General v Chisnall* [2024] NZSC 178, [2024] 1 NZLR 768 at [161] per Winkelmann CJ, O'Regan, Williams and Kós JJ.

105 See, for example, *Chisnall*, above n 104, at [132] (in respect of the s 26(2) right against double jeopardy) and [165] (in respect of the s 9 right not to be subjected to disproportionately severe punishment) per Winkelmann CJ, O'Regan, Williams and Kós JJ.

106 This is not the case in respect of non-derogable rights or limits which are not capable of justification. That issue does not arise on these facts.

107 *Chisnall*, above n 104, at [98] and [195] per Winkelmann CJ, O'Regan, Williams and Kós JJ. See also *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [64] per Blanchard J and [104] per Tipping J.

offender's risk of reoffending, it may facilitate or promote the offender's rehabilitation and reintegration, and it may provide for the reasonable concerns of the offender's victims.[108] By doing these things it may contribute to reducing the offender's community safety risk to a level that permits their release into the community. More generally, it may serve the Act's broader purpose of administering sentences to reduce the risk of reoffending by managing offenders' release and reintegration.[109]

[117] The second step requires a rational connection between the condition and the statutory purposes in s 15(2) (and, where an electronic monitoring condition is to be imposed, s 15A(1)). This Court has not defined "rational connection". In *R v Hansen*, McGrath J held that it requires that a limit be "fair and not arbitrary, carefully designed to achieve the objective in question", but Tipping J seemed to prefer the view that a rational connection may be satisfied by a mere logical relationship.[110]

[118] The Supreme Court of Canada held in *RJR-MacDonald Inc v Canada (Attorney General)* that a rational connection may be found on the basis of reason, logic or common sense.[111] That Court has recognised that the causal relationship between an infringing measure and its purpose may not be measurable where the measure is aimed at changing human behaviour.[112] We accept these propositions. In the present context, there will be a rational connection between a special condition and its purpose if the Board imposed it for one or more of the s 15(2) purposes (and the s 15A(1) purpose, where applicable) and it is capable, as a matter of reason, logic or common sense, of serving that purpose.

[119] As noted above at [95], a whereabouts condition is a condition authorised under s 15(3)(ab) (residential restrictions) or s 15(3)(e) (prohibiting the offender from entering or remaining in specified places or areas). An electronic monitoring condition is authorised under s 15(3)(f) (requiring the offender to submit to electronic

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108 Above at [93], [107] and [109].

109 See Parole Act, ss 15(2)(a)–(b) and 28(2)(b); and Law Commission | Te Aka Matua o te Ture *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006) at [123]. See also below at [127].

110 *Hansen*, above n 107, at [121]–[125] per Tipping J and [204] per McGrath J.

111 *RJR-MacDonald Inc v Canada (Attorney General)* [1995] 3 SCR 199 at [82]–[85] per La Forest, L'Heureux-Dubé and Gonthier JJ dissenting, [153] per McLachlin J and [184] per Iacobucci J.

112 At [154] per McLachlin J (with which Sopinka and Major JJ agreed); and *Canada (Attorney General) v JTI-Macdonald Corp* 2007 SCC 30, [2007] 2 SCR 610 at [40]–[41].

monitoring of compliance with a whereabouts condition). The purpose of an electronic monitoring condition is specified in s 15A(1); it is to deter the offender from breaching a whereabouts condition and to monitor compliance with such condition. So the Board must be satisfied both that a whereabouts condition is designed to meet one or more of the s 15(2) purposes and that an electronic monitoring condition is needed to monitor compliance with the whereabouts condition and deter the offender from breaching it.

[120] The validity of the limiting measure's purpose having been established at the first step, the Supreme Court of Canada explained in *Thomson Newspapers Co v Canada (Attorney General)* that the second and third steps in the analysis are concerned with the objective of the limiting measure and the means employed to achieve it.[113] At the third step—whether the protected right is impaired no more than is reasonably necessary for sufficient achievement of that purpose—the Board must consider the practical question whether there is any less intrusive way of achieving those purposes.[114]

[121] The fourth step involves an inquiry into whether the benefits that flow from the limitation are proportional to its adverse effects on protected rights.[115] This has been described as the essence of the proportionality inquiry.[116] It requires that the practical benefits of the limiting measure be assessed and weighed against the limitation on affected rights.

[122] Unlike the majority, we would not require a full proportionality analysis in each case or for every condition.[117] If the Board has correctly applied the relevant criteria in the Parole Act then it is likely that a decision to impose a special condition

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113 *Thomson Newspapers Co v Canada (Attorney General)* [1998] 1 SCR 877 at [125] per Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

114 *Chief of Defence Force v Four Members of the Armed Forces* [2025] NZSC 34, [2025] 1 NZLR 21 at [96(c)], n 133.

115 *JTI-Macdonald*, above n 112, at [45]; and *Thomson*, above n 113, at [125] per Cory, McLachlin, Iacobucci, Major and Bastarache JJ.

116 *R v KRJ* 2016 SCC 31, [2016] 1 SCR 906 at [79] per McLachlin CJ, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon and Côté JJ.

117 See above at [58] per Winkelmann CJ, Ellen France and Williams JJ.

which impinges on protected rights is a justified limit on those rights.[118] That is so because the Board, when deciding to grant parole with a special condition:[119]

(a) has acted for one of the s 15(2) purposes (and the s 15A(1) purpose, where an electronic monitoring condition is imposed under s 15(3)(f));

(b) has decided that the condition, in all the circumstances and having regard to the offender's community support and other release conditions, satisfies the Board on reasonable grounds that the offender will not pose an undue community safety risk;[120]

(c) has been guided by the principle that the condition must not be more onerous or longer lasting than is consistent with the safety of the community;[121] and

(d) has provided reasons in writing for its decision.[122]

[123] It is important to recognise that the standard set by s 7(2)(a) is not confined to conditions which engage NZBORA-protected rights. Rather, the proportionality analysis is applicable to all release conditions. We have set out above the list of standard conditions and types of special conditions.[123] It is obvious that all are intrusive, sometimes highly so, but not all necessarily engage protected rights. In our opinion, the majority's approach must result in a different, lesser standard being used as the measure for conditions that do not engage protected rights or which serve some predominantly victim-centric purpose.[124] In our view that is contrary to the legislation, which plainly provides in s 7(2)(a) for the same standard to be used as the measure for all conditions. It will complicate the Board's already difficult work.

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118 See *A (SC 70/2022) v Minister of Internal Affairs* [2024] NZSC 63, [2024] 1 NZLR 372 at [140]. See also *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [101] per Winkelmann CJ and O'Regan J; and *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [84] and [88]–[89].

119 There are other criteria which must be met too: see, for example, Parole Act, ss 29AA(3) and 33(1).

120 Section 28(2)(a).

121 Section 7(2)(a).

122 Section 116(3); and see *R (CA201/2015) v R* [2015] NZCA 165 at [18].

123 See above at [92] and [94].

124 See above at [52]–[55] per Winkelmann CJ, Ellen France and Williams JJ.

[124] We disagree with the majority's view that "the difficulty with the 'community safety' standard is that it easily becomes a 'no risk' standard".[125] This view may rest on an assumption that the statutory requirement that a condition be "consistent with the safety of the community" sets a low standard. We do not interpret s 7(2)(a) in that way. In our opinion, the indirect statutory language recognises rather that the connection between risk and condition will always be present but may be more or less direct, depending on the nature and purpose of the condition.

[125] In our view, the objective is that offenders should not be detained longer than necessary and should not be subject to release conditions that are more onerous, or last longer, than necessary, subject always to the baseline requirement that the community not be exposed to undue risk.

[126] It follows that the more onerous a release condition, or the longer it has lasted, the greater is the justification required for its retention. Where a condition engages a protected right in a material way, the Board must be satisfied that it is demonstrably justified. Ms Griffin correctly accepted that in argument.

[127] It bears emphasis that s 7 is not solely concerned with risk. In its 2006 report on sentencing guidelines and parole reform, Te Aka Matua o te Ture | the Law Commission stated that parole serves two broad purposes: to administer sentences to reduce the risk of reoffending, and to reduce the social and fiscal costs to the state of long prison sentences.[126] The latter consideration also underpins the principle that an offender "must not be detained any longer" and "must not be subject to release conditions" that are more onerous, or longer lasting, than necessary. The legislation was part of a package of reforms which abolished the previous automatic release date at two-thirds of a determinate sentence and standardised parole eligibility at one-third of a long determinate sentence.[127]

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125 Above at [52] per Winkelmann CJ, Ellen France and Williams JJ.

126 Law Commission, above n 109, at [122]–[124].

127 See Sentencing and Parole Reform Bill 2001 (148-1) (explanatory note); and Sentencing and Parole Reform Bill 2001 (148-2) (select committee report) at 2 and 32. We note that, from 1993, a prisoner serving a determinate sentence of more than 12 months' imprisonment, not being for a serious violent offence, was eligible for parole at one-third of their sentence: s 89(3) of the Criminal Justice Act 1985 as replaced by s 43 of the Criminal Justice Amendment Act 1993.

[128] For all of these reasons, on our approach a condition that engages protected rights cannot be imposed and maintained on a "no risk" basis, as the majority reasons contend. The condition must meet two requirements. First, it must have some rational connection with the objects of parole; specifically, the reduction of reoffending risk and/or the offender's rehabilitation and reintegration.[128] Second, it must be justified under s 7(2)(a). Of course, these standards will produce outcomes that vary from case to case and time to time, depending on the purpose of the condition, its expected efficacy, its effects on the offender, and the magnitude and nature of risk to community safety.

[129] In this case there is no doubt that the whereabouts and monitoring conditions imposed on 1 April 2019 were burdensome and oppressive for Mr Grinder, and further, that they engaged his protected rights to freedom of movement and association. Mr Grinder says that the conditions interfere with his employment, recreational activities and social relationships. For example, he says he has given up mountain biking and swimming and cannot go to areas where coverage is poor. The justification for these conditions was that, without them, the risk of reoffending would be too high. We think it obvious that these conditions, although very onerous, might reasonably be imposed for that purpose. Indeed, we do not understand Mr Grinder to dispute that, *if* contrary to his opinion the Board was right about his underlying reoffending risk and commitment to rehabilitation.

The exercise of the Board's power to discharge or vary a release condition

[130] Under s 58 the Board decides, on application by the offender or a probation officer under s 56, whether to discharge or vary a release condition.[129] Standard or special conditions may be the subject of such application. So an application will invite the Board to focus on a condition or conditions nominated by the offender or a probation officer. An application may be made at any time. In this case, by way of illustration, Mr Grinder did so just six months after his release.[130]

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128 Or another s 15(2) purpose.
129 See above at [98] and n 94.
130 That being in the context of a monitoring hearing under s 29B: see above at [80] and n 94.

[131] Mr Smith argued that if the statutory grounds for imposing special release conditions are met when parole is granted, a decision under s 58, which he characterised as a "fine-tuning" decision, will be a justified limit on relevant rights almost by definition.[131] We accept that decisions under s 58 may involve fine-tuning, but for the reasons that follow we do not accept that such decisions are almost by definition justified.

[132] The premise of ss 56 and 58 is that the offender has been in the community for a time and their circumstances or risk profile may have changed materially, making it necessary or desirable to modify release conditions. The ultimate goal of parole is that by the time an offender reaches their sentence expiry date they will be a law-abiding citizen who no longer needs the Board's supervision. In practice, s 56 applications by the offender or a probation officer may well result in release conditions being relaxed. An expectation to that effect is implicit in s 56(4), which provides that where a probation officer makes the application the officer may suspend the condition in the interim.[132]

[133] However, the direction need not be one-way. A probation officer may ask the Board to reinstate a condition, as happened in this case. And s 58(2)(a) envisages that the Board may extend the duration of a release condition.

[134] Sections 56 and 58 set no express criteria for decision, but a number are implicit. They operate collectively, and as a practical and workable set of tools to guide decision-making.

[135] First, a condition should not be discharged or varied where that would result in the offender presenting an undue risk to the safety of the community or any part of it (including victims). That is because such an offender will be recalled to prison if an application is made under s 60. We emphasise that it does not follow that a condition must be discharged if the offender would not pose an undue risk without it.

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131 Mr Smith appeared as counsel for the Parole Board to present submissions on points of law, as the Board had done in the Court of Appeal. Its status is that of a party. As Mr Smith submitted, that is appropriate when dealing with an issue that has significant implications for the Board's day-to-day operations, and for the reintegration and rehabilitation of offenders in the community. The Board did not seek to defend its decisions or to deprive Mr Grinder of the fruits of his victory.

132 But see Parole Act, s 56(5). See also s 56A.

What follows is rather that the Board may leave the offender in the community and adjust the condition as appropriate, having regard to its purpose, its efficacy in achieving that purpose, and its impacts on the offender. As Mr Smith submitted, decisions under s 58 often involve fine-tuning to facilitate rehabilitation and reintegration. Such decisions may be risk-neutral. By way of example, the Board might vary a special condition about place of residence to better suit the offender's circumstances.

[136] Second, a condition should be discharged or varied, having regard to the passage of time and the offender's present circumstances, where it is no longer justified by community safety considerations or the Act's other objects of facilitating and promoting rehabilitation and reintegration into the community as a law-abiding citizen.[133] The offender's circumstances may have changed in ways that remove the rational connection between the condition and its purpose. Where that is the case, the condition will be discharged or varied.

[137] Third, where a condition continues to serve an object of parole, the Board should consider how onerous it is, how long it has lasted, and whether it engages a protected right in a material way. The Board should then undertake a simple proportionality analysis, guided by the principle in s 7(2)(a) that release conditions should not be more onerous, or last longer, than is necessary and consistent with the safety of the community. If the condition is no longer justified having regard to its effects on the offender, it will be varied or discharged.

[138] This approach is consistent with the statutory standard for both release on parole and recall. We consider that the majority's approach is not. It creates a disconnect; the Board must take an overall approach when deciding to release an offender on parole but must take a condition-by-condition approach when the offender asks it to discharge or vary a condition connected in some sufficiently direct way to risk. This approach cannot be limited to a particular subset of conditions. It will effectively alter the standard for release in the first place, requiring that each condition be assessed on a standalone basis against the undue risk measure. That is so because

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133 See ss 15(2) and 28(2)(b).

the criterion for release under s 28(2) is that the Board is satisfied the offender will not pose an undue risk "within the term of the sentence". On the majority's approach, the Board will be less confident that it can sufficiently protect the safety of the community during the remainder of the sentence. The Board may adopt the reasonable assumption that the offender will more or less immediately make an application under s 56, as happened in this case.

[139] We also accept Mr Smith's submission that the Board will assess the application by reference to the offender's support and supervision in the community, including the support and supervision provided by other release conditions.[134] The removal of a condition will in practice be considered in tandem with other conditions which will remain and may be adjusted as the Board thinks appropriate. As indicated earlier, we think the majority's approach will significantly complicate the Board's decision-making in this regard. It may also be that, under the majority's approach, Mr Grinder himself would not have been granted parole in 2019.

Outcome

[140] Mr Grinder's is a difficult case. He has served a long sentence and his conduct in prison appears to have been exemplary. He has shown himself capable of complying with release conditions, including those directed to his rehabilitation and reintegration. Ideally he would now be the subject of light supervision following his release on parole in 2011.

[141] There are good reasons why that has not happened. His offending against children was very extensive in scope and over time, and in 2012 he appears to have been recalled for behaviour that would give him access to the children of vulnerable women. When he was released on parole in 2019 the Board had formed the view that he presented a medium to high risk of sexual reoffending and that risk had to be managed by conditions for breach of which he would risk recall to prison. Reduced to its essence, the reason for these conditions was that, having regard to his conduct on parole, the Board simply did not trust him to manage his reoffending risk. The whereabouts and monitoring conditions were designed to manage that risk.

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134 For the reasons above at [108].

Subsequent events appear to have vindicated the Board's opinion that the conditions were reasonably necessary. It removed the electronic monitoring conditions in January 2023, and by December of that year he had breached the whereabouts condition and was not being forthcoming with his probation officer about either his whereabouts or a new intimate relationship.

[142] In this Court, Mr Grinder sought a further reconsideration by the Board on the terms set out in the High Court judgment. That would be unwarranted, given what has happened since. The High Court order was complied with. It resulted in the monitoring conditions being removed. Those conditions were then reinstated for cause in December 2023, and the relevant Board decisions are not the subject of this appeal. In effect, we would be directing they be reconsidered without a procedural or factual basis for doing so. For purposes of this appeal it is appropriate to adopt the position that the whereabouts and monitoring conditions are presumptively justified following their retention and/or reinstatement. If Mr Grinder wishes to do so, he may make a fresh application under s 56, and failing that we may assume the Board will reconsider the conditions at his next review.[135]

[143] Mr Grinder also invited this Court to set aside the Court of Appeal decision and reinstate that of the High Court. We interpret this as an invitation to reinstate the High Court's reasons for judgment. We have accepted that in its decision of 14 October 2021 the Board did not undertake the simple proportionality analysis which we consider necessary. But the High Court decision was wrong in law for the reasons we have given. And although our reasons differ somewhat from those of the Court of Appeal, we consider that it reached the correct outcome. For these reasons we would dismiss the appeal.

Solicitors:
Ord Legal, Wellington for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for First Respondent
V J Owen, Wellington for Second Respondent
Thode Utting & Co, Auckland for Criminal Bar Association of New Zealand Inc as Intervener

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135 See above at [89].