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IN THE SUPREME COURT OF NEW ZEALAND SC 147/2023

I TE KŌTI MANA NUI O AOTEAROA [2024] NZSC Trans 18

BETWEEN **BRETT DAVID GRINDER**

Appellant

AND **ATTORNEY-GENERAL**

First Respondent

NEW ZEALAND PAROLE BOARD

Second Respondent

THE LAW ASSOCIATION

NEW ZEALAND CRIMINAL BAR ASSOCIATION

Interveners

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

CIVIL APPEAL

MS CASEY KC:

E te Kaiwhakawa, tēnā koutou. Casey appearing with Ms Hensman for the appellant.

WINKELMANN CJ:

Tēnā korua.

MS GRIFFIN:

E ngā Kaiwhakawā tēnā koutou. Ko Ms Griffin ahau, kei kōnei māua ko Mr Zhang mō te kaiwhakahē tuatahi. Ms Griffin and Mr Zhang for the first respondent, the Attorney-General.

WINKELMANN CJ:

Tēnā korua.

MR SMITH:

E te Kaiwhakawa, tēnā koutou. If it pleases the Court, Smith and Ms Owen for the second defendant, New Zealand Parole Board.

WINKELMANN CJ:

Tēnā korua.

MS PRIEST:

Tēnā koutou e ngā Kaiwhakawā, may it please the Court. Counsel's name is Ms Priest. I appear with Ms Jackson for the Law Association.

WINKELMANN CJ:

Tēnā korua.

MS THODE:

Tēnā koutou e ngā Kaiwhakawā. Ms Thode and Mr Wall for the Criminal Bar Association.

WINKELMANN CJ:

Tēnā korua. Well mōrena everyone. Now we have a few preliminary thoughts. Firstly, have counsel discussed timing between them, because we have a lot of parties to get through this morning?

MS CASEY KC:

Yes we have thank you Ma'am. We're agreed that the appellant will speak until midday, and we know the Court has indicated that you'd like to hear from the interveners for 45 minutes.

WINKELMANN CJ:

Yes.

MS CASEY KC:

The respondents' preference would be that that followed from the appellant, given that the interests are aligned.

WINKELMANN CJ:

Yes and that was our view, too.

MS CASEY KC:

That's fine, so that would take us through to quarter to one. My learned friend Ms Griffin will start at quarter to one and then for the Attorney-General continue through to about 10 past three. The Parole Board will speak from 10 past three to 20 to four and I'll have 20 minutes in reply.

WINKELMANN CJ:

Well, in relation to Parole Board, our view was that the issues have been pretty well covered by the respondent and their position is a little bit irregular in that the respondent was initially – the first respondent was initially representing the

interests of the Parole Board, but we are interested in them, we are therefore interested in them giving us very focused submissions and touch – and eliminating any duplication and touching only on what the issues mean for the operation of the Parole Board.

MS CASEY KC:

Thank you Ma'am and I think we would all be grateful for the extension of time that that gives, or the flex of time.

WINKELMANN CJ:

Yes, I mean, I would have thought possibly be ideal if the appellant could be finished by 11.30, because I suspect inevitably there will be slippage, but we'll see how we go. I mean, the submissions are very discursive and yet the issue is relatively narrow and so if counsel, we have read all the submissions of counsel, and the materials, if counsel could just focus on the key issues, on the structure, and I see you have helpfully given us a road map, yes.

MS CASEY KC:

Thank you, Ma'am.

WINKELMANN CJ:

The other issue is we'd like some update, and I don't know who it would be from, as to the status of the condition that was applied which had the impact in relation to the appellant's access to [redacted].

MS CASEY KC:

Thank you, Ma'am, we will confer on that. It was something that we raised with the Parole Board but, as a matter of immediate concern, but we haven't heard anything back, so we will confer.

WINKELMANN CJ:

Right.

MS CASEY KC:

Thank you. If I may, I wish to start this morning by acknowledging Douglas Ewen Kings Counsel. This is his case. When he asked me to take it on back in July, I of course said yes, but it is with deep regret that it is me standing here and not him and, if I may, this is also a pretty typical Douglas case. It is a long way from this courtroom to a local gym and a model train club where, somewhere in the suburbs, that a man trying to rebuild his life wants to attend without fuss or drama, and without fear that an error of judgment on his part will land him back in prison for the rest of his life.

Douglas Ewen was bringing this case to this court because he and others here, whom I also acknowledge, were seeing that something was awry in the system, in a system that was already tipped against what must be one of most societies most alienated and disenfranchised groups of people. Of course Douglas Ewen took this case, and of course he pushed it this far, and I am honoured to pick up the baton for the last leg.

This case is, of course, about the residual rights and freedoms of people on preventive detention. As we know, residual rights of sentenced offenders are all the more precious because of the rights that have already been lost. In a just society that respects the rule of law, the boundaries of what Parliament has said is the appropriate limit of State interference and control over sentenced offenders, must be guarded scrupulously. The appellant says that the Parole Board has gone outside these boundaries. Justice Gwyn in the High Court agreed, the Court of Appeal disagreed, and here we are.

So, if I may now just refer to the road map which gives a bit of a structure of where I am hoping to go this morning, noting the Chief Justice's comments about being succinct.

The appellant identifies that the key question is simply this: is the Parole Board authorised to impose highly intrusive conditions when, as the Board itself acknowledges, those conditions are not necessary to protect the community from any undue risk of offending? And I have noted in the road map "undue"

is, as you would expect, a sensible and coherent threshold test. It takes into account both the likelihood of offending and the nature and seriousness of any subsequent likely offending. So, it's a genuine test and it's very important for the purposes of this appeal that we are clear that the appellant is already below that threshold. He could not have been released on parole unless he was below that threshold.

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So, we are not there. We are talking about here is undue, here is where the appellant is at low risk and I will come to this in a minute, and the Parole Board is saying we can nonetheless impose very restrictive, some of the highest most impactful parole conditions, to lower him further. Undue, where he is, we can take them further down. The question is how tight can the Parole Board screw the lid down. The appellant says, to the point where he's below undue. That's –

KÓS J:

Well he's only undue, he's only below the barrier of the threshold because of the conditions.

MS CASEY KC:

That was the case when he was released on parole, and as I'll come to soon, his risk has now changed considerably, we're now six years in, and those conditions are no longer necessary for that point. There is no challenge to the conditions that were necessary to bring him down below undue. This case is what happens well below that.

WILLIAMS J:

So is this really about the point at which the whereabouts condition can be dropped?

MS CASEY KC:

Yes, and the electronic monitoring condition.

WILLIAMS J:

That's, yes, and that the key, of course. Yes, all right, thank you.

MS CASEY KC:

So to answer the question I'd like to first then, not very long, but a brief period of time talking about the context of what preventive detention is and how it differs from other regimes, preventive regimes in New Zealand, then I'd like to talk about the importance of this decision on the facts for both the appellant and the 70 or so other parolees – sorry. Offenders on preventive detention in the community. So first of all, just outlining briefly preventive detention, and we should have our first go with the ClickShare to show you section 87 of the Sentencing Act 2002. Now I know this Court is reasonably familiar with the ESO and the PPO regimes, but you'll see on the ClickShare, and I'm sorry this section didn't make it into the bundle, so a sentence of preventive detention: "…is to protect the community from those who pose a significant and ongoing risk to the safety of members" of the community, and there's the conditions, and the basis on which it can be imposed.

So, and I'm taking this from the Law Commission's Issues Paper on our preventive regimes. Preventive detention goes back to 1906, the Habitual Criminals and Offenders Act. It was the original lock up and throw away the key because of concerns about public safety as to what would happen when people were released. So well pre-dates the ESO and the PPOs. The basic structure is very simple. Obviously it's a sentence imposed at the time of sentencing. The offender stays in prison forever unless the Parole Board assesses that they do not pose an undue risk to the safety of the community. It is exactly the same release decision as ordinary parole, section 28 of the Parole Act 2002. Offenders on preventive detention can and likely will be subject to standard conditions and any special conditions for the rest of their lives, and they are subject to recall for the rest of their lives.

I've noted just on the outline, if the Court is interested by the numbers, as at June 2023 there were 297 offenders subject to preventive detention, 46% of whom were Māori, and of those 76 people had been released – are currently

on parole. Just by way of contrast for ESOs I've given references there, we're looking at 197 offenders, 41% of whom are Māori, and for PPOs, public protection orders, only five have ever been ordered, and two of which were overturned on appeal. The difference between the ESOs and the PPOs is very important context for the, issue for the Court. Of course ESOs, extended supervision orders, are imposed at the end of the sentence for offenders being released but still a high risk of sexual offending and/or a very high risk of violence offending. These are post-sentence measures to mitigate the risk, an established high risk of harm to the community. Public protection orders are also post-sentence and are imposed on offenders where there is an imminent very high risk of sexual or violent offending. Preventive detention in contrast is part of a sentence at the time of sentencing so there is no issue of retrospective penalty or double jeopardy under section 26 of the Bill of Rights Act 1990, we're not in *Chisnall* territory here. But the critical flip side of that is that preventive detention orders are never lifted, even when the risk assessment shows low or even minimal risk of re-offending.

People on ESOs or PPOs who achieve the level of risk reduction that this appellant has, the order would be lifted and they would be free. There would be no statutory basis to maintain the order at all. But a person sentenced to preventive detention never gets out from under regardless of the risk they pose to the community. This is a preventive regime that continues until the person dies, regardless of whether they pose any risk.

Preventive detention is also far harsher than ESOs and PPOs. The person is held in prison under ordinary prison conditions until they meet the undue risk threshold. So critically parole for people with preventive detention is not about managing high risk offenders in the community. It is about managing low risk offenders in the community, because if they are undue, if they meet that low threshold of undue, they stay in prison or they go back to prison. So we are only ever talking about offenders below that.

The other major significant difference which is critical for this case, because we are talking about what are the statutory constraints on the Parole Board, is that

unlike ESOs and PPOs, which are administered by the Courts, the conditions for preventive detention release and special conditions are managed only by the Parole Board and the Department of Corrections.

WINKELMANN CJ:

Not all of the conditions under which people are held under the ESOs, or even the PPOs, are administered by the Courts.

MS CASEY KC:

But there are rights of appeal and challenge through the Courts under those systems.

WINKELMANN CJ:

Yes. But not in relation to preventive detention?

MS CASEY KC:

Not in relation to preventive detention. There's only judicial review of conditions. There's only judicial review of release decisions. There is a right of appeal for a recall decision. But, so that the level of supervision by the Courts is much lower for preventive detention. It is just the ordinary parole supervision, with no recognition of the significance of the nature of the sentence.

So the closest equivalent to preventive detention is life imprisonment. It effectively operates in the same way. But again important context for this Court, life imprisonment is imposed as a penalty for the seriousness of the offending. Preventive detention is not. It is a penalty that is higher than has been authorised to reflect the seriousness of the offending for the purposes obviously of preventing harm to the community.

So there are obviously a lot of elements of concern with preventive detention in terms of its Bill of Rights compliance. This case is dealing with just the special conditions. Other cases have come through, most notably the *Miller v New Zealand* (2017) 11 HRNZ 400 (UNHRC) decision to the UN about the overall lack of rights compliance of the sentence structure.

So I'm noting, I'm at paragraph 2(d). I've referred to the Law Commission's Issues Paper, which just to say it describes the preventive regimes, those three, as some of the most coercive exercises of State power known in New Zealand law, and it also describes preventive detention as the most restrictive of the preventive regimes, and I've given the references there in my outline.

I've just mentioned *Miller* before, and I will ask Ms Hensman to take you to the United Nations Human Rights Committee decision in *Miller*. This was the challenge to whether preventive detention is contrary to the Bill of Rights Act and the ICCPR, and the UNHCR agreed that it was. It found that continued detention in prison after the punitive period of the sentence is arbitrary in violation of articles 9 and 10 of the ICCPR. If I could take you, I just want to take you to paragraph 8.3. Because although this initial challenge of course to the detention element, sorry your Honours, I've got too many bits and pieces. Respectfully the comments also have some application to the in community aspects.

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So you have up in front of you paragraph 8.3 and in the middle of this paragraph you will see the Committee refers to the situation of these applicants where they have served a 10-year punitive sentence and then have been serving preventive sentences for 15 additional years. The Committee recalls its General Comment No 35 and talks about: "The [concept] of 'arbitrariness' is not to be equated with 'against the law,' but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law, as well as elements of reasonableness, necessity and proportionality." And then it goes on: "Namely, preventive detention following a punitive term of imprisonment must, in order to avoid arbitrariness, be justified by compelling reasons, and regular periodic reviews by an independent body must be assured to [ensure] continued justification ..." Just going down over the page, must be: "... aimed at the detainee's rehabilitation and reintegration into society," and the Committee records serious concerns.

And then down at, last point is 8.5 at the bottom of this page: “The Committee considers that as the length of preventive detention increases, the State party bears an increasingly heavy burden to justify continued detention and to show that the threat posed by the individual cannot be addressed by alternative measures.” And this sent – and they say, you know: “As a result, a level of risk which might justify a short-term preventive detention, may not necessarily justify a longer period...” and then goes on.

And just to round it off, at the bottom, 8.6, as the conclusion, the Committee: “Under these circumstances,” just right at the bottom, “the Committee considers that the length of the authors’ preventive detention, together with the State party’s failure to appropriately alter the punitive nature ... [breaches] the Covenant.”

So those are comments directed to the preventive, the imprisonment element of the preventive detention and the ruling that the structure of the sentence in that regard is arbitrary. It is the appellant’s submissions that these comments apply not with the same force, because we’re not talking about detention, but with some force to the infringements and limits of the rights of preventive detention offenders in the community. Their rights are still being limited and this – and they’re being limited for the purpose of for preventive measures to protect community safety and, respectfully, these concepts of the need for minimum impairment, rationality, lack of arbitrariness and this concept that as these restrictions continue on for years and years and years, the justification for them, if anything, must get stronger, apply with some force to the conditions in the community.

WINKELMANN CJ:

So that just gives colour to the section 5 analysis, doesn’t it?

MS CASEY KC:

It does. So just for completeness, I am noting that the Law Commission’s current proposal and it’s only – it is its proposed paper, the second paper coming out – came out in June this year, it proposes to abolish preventive

detention and replace the preventive measures with a tiered post-sentence regime targeting at managing high risk offenders in the community with a focus on rehabilitation administered by the courts.

The Law Commission tentatively at the moment sees the section 26 problems as outweighed by the need to calibrate preventive measures to situations of actual high risk and to ensure that the system operates in a rights compliant way as possible.

So, as why is this context important? Preventive detention by its very structure is already rights non-compliant and is recognised as being one of the harshest exercise of coercive power by the State. And the issues do not evaporate for offenders released on parole. Being subject to parole conditions, especially high impact conditions, are serious constraints on protective freedoms, most particularly freedom of movement, freedom of association and the total loss of privacy which affects freedom of thought and freedom of expression.

Now, I have just noted in 2(g) a reference to this Court's decision in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 where the Court recognised that just the invasion of privacy, and the loss of privacy, is itself an onerous burden in the terms of managing offender's risk in the community, even without its impact on these other matters, and my submission is it's important for this Court not to lose sight of what those constraints mean, thinking back to our local gym and the model train club. Under the sort of conditions that the appellant has been living under now for more than five years, the person cannot do pretty much more than work, go to work, home and the supermarket, without first asking for permission. Libraries, churches and any type of recreational facilities are out of bounds. Where they live has to be approved. Where they work, including voluntary work, has to be approved. Any associations can be prohibited, and close relationships are subject to close scrutiny. Phones and computers must be open for inspection on request without cause, and that is not even touching on the psychological and social and employment impact of wearing an electronic monitoring device for years on end.

These are intrusive measures designed for the purpose of monitoring and control, and the person is subjected to them potentially for life. This is literally Big Brother surveillance, and regardless of the justification the burden of living under this should not be unrecognised or understated. These are the rights that the ICCPR affirms and protects because they are important rights for the recognition of the inherent dignity of all persons. Limits to them must be fully and strongly justified, and I've already noted in *Miller* the impact of time. So the appellant's submission is that the level of justification for such measures must be calibrated to recognise the building impacts, and the concept of minimal impairment becomes critical.

I just note one last point in electronic monitoring in particular, if we can bring up section 107RB. So the Parole Act itself acknowledges that electronic monitoring is a high-impact condition, even if the context of extended supervision orders where you'll recall we're talking about offenders with high or very high risk in the community. So RB. And imposes constraints on the exercise of electronic monitoring even for those offenders recognising the high impact of these conditions. So this requires that, for ESOs, electronic monitoring has to be reviewed every two years, and obviously setting the expectation if the justification for electronic monitoring has fallen away, as it has in the appellant's case, then the act itself contemplates that it will be lifted.

So that's preventive detention. Now I'd like to turn very briefly to talk about the facts and the decisions under review. This is not an abstract problem. We are talking about conditions which have a real life impact on the appellant and, as I said, around 70 others, and may make the difference between the ability to reintegrate and rebuild a life, and whether someone is going to be recalled to spend the rest of their life in prison. So it is, in my submission, worth a few minutes to ground us properly in the facts.

So first of all in – the thing about the road map is I've just given you the references. I will take you to some of these documents but not all of them. So first of all who the appellant is. Was sentenced in 2003 for very serious

offending. His last offence was committed in 2001, 23 years ago. He was released on parole in 2011 and recalled in 2012 for breaching conditions, not re-offending. He was released on parole for a second time in 2019 when he was 57 years old.

I'd like to just briefly touch on the Parole Board decision, which is at tab 11, but will come up, and your Honour Justice Kós this is going back to your question. So tab 11, 201.0001.

WINKELMANN CJ:

What date decision is this?

MS CASEY KC:

This is 1 March 2019, is the date of the hearing at the top of the page there. So I think if we scroll down to paragraph 2, it just talks about him being released previously and come back, and then go to paragraph 6, the Parole Board talks about risk.

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We have an assessment risk of re-offending is assessed as being medium to high and then the Board goes on to talk about the experience of the last release and how Mr Grinder wasn't ready to be fully compliant.

And then at paragraph 11, thank you, so in the middle the Board says: "However we are satisfied on the material we have today that [he] does not pose an undue risk to the safety of the community ... takes account of the support and supervision ... and the special conditions mitigating risk which we will be imposing." And the – paragraph 14 sets out the introduction –

KÓS J:

So he is released as a result of the special conditions?

MS CASEY KC:

Yes.

KÓS J:

I mean, patently without those special conditions he wouldn't meet the threshold.

MS CASEY KC:

He wouldn't, no, and that's how it's supposed to.

KÓS J:

Correct.

MS CASEY KC:

It's the – that's how it's supposed to operate. In fact, it's built into the word "conditions", the conditions, you know, the conditions of your release, your release is conditional upon these things, so this is how it is supposed to work.

Paragraph 14, we see the introduction of the GPS and a desire to be more precise so that where, where he is not permitted to go. So then we have the Board is also sufficiently concerned that it invokes the power to do two six-monthly review hearings and the first of those is – the next tab, tab 12, 201.0005.

WINKELMANN CJ:

The Board is sufficiently what, sorry?

MS CASEY KC:

They are sufficiently concerned or wanting to monitor matters closely that they invoke a power under the Act to convene a review hearing every six months. So rather than waiting for something to happen everybody comes back and they assess how is it going and this is, this is the genuine fine-tuning. I will come back to my learned friends for the Parole Board's use of the word "fine-tuning" but this is the genuine fine-tuning hearings.

So this is the first review hearing, you'll see 22 October 2019, paragraph 2, records that the appellant is doing well, he's doing what he's supposed to be doing, he's engaging well.

And then if I may flick through to paragraph 10, so the appellant is already asking to be released from the whereabouts and the EM conditions, because he is finding them quite intrusive and – but at paragraph 10 the Board at this point says: "It seems to us there is good reason to retain the condition." And if I can take you over the page and just to the last sentence of that paragraph: "The Board is of the view that the whereabouts condition remains both relevant and necessary until we can be satisfied that [the appellant] is both established in the community and demonstrates sustained compliance with release conditions that mitigate his risk."

The Board goes on at 11 to acknowledge that it does have implications for the appellant's employment opportunities but they, at this point, see it as essential. This is a balanced decision, your Honours. This is saying, look, we're six months in, let's wait and see, let's be satisfied that he's established in the community and demonstrates sustained compliance, we're still needing these to keep him at the undue – below the undue risk level.

The next six-monthly review, I just briefly go to it, 201.0010, tab 13. The appellant is asking again but he's mitigated his request now. As you will see at paragraph 3 of this decision, he just wants to change some of the wording so that he can go to some of these places, and then at paragraph 4, says: "When we discussed the rationale for that change, it seemed to us to come down to [the appellant] saying that if he had the opportunity, he would like to visit a church or if he had a day off, he would like to spontaneously use other recreational facilities and the like," and that the definition of park was too vague.

Down to paragraph 7, the Board goes he is doing well but we're not satisfied that we should vary just yet.

So then two years in, that's the end of the monitoring hearings, two years in Mr Grinder makes a formal application for variation of his conditions. That first comes up in May 2021, page 201.0013, this is tab 14. His application is supported by an up-to-date risk assessment by a psychologist who has given risk assessments for the appellant before, right through back to 2016, he's familiar with him and there's no issue about this person's expertise or the Parole Board's comfort with his expertise. His application is not opposed. Actually, if we can go to paragraphs 3 and 4. His application is not opposed by the Probation Service who consider – who say he is doing well and they have no problem with this. The Board, however, at paragraph 6 says, look, we're not satisfied we've got enough information, we want another risk assessment undertaken on a different basis. So they say at paragraph 7, we need an updated psychological report and they adjourn until October for that to happen.

Then we get to the decision under review and this is tab 15, page 201.0015. Actually, I'm sorry, before I go to the decision, I do need to take you to what the report said. So this is tab 22, page 301.0030. I am conscious that this is being livestreamed so I am going to be a little cautious in terms of privacy while we discuss these psychological reports.

So, this first one at tab 22 is the original report that was provided in support of his application in May and I just want to take you particularly to paragraphs 42 and 43 which are on 301.0042, because these talk about the impacts of the GPS monitoring. So paragraph 42, it starts with, says: "It goes without saying that this type of approach," the expert there is discussing the control focus versus the reintegration focus for offenders and talks about – 42 talks about the real practical impact of the GPS monitoring on this offender and at 43 just notes that of course the appellant is being open with his past in significant relationships such as his employer and circle of friends, et cetera, but he has an understandable concern about wider knowledge.

More importantly, we go to tab 23 and page 301.0046. This is the report that the Board commissioned. This is what they asked for and if I can take you

through to paragraph 15 on page 301.0048. I will just wait, Ms Hensman is doing a sterling job.

WINKELMANN CJ:

So the first report you took us to was dated 27 September 2021 and this one's report is 6 September 2021?

MS CASEY KC:

The first one was 21 May.

WINKELMANN CJ:

Oh, okay.

MS CASEY KC:

So that was the one that supported his initial application that the Board then adjourned to get this report in.

So this is the report and paragraph 15 talks about the impact again on the GPS and the whereabouts condition are having on the appellant at this time and the concerns, and if you go over the page, all the things that he has – is unable to do. All the prosocial, pro-reintegration, rehabilitative, connecting back into the community things that the GPS condition is interfering with and similarly paragraph 16 the same. There is no doubt that these are high impact conditions.

Then if I may take you through to paragraph 33 on page 301.0052. This is the conclusion of the Board's commissioned psych report. So, low risk range of offending and then near the end of 33 we see: "Any offending risk would likely be increased in the context of loneliness [or] a sense of rejection ... an unbalanced lifestyle, including over-work ..."

Then 34: "Mitigating factors include satisfying and balanced employment, involvement in age-appropriate social activities and hobbies, the development

of fulfilling adult friendships, exploring his sexual orientation safely... and ongoing support."

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We have just seen, your Honours, that the whereabouts and the GPS condition in particular are contrary to this. So the Board has information that not only is the appellant low risk but that continuation of these very conditions is compromising his reintegration and his rehabilitation.

Now, I will take you to the Board's decision which is tab 15, page 201.0015 and, thank you, could we make it a bit bigger? Never mind, perfect. So the Board at paragraph 4 discusses that it sought a report. At paragraph 6 – paragraph 5, the Board says we've now got the benefit of that information. Paragraph 6, he's doing well, has good employment, had a promotion. Paragraphs 7 and 8, the Board acknowledges the impact of the GPS monitor. Paragraph 9 refers to other people speaking in support. Paragraph 10 recognises the low risk.

Then may I take you across to paragraph 15: "Whatever the current accurate assessment of risk is, it is not no risk. We consider that ensuring [the appellant] does not offend ... [the GPS device will] reassure the public." Was not risk reduction now; it's reassuring the public.

But also please note that they're concerned here about children on their own and your Honours will have seen, when you read the submissions, that the Board has since flipped and is not concerned about that anymore, it is now concerned about meeting parents, ie, most of society, never mind.

So at paragraph 16, they appreciate the adverse impact of monitoring but maintain the condition.

So the next step and the last one that I will take you to because it is the other decision on review, under judicial review, is in the next tab and it is 201.0018. Under the Parole Act, the only recourse other than judicial review for a decision like this is to take it to the Panel Convenor for review. It is a limited grant of

review, it is not merits, it is error of law, wrong process, et cetera. So this is the decision, Mr Grinder and his counsel took it to review and if I could take you to page 6, paragraph 28, or around paragraph 28.

The Parole Convenor – the Panel Convenor is answering the challenge to the fact that the Parole Board said, look, we can mitigate down to no risk, we can impose conditions including GPS down to no risk and paragraph 30 is the key: "The Board did not have to form a view about whether that was low risk or the higher risk [of undue]. It also did not have to establish that without the special conditions [the appellant] was an undue risk. Special conditions mitigate risk. Sometimes they are necessary to ensure that an offender is no longer an undue risk. Sometimes they simply enhance risk mitigation for an offender who is already assessed as falling well below the undue risk threshold."

It's that last sentence that is before the Court. The Court of Appeal effectively endorsed that sentence and this is where the appellant says the Parole Board has misunderstood its statutory powers and its statutory function and to be clear here –

KÓS J:

Can we just be clear, what is the assessment in that decision? Is that he is already falling well below the undue risk threshold, if so, where do we find those words?

MS CASEY KC:

They are low risk, that he's – there is undue risk and there's low risk. So the Board, when he was released he was medium high risk of re-offending and the conditions, when he was here, conditions were necessary to bring him to below undue risk. He is now assessed at low risk and the Probation Office and his psych don't see the need for these special conditions, but the Parole Board has said whatever the risk is, it's not no risk. So, they are not – they are refusing to attach and apply the undue risk. They say that's not necessary, we don't have to think about undue risk, so long as it it's not no risk we're allowed to use these intrusive conditions just to manage risk.

KÓS J:

I just wonder if we're speaking the same language here. When the psychologists and the convenor use the expressions "low risk, medium risk or high risk" I'm not sure they're calibrating the same census, the undue risk/not undue risk test.

MS CASEY KC:

It's an input. So the input, the – this, you're correct, your Honour, low, medium, high, those are inputs into the Board's specialist assessment of is there undue risk and what this review panel decision and the Board's own decision itself made clear is the Board is saying undue risk was assessed when we released him but now he is in the community we don't look at that criteria anymore, whatever the risk is it's not no risk, we're allowed to impose conditions well below the undue risk threshold, and this is what the Panel Convenor is saying at 30, the Board did not have to establish that without the special conditions Mr Grinder was no risk, was not – was undue risk, and I don't think there is any contention between the parties here that that's what we're talking about, is that the Board is playing well below the undue risk threshold.

WINKELMANN CJ:

I mean, I can't help thinking that this, that the undue risk/risk dichotomy that's set up in the submissions is concealing the real issue for the Court which is the proportionality analysis that the Board has to undertake, as every decision maker does where their decision is limiting rights, under section, and 5, and the real issue for the Court is how risk factors into that in terms of proportionality.

MS CASEY KC:

Yes, that's exactly right and that is when we get to statutory interpretation analysis, which is now, that is the exact question: what is the threshold of risk that is acceptable, that the Board must measure proportionality against? The Parole Board, the Attorney and the Court of Appeal have said there isn't one, or if there is one it's zero, it's anything above no risk. The High Court, and respectfully we say the Act, requires a threshold and then the question for the

Court is: what is that threshold? If I may, I'd now like to turn to my written submissions on –

WINKELMANN CJ:
Well, wouldn't you say section 5 also requires that threshold?

MS CASEY KC:
Yes, yes, but there is actually a proportionality provision in the Parole Act as well which we would say is a statutory embodiment of section 5.

So, if I could take you to my written submissions starting at page 10 and this really is just to sort of make sure I keep in logical order of what we say is the appropriate statutory interpretation approach.

So, obviously matters that you know, parole is only available to offenders on a long term sentence or on a determinate sentence. Just for completeness for the Court, for short term sentences, the sentencing court can impose release conditions at the time of sentence. The *Patterson v R* [2017] NZCA 66 case confirms that they are subject to the same sort of constraints.

The Court, on the leave to appeal, the question on leave to appeal was dealing with indeterminate sentences. We're just noting at 38, 39 that the statutory provisions are the same. I have noted at paragraph 39 that the impact of long-term makes a difference for the indeterminate sentences.

I haven't included this in my written submissions, but I do want to make the point, too, that we are in a preventive measure, so this is not any element of penalty, it can't be.

WINKELMANN CJ:
Punishment.

MS CASEY KC:

Any element of punishment, so of course the calibration to risk to community is central. So, can I start with section 28 of the Parole Act which I have just set out there at paragraph 40. So this is expressed as a negative. Subsection (1AA) says there is no entitlement to parole.

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Subsection (2) sets out the undue risk as a negative requirement on the Board, you must not release unless they are below undue risk. But subsections (a) and (b) talk about – actually, can you bring up the provisions of the Act, sorry, yes, (a) and (b) talk about taking into account: "The public interest in the reintegration of the offender into society as a law-abiding citizen." So, public safety is paramount, we know that, but the Act also directs – puts a lot of focus on the importance of reintegration, not just for the offender, but in the public interest.

I've noted in the road map, your Honours, and paragraph 4(a), a reference to *Vincent v New Zealand Parole Board* [2020] NZHC 3316, which again I apologise is not in the bundle. *Vincent* is the decision which confirms that for preventive detention subsection (1AA) of section 28 gives way and it is arbitrary to detain an offender on preventive detention if they do not pose an undue risk. So there is a statutory – we've read in a statutory obligation to release if risk can be managed down to undue. *Vincent* was a case of a man who had spent 52 years in prison on a preventive detention sentence for an offence which had a maximum penalty of 10 years.

WILLIAMS J:

So can you tell, "28(1AA) gives way", what was the rest of that sentence? I'm just – I type very slowly, I'm afraid.

MS CASEY KC:

I apologise, your Honour.

WILLIAMS J:

I should.

MS CASEY KC:

That gives way to the fact that detention of an offender on preventive detention who no longer poses an undue risk to the community is arbitrary and there is an obligation to release.

WILLIAMS J:

So it gives way to the undue risk test?

MS CASEY KC:

Yes. And an obligation to release if the offender falls below it. So that, that's the *Vincent* decision, a decision of Justice Mallon back in 2020.

KÓS J:

If that's the case, why are we here debating special conditions? Haven't you got a "gotcha" on your argument? You've got a, you say, on the Parole Convenor's report a conclusion that this man is below undue risk?

MS CASEY KC:

The Parole Board is and the Attorney are saying, well, yes, but he's in the community now and we can fine-tune.

KÓS J:

Right.

MS CASEY KC:

So we can, even though he's below undue risk, we can –

KÓS J:

I'm sorry, you're quite right, yes, that's right.

MS CASEY KC:

Yes, I wish we had, yes.

WILLIAMS J:

So this comes down to why the bracelet remains and you point to the references to community confidence, et cetera, as the true reason and you say that every – all counsel agree that this debate is below the undue safety line?

MS CASEY KC:

Yes.

KÓS J:

Except the bracelet is gone?

MS CASEY KC:

No, the bracelet is not gone.

KÓS J:

But –

MS CASEY KC:

Came back.

WILLIAMS J:

But, no, you say – sorry, let me get this right, because it is quite important. You say that the bracelet is not relevant to whether this man continues to pose an undue risk?

MS CASEY KC:

Correct. We are, and it –

WILLIAMS J:

We're all at one on that point.

MS CASEY KC:

We're all at one on that point. He is below undue. The argument is the Parole Board says we can still screw down tighter than that.

WILLIAMS J:

Yes, yes, I get that.

MS CASEY KC:

And we say, no, no, no, you're up here. But that's –

WILLIAMS J:

Yes, but that's not a matter of advocacy.

MS CASEY KC:

No.

WILLIAMS J:

You say everyone agrees that.

MS CASEY KC:

Yes, and the Parole Board said so.

WINKELMANN CJ:

But the Parole Board really says, I think, that it's too artificial to say, once you're at managing conditions, it's too artificial to say, oh, it's this concept of undue risk and you can't, you know, that kind of restricts the Parole Board's flexibility in what it can do to manage risk. It's too restrictive is what is said against you.

MS CASEY KC:

Yes.

WINKELMANN CJ:

And you would say, well, section 5 must have some concept of what is a risk that justifies a restraining condition, but are you not also possibly restricting yourself unnecessarily to try and argue that it's undue risk on the basis of statute, for statutory framework? Isn't that a little bit insensitive to the needs of the Parole Board and also to the needs of the offender?

MS CASEY KC:

Thank you. A couple of answers on that. Yes, it is, yes, that's what we are arguing and the Parole Board complaining that it wants more flexibility to do its fine-tuning, and to manage risk in the community, must give way to proportionality because we are not talking about nothing here. We're talking about serious infringement of rights. Not just for the offender but we're interfering with his rehabilitation, reintegration, so the statute sets a level for its own purposes, and because in a just society it must. So yes the Parole Board obviously wants complete flexibility to release an offender because they are not undue, and then screw them down tighter so that there's no possibility of them offending, ignoring the fact that the prospect of their reintegration now becomes more and more and more and more difficult in –

WILLIAMS J:

Well you're not saying there's no possibility of them offending?

MS CASEY KC:

Well you can, if you screw down tight enough.

WILLIAMS J:

I see. To ensure there is no possibility. Right. I see.

MS CASEY KC:

Yes, no possibility, yes. That's what they're, not no risk. That's what they're talking about. They're saying we've got the power to screw it down as tight as we wish to keep the community safe from any risk of offending, and the appellant says, no, no, there is a threshold. Section 5 doesn't work without a threshold, and I'll come to that later, and it's therefore not just the individual but also for the interests of society.

WINKELMANN CJ:

Is that – does section 5 also help you in that because, I'm just thinking whether there's a statutory reason why they have to take into account rehabilitation in their conditions. I mean certainly it's one of the reasons they must impose a

condition, but could the imperative of rehabilitation go to the rationality of the condition?

MS CASEY KC:

Yes, and I will come to that as well. They all feed in. But in terms of it's too hard for the Parole Board, don't forget this is what they do at the point of release. They balance all these conditions, and they put the pot together, and they say, yes, with these, we're down to undue. This is their bread and butter, it's not too hard for them, and they know, and we see in that decision, they knew they were below the undue risk, and the Panel Convener said, yes, they're below the undue risk, and we know that. This is their expert work. They do it at the beginning, they can do it while they're in the community, it's not too hard. But to answer the last point of your question, Madam Chief Justice, why should we be constraining their discretion? And the answer is, I think the Law Commission report refers to it, and I've got a reference later, this is the guard rails for the rule of law for these people. This is the limits, if the Parole Board has a completely unfettered discretion, and the Act is interpreted to allow them one, all they have got is judicial review, and your Honour, most of the fabulous lawyers at the Bar who are taking those cases, that is not how we maintain a rule of law for people under the most coercive exercise of state power available under legislation according to the Law Commission.

WINKELMANN CJ:

Sorry, I wasn't really asking you that. I was just saying the Parole Board said that if you jam this into undue risk, it is overly constraining, and I can see some thing in that, they need to be responsive, but I'm also wondering whether you're not unduly constraining your argument by trying to make a statutory interpretation argument that it has to be undue risk because really you're saying that it's section 5 proportionality and it has to be responsive to the individual offender and individual circumstances, and a properly undertaken section 5 framework, as you've outlined the situation, where this is not punishment, it's protection of the community, it cannot be a no-risk model.

MS CASEY KC:

And your Honour, I apologise because I was trying to answer that question as to say yes, but we need to read it clearly into the legislation, because the Parole Board is not doing it.

WINKELMANN CJ:

And so you need some words.

MS CASEY KC:

They know they're subject to section 5. We need some words that the Parole Board, the review panel convenor, the parole lawyers, everybody can go "there's the words". It's not a free-for-all, and that's the rule of law argument, that this has to be a constraint. It's in the legislation, we say, and it's appropriate to be there.

WILLIAMS J:

Well it's never a free-for-all. Well, two things. One, whether you say there is an undue risk, or acceptable risk, our system is predicated on risk remaining for offenders who are released on parole, obviously, and there's a wide margin of discretion there, right. In undue, or whatever other adjective you want to attach to risk, and the expert in that is the Parole Board obviously. But you say in this case the Parole Board has said, this person is below the usual line, at least for release or recall.

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MS CASEY KC:

Yes.

WILLIAMS J:

So your argument – let me just repeat so I can understand. Your argument is really that there needs to be an adjective attached to "risk" that isn't any in order to discipline the Parole Board's work.

MS CASEY KC:

Yes.

WILLIAMS J:

But that said, it is going to be the case, isn't it, that once you talk about risk assessment, you've still got a very wide margin of discretion, and are you really solving the problem you think you have?

MS CASEY KC:

Yes.

WILLIAMS J:

Okay.

MS CASEY KC:

And as for this, undue risk, as you've seen, it's at the top of my road map, is a very wide directed to the Parole Board to exercise its judgement. So when the Parole Board itself says: "Yes, we're under there." We say that's the section 5 no-go. You can't impose electronic monitoring. It cannot be justified below that threshold. And why we choose "undue" as the adjective, is because that's the swimming pool –

WILLIAMS J:

It's in the Act.

MS CASEY KC:

And it's the swimming pool the Board plays in. They do this all the time.

WILLIAMS J:

Right. I see.

KÓS J:

But it was justified originally.

MS CASEY KC:

It was.

KÓS J:

And so we've now got a person who's rehabilitated to an extent and they are, you say, well below the undue risk threshold, but it can't surely be the function of the review process of the Parole Board that its task is to then strip away condition by condition until you get to a point where the individual is as close as possible to the undue risk level, in other words you increase risk back up to that threshold. That seems a very strange review process.

MS CASEY KC:

And that's the dichotomy that the Parole Board gives you, but it's not the right one. What happens is this man goes out into the community, subject to these conditions. As he rehabilitates those conditions strip away. They're not raising his risk. If they're still necessary to keep his risk managed at the appropriate level, they don't go away.

KÓS J:

So what's "appropriate"?

MS CASEY KC:

Well the undue.

KÓS J:

That's a new adjective.

MS CASEY KC:

The – sorry.

WILLIAMS J:

Well they will raise risk to some extent. They must do.

MS CASEY KC:

Well, you remove a control.

WILLIAMS J:

Unless the Parole Board are clairvoyant.

MS CASEY KC:

And they're not, so we are dealing with a Board that has to assess risk, and is not allowed to be so risk-averse that they clamp everybody to the ground. They're not allowed to be. That's built into the Act. So –

KÓS J:

But nor should they be throwing them out of the basket to say let's just get up as close as we can to the undue risk threshold, and no other condition can be justified.

MS CASEY KC:

I think – I want to do a bit of a, if I may, to say look, it's a reality check thing here. The top intrusive conditions, electronic monitoring, whereabouts conditions, they must be subject to that scrutiny. Is there going to be that much concern about the standard conditions, which are by Parliament are deemed to be, have a presumptive proportionality? No. So they're not going to be all stripped off. Standard conditions are probably going to stay there forever unless something makes them incredibly intrusive. But when you are looking at the most intrusive conditions, yes, the Parole Board is supposed to, that's its role under the review provisions in the Act, if they're no longer necessary to bring a person down below the undue, they must go because they're no longer justified. It doesn't mean we're going to calibrate him up to the point where he's bumping his head against undue and is going to step over the line. The reality of the system is, reintegration is supposed to be a gradual removing of the controls, and you can always say, if I take that control off, the risk goes up, of course it does, a bit, it must.

WILLIAMS J:

In theory at least.

MS CASEY KC:

In theory, but the reintegration gets better. So that's – and this is the job that the Board is good at. It does it on release. It does it on recall. For some reason it's saying, we want more freedom in the community so we can clamp people down harder. So that's…

WILLIAMS J:

Does the Parole Board address the expert evidence about the maintenance of electronic monitoring increasing risk?

MS CASEY KC:

Not in its written submissions here.

WILLIAMS J:

No, no, I mean the Parole Board, not Mr Smith?

MS CASEY KC:

Well you've seen the references, they acknowledge that it's a problem, but have formed a different view, and if they were saying we still think that this is necessary to bring the appellant's risk to below undue, we wouldn't be here, but yes.

So that's release on parole, and special conditions are – I'm now just taking you through where can we find the constraints on the Board's discretion for special conditions. So the next provision is section 29AA which is the special conditions and I've just got those in – the key point is, in my submissions, the Board may impose any special conditions that the Board specifies. So there's no constraints in there. There is time limits.

But then section 15 sets out the purposive constraint, so these are – this sets out the rational connection requirement. Special conditions can only be designed for the purposes in section 15 and it's subsection (2) that's the key. So, to reduce the risk of re-offending, facilitate or promote rehabilitation, provide

for reasonable concerns of the victims of the offender, or if there is an ESO direct order from the Court.

Now, the Parole Board and the Attorney say, well look, you can't have an undue risk criteria because undue risk just doesn't land, in particular, for example, in concerning the interests of the victims of the offender. In my written submissions, your Honours, I said, well look, we are in conditions that are designed for the purpose of reducing risk, so we don't really need to worry perhaps about those other conditions.

WINKELMANN CJ:

Well, I mean, those other conditions could legitimately be imposed, couldn't they, to meet the interests of the victim and also to achieve rehabilitation?

MS CASEY KC:

And we absolutely agree that rehabilitation and reintegration will overlap with reducing risk of offending. They are – they feed on each other. Reduce risk, increase your rehabilitation, increase your reintegration and your reduction in offending goes down. So what I'm focusing on in this appeal and I say legitimately, is where you have got really intrusive conditions that are designed at risk, you can't say the proportionality analysis doesn't apply simply because it's a bit awkward to apply it to addressing the interests of the victims of the offender.

ELLEN FRANCE J:

So you're not applying universal test, you are saying the Board has to make some judgement about the level of intrusiveness and then what you need in terms of proportionality might differ?

MS CASEY KC:

Yes.

WINKELMANN CJ:

That's what you're saying.

ELLEN FRANCE J:

And I'm just wondering how, then how –

MS CASEY KC:

No, I think I need to, I think I need to back up a little on that and maybe step it out a bit further. No, the level of risk, where the Board has to assess risk in terms of proportionality, it must use the undue risk threshold.

ELLEN FRANCE J:

Yes, but that equates that you, your prefatory remarks equate to saying you have to look at the nature of the condition and then what you need to do in terms of proportionality may well differ, otherwise you can't, on your argument, you can't accommodate.

MS CASEY KC:

Yes, yes, that's correct. So when you're talking about risk, it has to be that threshold. When you're not talking about risk, it's something else.

WINKELMANN CJ:

But I mean, so for instance, if it were in a different case, if the requirements of the victims were that we don't want him to live anywhere in New Zealand except Stewart Island because this is as far away from us as he can be, in a different case you would say –

WILLIAMS J:

That's a bit harsh on Stewart Island.

WINKELMANN CJ:

Well, it's as far away from the person as they can be.

WILLIAMS J:

Oh, the person, right.

WINKELMANN CJ:

Not because of any judgment about Stewart Island, obviously. If you had that hypothetical, then you would say that's – that doesn't meet the section 5 proportionality thing, it's too restrictive, it can't, and it's not rationally, et cetera, et cetera, yes.

MS CASEY KC:

Yes, because you've still got a section 5.

WINKELMANN CJ:

But it's – but you're not putting undue risk in there. I mean, I just don't think there's any issue.

MS CASEY KC:

Because it's not a risk.

WINKELMANN CJ:

No.

MS CASEY KC:

It's not a risk assessment. But I do need to put two caveats in there, if I may. One is the Court of Appeal decision in *Miller v The New Zealand Parole Board* [2010] NZCA 600, which is in the bundle and I've referred to in my notes, which is a decision about recall. So could we bring up section 61, because it's good to talk about this now.

Recall decisions, so this is recalling an offender from parole, are governed by section 61, I hope – here we go – and it says the grounds of recall are that there are undue risks to the safety of the community, or breach of release conditions, or done these other things.

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The decision in *Miller* was that undue risk permeates the entire recall. That it doesn't matter that it's not referred to, it doesn't matter that there is a breach of

release conditions, the Board also has to assess undue risk before it does a recall. Now that, and what I said in my written submissions, is with that, with that authority there, is there any, you know, there might be a case on victims of offending whether you still have to assess risk, not an issue for this case.

But the second caveat that I do need to note, which I haven't put in my written submissions, is goes back to the preventive nature of this sentence and my submission, if I may, is that that must bring in risk into every element of a parole condition when the only justification for the condition is risk to the community. So that's a slightly separate treatment of a preventive detention, that you need to read in an additionally addenda or requirement for a preventive sentence. But it's not an issue before the Court right now and I don't need to go down there too far, I just don't want to be conceding a point that may become relevant at another time.

WINKELMANN CJ:
So are you not conceding that, that a condition which is to meet the reasonable requirements of the victim can be imposed even though it is non-responsive to risk?

MS CASEY KC:
Logic would say it must, but how you fit that together with the fact that this is a purely preventive order, I don't know.

WILLIAMS J:
I think –

WINKELMANN CJ:
Well, I suppose we don't need to decide it.

MS CASEY KC:
Exactly.

WILLIAMS J:

The answer is, the Act can't be expected to be perfectly symmetrical.

MS CASEY KC:

Thank you.

WILLIAMS J:

There are going to be some exceptional issues here and obviously victims' interests and rights is an important issue in its own right, quite apart from risk.

MS CASEY KC:

Exactly, yes.

WILLIAMS J:

Because there is something restorative about the sentencing process, even preventive detention.

MS CASEY KC:

And you would have to think that if there were reasonable interests of the victims that couldn't be accommodated, you might be looking at an increasing risk environment.

WINKELMANN CJ:

I mean, the answer probably is the fact that it's not response to risk goes into the proportionality measure.

WILLIAMS J:

Yes.

WINKELMANN CJ:

So, you wouldn't be allowing a very extensive limitation on rights to meet the – a substantial limitation on rights to meet the interests of victims, because it's only a preventive regime, if that substantial limitation didn't respond to risk.

MS CASEY KC:

I think that's a very nice way of putting it. If it's not responsive to risk, it goes into the measure. Can we have that –

KÓS J:

I mean, a good example is the condition about non-contact to victims. There's no particular risk association because the victim is perfectly well aware of the danger.

MS CASEY KC:

Yes and that, if I may, that gets back into it, it is a slightly – it's a regime that that is a bit amorphous like that and because it is trying to do a few things.

So, we're back on section 15. So, the point of section 15 is that the only constraint in section 15 on the Board's powers is a purposive one. There must be rational connection, there must be design for this purpose.

So now we come to section 7 which is the generic and we say central constraint on the Board's powers. So these are the guiding principles and the key – there are a number of things that I want to draw out about section 7. So: "(1) When making decisions about... paramount consideration for the... is the safety of the community." And "(2) Other principles that must guide the Board's decisions are..." These are decision-making criteria. This is an operative decision-making provision, that is the first thing to note about it.

The second, and I'm on page 14 of my submissions here, but the second is that it contains obvious but unstated constraints, and my first point is when we're talking about the safety of the community, you have to read in what we're keeping the community safe from, which is the risk of re-offending. So that's not in there, but it's obvious brought in and, as I say in my submissions, we're not talking about safety from earthquakes, we're talking about risk of re-offending.

The third, we say, is that section 7(2)(a) directs the proportionality assessment and it's a very clear proportion – it's supposed to be a proportionality, it requires a comparison, no more than necessary, no "... more onerous, or last longer, than is consistent with the safety of the community."

So what the appellant says is the question for the Court is, what is the threshold of safety of the community? What is an acceptable level of risk of re-offending against which you measure whether a condition is no more onerous than is required to meet that end?

The next thing to notice, which I'm at paragraph 54 of my submissions, is that the threshold is the same. So section 7(2)(a) says it applies to release and it applies to recall – we know that from *Miller* – and it applies to conditions, in the exact same terms. What is consistent with the safety of the community is the same for all those decisions and, respectfully, that is the end, I say, of the Parole Board and the Attorney-General's case. It doesn't change for special conditions once the offender is in the community. The Act keeps it the same, and we know it's "undue" for release and we know it's "undue" for recall and section 7 says it's the same. So…

ELLEN FRANCE J:

So do you get that from the "must not be subject to release conditions that are more onerous, or last longer"?

MS CASEY KC:

Yes, "must not be detained any longer than is consistent with the safety of the community" and "must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community".

ELLEN FRANCE J:

And you say the release conditions not be more onerous, et cetera, carries on, if you know what I'm…

MS CASEY KC:

The concept consistent with the safety of the community is the same.

WINKELMANN CJ:

If the concept of the safety of the community is carrying on, and you're saying it's unlikely that that meaning changes like this?

MS CASEY KC:

Yes, exactly, and because the same words are used in the same section. So the question for the Court is, what is the acceptable level of risk in the Parole Act that you measure what is consistent with the safety of the community? So, respectfully, the statutory interpretation argument: "Well, undue risk doesn't appear here or doesn't appear there," really doesn't matter. What we're looking at is what is meant by "consistent with the safety of the community", and we say that in the context of this legislation Parliament has already decided that if an offender doesn't pose an undue risk then it is acceptable for them to be in the community, and, respectfully, the only coherent way to read section 7 is that is what Parliament intended. It is acceptable for them to be in the community if they are below that. That's our acceptable level of risk. That is the threshold against which we measure "no more onerous, or last longer".

So that's the appellant's case in a nutshell and then I was going to turn to what I'm calling the four planks and the arguments that were put forward by the Attorney and the Parole Board in the lower Courts. This is at page 17 of my written submissions and I don't think I need to spend much time on them, partly because many of these don't appear to be the focus of argument before this Court, but if I can just do a quick two-minute run-through.

So obviously the first plank of the case and the Court of Appeal decision is that there is no express reference to "undue risk" in section 7 and what we note is that is true but actually there's no reference to risk assessment in imposing conditions at all. The Court will recall section 58, 28, the conditions imposing provision, doesn't refer to a risk assessment. It just has to be for that purpose.

So risk assessments are built in, obviously, because that's the Board's job, but every time, as I say in 64, every time the Act does direct, expressly direct, the Board to assess risk in the context of parole it uses the word "undue". So it's the standard. It's not the same for ESOs. ESOs are "high" and "very high".

Talking about *Gilmour v Chief Executive of the Department of Corrections* [2017] NZCA 250 and *Miller*. I've talked about *Miller*. *Gilmour* seems to have fallen away.

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The second plank of the Court of Appeal was the issue about victims, conditions imposed for victims' interests, I think I've covered that.

The next point is different thresholds apply to special conditions when the offender is in the community. I think our exchange that we've just had, we say section 7 just doesn't allow that and nor does the reintegration purpose of the Parole Act itself and the assertion that it is too hard, we say, look, they do it at release, I think they can manage it in the community.

That takes me through to paragraph 79 of my submissions on page 20, talks about the argument that the Parole Board and I think the Court of Appeal raise –

WINKELMANN CJ:

Is this your fourth plank, or is it?

MS CASEY KC:

This is the fourth, third plank, I think I'm in.

WINKELMANN CJ:

Still on third.

KÓS J:

Oh, still third plank.

WINKELMANN CJ:

So that's different thresholds applying to offenders when they're in the community?

MS CASEY KC:

Yes.

WINKELMANN CJ:

Okay.

MS CASEY KC:

Starting at paragraph 19. But there's a nuance to this argument that has got more emphasis from the Parole Board in this Court and was, was part of the Court of Appeal's analysis. So my paragraph 79 at the bottom of page 20 talks about the, the Court of Appeal and the Parole Board say, well, actually you can justify a different level of acceptable risk when you're in the community as opposed to a release or a recall decision because the consequences of a release or recall decision is detention and the UN has already told us that if we detain beyond undue – when there's no undue risk, we're being arbitrary. So it's okay and we can read the statute as imposing a lower or non-existent threshold when you're in the community because the consequence of our decision is not detention, and, your Honours, that's where I came back to where I started with this morning.

Yes, arbitrary detention is a wrong, a terrible wrong, but arbitrary constraints for decades in the community are also an infringement of rights and, and a wrong, and the proportionality assessment needs to be as robust. Yes, detention is bad, but these constraints are not nothing and I think I've got a reference on my outline to the decision in *R v Janssen* [2007] NZCA 450 which talks at paragraph 17 about: these rights of movement and association may be constrained in a community, they are not to be ignored and to say, well, we don't need that proportionality assessment for conditions in the community if it's not detention, respectfully, is ignoring the very severe impact those rights have. Yes, it is not as bad as detention but that doesn't mean there's no threshold.

The fourth plank is the too difficult for the Parole Board and that was a different argument than I think you're seeing from the Parole Board today, or as I understood it. It's we can't do a condition-by-condition analysis, it's too hard, we don't have time, we're busy and, as we say, with respect, that is plainly wrong and contrary to the legislation.

Special conditions have to be imposed by a decision of the Board, so of course they have to consider each special condition separately as well as in the package, otherwise they're not turning their mind to section 7(2)(a) for each special condition. It's a legal requirement and we note at paragraph 82 that it also appears to be overstated. The conditions of concern that may "go over the line" are being unjustified, are going to be obvious. And as I say at paragraph 83, according to the Law Commission's 2023 paper, the practice reflected in the MOU between the Parole Board and Corrections, is that the Board gets advice on each special condition and what its rationale is. So, respectfully, the idea that it's just too hard isn't reflecting reality.

I'm about to turn to the Bill of Rights argument. Would it suit to break early or should I go for five minutes and come back?

WINKELMANN CJ:

Go for five minutes.

MS CASEY KC:

Thank you. So I am now on page 23 of my written submissions and so I've talked very briefly about section 7(2)(a) which we say is the statutory embodiment of a proportionality analysis. But the issue, and the Court of Appeal said, well, we don't need to – you don't need to have an undue risk threshold because, look, there's a statutory proportionality analysis here, and the appellant's position is, actually, you have to interpret section 7(2)(a) as being consistent with section 5 of the New Zealand Bill of Rights Act 1990. It has to be a proportionality analysis that is as good as section 5. Section 6 of the Bill of Rights Act requires nothing less.

WINKELMANN CJ:

Is your attachment to the words "undue" not because there's any particular magical content to its meanings, but really because it makes – it's a clear signal, well, it's not just any risk, it's, it's saying it's, it's not no risk, it's saying that this is a managed risk?

MS CASEY KC:

Not quite. We want it for that reason, it needs to send a clear signal that this is not no risk and a managed risk. But there is magic in "undue risk" because that is the risk that Parliament has said is acceptable in the community. So we do endow it with some glitter.

WINKELMANN CJ:

Okay.

MS CASEY KC:

So going back to the BORA analysis, to the extent that it exists and I think it is, I think it is pretty crucial, is the Court of Appeal said section 7(2)(a) is your answer, the Attorney-General says section 7(2)(a) is your answer, there is a proportionality assessment, nothing to see here, don't worry. But that is conflating a mechanism with a proportionality assessment that meets the requirement in section 5 that any limit of the right be demonstrably justified in a free and democratic society. Section 6 of the Bill of Rights Act says you have to read them consistently and the appellant's position is that to do that, you have to set a BORA – sorry, Bill of Rights threshold to the meaning of the words of what is consistent with the safety of the community. So –

ELLEN FRANCE J:

I'm not quite sure what, on your approach that it has to be undue risk, the level has to be undue. What does – what are you seeing the proportionality assessment in BORA as adding to that?

MS CASEY KC:

It's not. If we get the undue threshold in, it's there, that's what we say. The BORA analysis tells us we have to have an appropriately calibrated threshold, in section 7(2)(a), can't be no risk, we say it should be undue risk for the reasons we've talked about. So we're just saying section 6 and section 5 of the New Zealand Bill of Rights Act endorses that you can't just leave this unfettered no-threshold approach there.

WINKELMANN CJ:

Well, "undue" probably, well, I don't know, isn't section 5 an extremely nuanced thing, so it balances the right being limited with the purpose, tests of rationality, isn't that doing quite a lot more than section 7, or not?

MS CASEY KC:

Section 7 and section 15, probably between them, do the lifting. Your rationality is section 15, it has to be designed for this purpose. We know what the purpose is, although I will come back to that. So this is the – section 7(2)(a), I suppose, is the minimal impairment element. It's a statutory direction to minimal impairment in section 7(2)(a).

WINKELMANN CJ:

I suppose section 7(a) also brings in your rehabilitation point, because your point about the Board's decision in this case is that it is actually just doing the constrain, constrain, constrain, it's not taking the slightly zoomed-out look which is actually you may be doing more harm to the safety of the community, the rehabilitation of this person.

MS CASEY KC:

So yes, that's – and you, the Board, don't forget, has got quite a – it's a discretion, so we would, if we needed to pack those in somewhere, we would pack them in under section 29AA which is the discretion to impose special conditions. There is places for the –

WINKELMANN CJ:

No, my point is it's in (a): " ...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."

MS CASEY KC:

Because of rehabilitation and reintegration concerns, yes, and that goes back to because of the public interest also in rehabilitation, reintegration. So this is just another way of looking at the statutory interpretation argument, your Honour.

KÓS J:

So if you're the Parole Board sitting there, how do you apply the standard? I mean is there a difference between the standard in section 7(2)(a) of "consistent with the safety of the community" and the standard you're trying to impose?

1130

MS CASEY KC:

No. This is –

KÓS J:

You think that packages, that statement in section 7(2)(a), packages the undue risk proposition?

MS CASEY KC:

We know it does on release and recall.

KÓS J:

Well, does it tune it up? Does it make – I'm trying to work out how it adjusts it. I'd be quite happy if I was a Parole Board member with a standard of the safety of the community. It's pretty broad.

MS CASEY KC:

The problem is the Parole has said it's so broad that it means that we can impose electronic monitoring because the risk is above zero.

WINKELMANN CJ:

For six years, five years.

KÓS J:

So there's a necessity requirement as part of section 5 –

MS CASEY KC:

Yes, and that needs to be read in.

KÓS J:

– and also part of section 7.

MS CASEY KC:

Yes, but if you look at section 7, if you read it as the Board is, saying "consistent with the safety of the community" says anything above no risk is consistent with the safety of the community, your proportionality analysis has fallen over.

KÓS J:

Correct, it's gone.

MS CASEY KC:

There's nothing to judge minimal impairment against. Everything is justified. It's like if you bring a zero into mathematics, A times B times C times D, the Board says D is zero, always zero, we can go anything to no risk, the answer will always be justified.

WINKELMANN CJ:

Well, not so, not unless there's some sort of rational connection between the condition and the management of risk.

MS CASEY KC:

Sorry, yes, there is – you've reduced yourself to a rationality link only. Anything that is rationally connected with reducing risk of offending –

WINKELMANN CJ:

And you've taken out proportionality?

MS CASEY KC:

You've taken out proportionality because you have said: "We set our objective is anything above zero, anything below zero" – sorry, come back to that. You can't do a minimal impairment if all you've got is rational connection because everything will pass that. No matter how intrusive it is, no matter how low the risk, everything passes a proportionality assessment if the threshold is zero. And that may be the best time to pause.

WINKELMANN CJ:

Yes, alright. We will take the morning adjournment.

COURT ADJOURNS: 11.32 AM

COURT RESUMES: 11.51 AM

WINKELMANN CJ:

Ms Casey.

MS CASEY KC:

Your Honour, I have a preliminary answer to the question you asked this morning about the matters that are dealt with in the redacted sections of my submissions at paragraphs 32 and 33 and in particular the Panel Convenor's decision on that condition that it is assumed that this can be dealt with through an agreement or permission from the probation officer. So I can give a high-level answer that that agreement has been sought and that access has been allowed with permission. I understand my learned friend for the

Attorney-General is going to get more details from the Department of Corrections.

But that does raise a particular point that I wanted to make in my submissions in any event about the Parole Board's submissions to this Court that, actually, one of the reasons why you shouldn't be concerned about the scope of discretion that the Parole Board is claiming is that, of course, the probation officer has to administer the conditions in a way that is consistent with the New Zealand Bill of Rights Act.

I have six important points, if I may, to answer that. I know six is a lot but they are quite short. The first is that's contrary to the statute. Section 7, that's in front of you on the ClickShare screen, directs the Board to make the proportionality assessment, not the probation officer. The second is that is not consistent with the rule of law and I have given references in my submissions on page 10 and footnote 32 to comments to similar effect in the *Fitzgerald v R* [2021] NZSC 131, [2021] 1 NZLR 551 decision of this Court.

WINKELMANN CJ:

You've also got the "prescribed by law", don't you, and the arbitrariness?

MS CASEY KC:

Yes, exactly. Sorry, seven points. The third is that the probation officer can mitigate some unreasonable conditions but not all of them. Most particularly, they can't do anything about electronic monitoring.

The fourth, and this is really important, is that they can never mitigate the unreasonable condition completely and this is what this condition is. The person still has to ask permission and they should not have to ask permission for that contact. There was never any justification for that restriction but now they have to ask permission and if you delve into the Law Commission report of 2024 they talk about the difficulties long-term offenders have with the number of probation officers that they are getting with that exercise of

discretion. It should not be subject to a discretion. It's a right. It can only be limited on proper grounds.

The next point is that if the Board has set the condition it is presumptively justified, and the probation officer isn't expected to and doesn't have the resources to make a proportionate risk assessment.

The final one, again coming from the Law Commission, and this is the 2023 paper, the Issues Paper, at paragraph 10.91, and I'm sorry, I haven't got that in my road map, the Law Commission already recognises that there are significant access to justice issues if an offender has to rely on judicial review of a probation officer's decision to ensure that their rights are only limited to the extent possible. The complexities are not just the lack of counsel but that judicial review is a civil claim, most probation lawyers are legal aid qualified for criminal, most civil aren't criminal, et cetera, et cetera. So, as an answer to "it's okay if we interpret the Board's powers really widely", respectfully, the condition referred to in the redacted sections is an illustration of why not.

So, I have got five minutes left and I want to briefly touch on the rest of my submissions on the Bill of Rights issue. So I'm back – I'm on the road map at paragraph 4(f) and I'm in my written submissions and I would like to go there on page 24. Because this, what I have set out in paragraphs 91 to 93, is the issue between the – what do these different definitions or interpretations land on the ground, and so at paragraph 91 I set out what the Court of Appeal says is consistent with community safety, which we say: "... would justify imposing restrictions that interfere with fundamental rights so low as to be almost non-existent." And this is: "It is the very nature of release on parole..." I'm quoting from the Court of Appeal here, that rights "... will be curtailed... that may occur even when an offender is assessed a low risk of offending and does not present an undue risk of re-offending..."

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

In paragraph 3, I have set out Justice Gwyn's approach which we say is the correct approach which is that the Parole Board should have asked itself: "Is the continuation of the special conditions a reasonable, necessary and proportionate means of ensuring the [offender] does not represent an undue risk to the community?"

And as I say in paragraph 94: "The Court of Appeal's approach appears to water section 7(2)(a) down to such a level that it authorises limits on rights that barely have a rational connection to protecting the community from the risk of re-offending, let alone constituting a demonstrable justification for those limits." And as we say: "Respectfully, the Court of Appeal appears to have lost sight of what is at issue here. Guaranteed freedoms are not to be limited for some 'nice to have' improvements in risk management when the risk is already so low that Parliament considers that the offender can be safely in the community."

And just finally, standing back to my road map, which I have now lost, here we go, at (f) I just run the Court through the standard proportionality analysis and say: "Is 'simply enhanc[ing] risk mitigation for an offender who is already assessed as falling well below the undue risk threshold' a sufficiently important objective" for intrusive parole conditions? And my respectful submission, I'm on my road map here, is that it doesn't even meet that threshold. That is not a sufficiently important objective for the imposition of these sorts of intrusive conditions. Rational connection may be.

Minimal impairment, and this is the discussion we were having before the break, you can't assess minimal impairment if you don't know what your – the impairment is aimed to achieve. If there is no threshold, there is no sense that another approach would be less intrusive because the threshold is at zero. So, it's an odd logic but if whatever the risk is, no risk is good enough. As we say, the answer to the proportionality assessment will always be the same. So long as there is a rational connection, it's justified and the appellant's position, as I say in (g)(i), that simply doesn't meet what section 5 BORA requires and I've just put in a reference there to the decision at *D*, in *D* which

talks about – sorry, the need for a genuine risk to community safety, that's in the context of registration of offenders. But section 5 requires a level of risk, some threshold against which proportionality can be assessed.

1200

Finally, just to close, this is especially so, that the importance of this risk threshold is especially so in a sentence which is, in this phase of its life, justified only on the basis of preventive measures. If there is no rational justification or proportional justification against real risk for the community then the sentence itself has become arbitrary and the deprivations of rights are arbitrary, and all those problems with preventive detention and its structure come to roost here.

So that was a very fast move through the Bill of Rights. I am miraculously on time unless there are further questions.

WINKELMANN CJ:

Thank you, Ms Casey.

MS CASEY KC:

Thank you, your Honours.

WINKELMANN CJ:

So is it Ms Priest or Ms Thode? Ms Priest.

MS PRIEST:

May it please the Court, the context within which Mr Grinder's appeal is determined ought to be evidence based and not fear driven. To this end the submissions on behalf of the Law Association will focus on generalised policy considerations with some comments on the practicalities of parole. A brief application to the facts will conclude if there is sufficient time.

In terms of policy considerations, we're informed by the Law Commission's work in this space across 2023 and 2024 where there's been a complete review

of preventive sentences and orders which includes preventive detention, ESOs and PPOs.

In general terms the Law Commission recognises the inherent impact that the Parole Act, particularly with indeterminate sentences, has on parolees' fundamental human rights under the New Zealand Bill of Rights Act and we know also that preventive detention can infringe on international human rights from the decision of *Miller v New Zealand* which was, of course, before the United Nations Human Rights Council.

Fear, in my submission, cannot overwhelm risk. It is not controversial to suggest that high-profile offending by parolees has been a powerful driver in the application of preventive detention and other preventive orders. Examples of high-profile offenders in indeterminate sentences re-offending on parole have driven obviously policy, and there's a reference here to the 2023 Law Commission paper at 3.47.

There's been an increase in surveillance legislation post-release and that's set out in our submissions at paragraph 19, but this culture of control and of normalising of observing or observation and tracking of people for a preventive purpose has significantly increased with New Zealand having the highest incidence of EM monitoring per capita globally. The Board has used curfews in the past as a standard special condition to help an offender seemingly transition back to the community and the decision of *Woods v New Zealand Police* [2020] NZSC 141, [2020] 1 NZLR 743 made it clear that residential restrictions could only be imposed where there is a nexus to risk. In the *Woods* case it was effectively determined that the blanket use of curfews as a condition on release, in the absence of a nexus to risk was unfair and arbitrary and we see that brought up in the decision of *Woods* here and this is paragraph 74. As a result of the *Woods* decision, the Parole Board of its own motion recalled some 800 parolees to reassess whether their parole curfews had any nexus to risk, cancelling, as I said, over 800 of those recalled.

Some of the research that we have included in our submissions include the Kim Workman “Is this the Dawning of the Act of Surveillance? – Monitoring Offenders in New Zealand” (2015) NS21 Journal of New Zealand Studies 69 report which is a New Zealand report suggesting that EM conditions can be somewhat counterintuitive, and I refer to my submissions at paragraph 27, but what the evidence tells us is set out in the page on the screen. Effectively, that electronically monitored controls can increase the probability of breaches of release conditions and consequential risk of imprisonment. There is obviously higher financial costs that associate with that.

Also, external control strategies fail to promote these internalisation of prosocial mindsets and they are, of course, essential for long-term change. Simply complying because there is the threat of imprisonment fails to promote that and we have, of course, the comment that coercive control tactics coupled with the threat of sanctions negate hope and can encourage defiance against obviously the state and the probation officer on the – on a day-to-day instance.

This does have some similarities to the US, where in a different study reference, Kate Weisburd “Punitive Surveillance” (2022) 108 Va L Rev 147, Weisburd stated that the use of GPS tracking for parolees has spawned this term “punitive surveillance” and the study also demonstrated this new type or described this new type of incarceration, the prison outside the prison, and coining the term “e-carceration”.

The need for meaningful reintegration and support of parolees is critical to their success and that, of course, underpins the need of all of society that we can live without the fear of further rehabilitation. It is critical that there is an evidence-based approach to risk and one study from Melbourne revealed six key factors which were identified as leading to a crime-free lifestyle and this is the paper by Joe Graffam and others “Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals” (2004) 40 Journal of Offender Rehabilitation 147, also attached to the submissions and we see, I have highlighted, the six variables there.

Firstly, this readiness to change mindset which, of course, is very internal. Secondly, avoiding social isolation and boredom with identifying that being alienated from friends, family and community was a negative factor. Thirdly, stable housing was essential, often, of course, requiring employment first. Fourthly, avoiding further difficulties with the authorities and this relates to reporting, including interactions with the police, with parole officers and managing to reintegrate or integrate these obligations into a recovery schedule which is working towards a prosocial, free life. The fifth factor identified was success at drug rehabilitation with drug use and addiction being a key factor with parolees and their ability to do that often with very limited support and that statement would be applicable in New Zealand as well.

WINKELMANN CJ:
Could I just ask for the name of that report, I was just trying to find it.

MS PRIEST:
Sorry, Graffam, it's in the additional material bundle requested by the Court from the Law Association.

WINKELMANN CJ:
Okay, thank you.

MS PRIEST:
And finally, the sixth factor is addressing basic educational and training needs with that long-term ongoing support to obtain employment.

In the research which was undertaken, we did identify two other important contextual factors which are relevant to lowering risk and this is from the Arjan AJ Blokland and Paul Nieuwbeerta “The Effects of Life Circumstances on Longitudinal Trajectories of Offending” (2005) 43 Criminology 1203 research paper and the first, which is perhaps very well-known, is that crime decreases with age. Relevant in this case with Mr Grinder being in his sixties, but it is a relevant non-stable factor to be taken into account in the management of risk. And the second, within the same article, is that crime decreases with marriage.

1210

WINKELMANN CJ:

Or stable relationships, one assumes.

MS PRIEST:

I think I would certainly concede that now. I'll just see what page that's on. Is it 1204? Certainly this research indicated individuals who were married were less likely to report re-offending and there was also correlation with divorce and an increase in offending which I'd also hoped to highlight but that's within that report also.

KÓS J:

It's just on that page there.

MS PRIEST:

Further down. Thank you, Sir. Yes, so separation again increasing the rate of convictions leaving individuals when separated 44% more likely to be convicted than when they were married and 4% more likely than when they were single. So just an interesting correlation but one I think that while I'd not seen it by way of reference to the relationship I think the idea that connection for parolees in the community as being a protective factor is not controversial itself.

Turning then to the consistency with the New Zealand Bill of Rights Act and I just wish to take the Court through some aspects of the Law Commission reports to highlight certain parts.

The Law Commission in the 2023 Issues Paper at 10.57 recognised, of course, that restrictions in the form of conditions must be rationally connected to the risk posed by the individual and impair the individual rights or freedoms no more than is reasonably necessary, obviously reflecting the case law progress in this area as described by counsel for the appellant. So the management of conditions ought to be flexible enough to take into account those subject to

preventive regimes coming from diverse backgrounds and their needs and risks being diverse.

Safety of the community and conditions proven to reduce risk and promote successful reintegration, this inherently includes rehabilitation and reintegration of parolees and, of course, the objective must be to support a parolee to live a good, prosocial, offence-free life and effectively to build an entirely new normality through graduated change. The indefinite nature of preventive detention and these other sentences has contributed to feelings of hopelessness and despair, and it's in the Law Commission report. It indicates that that has resulted in high levels of self-harm and some suicides in the equivalent UK regime. So the risks of real psychological harm to parolees is important. That's at 3.58.

So creating connections and social networks is linked to long-term success on parole and I think child sex offenders are especially ostracised. They are often prohibited from returning to their home towns, limited to forging new relationships with other child sex offenders who they are in shared accommodation with and attend maintenance groups with.

So overly restrictive conditions can foster anxiety and probation officers can be seen as enforcers of conditions, so strict conditions, of course, do send a message of a lack of trust and confidence in a parolee's ability to succeed.

This is all reflected in my submission in the Law Commission's preferred approach paper which was released in 2024 and, of course, that proposes a unified regime for all preventive orders, including preventive detention, ESOs and PPOs.

There are the three purposes of the new Act and this is at 1.23 to 1.25, summarised in the green box on your screen. Firstly, the protection of the community by preventing serious sexual and violent re-offending; secondly, to support a person considered at high risk of future offending to be restored to a safe and unrestricted life in the community; and, thirdly, to ensure that limits on

a person's freedom to address the high risk that they will sexually or violently re-offend are proportionate to the risks that are the least restrictive necessary, and they are elaborated on in 1.23 to 1.25 of that report.

Interestingly, as part of this consideration of how best to reintegrate these high-risk offenders into the community, there is a proposed new ground for name suppression to be available to all parolees and this is set out – I've got that 1.86… In any event, there is a proposal that there is name suppression available to parolees in order to further their reintegration.

The Law Commission does propose that a needs assessment be undertaken of all parolees with a plan showing the steps to get to a safe and unrestricted life in the community, and this is set out at 1.100, the point being that there is, I think, an ambitious perhaps aim to effectively transition a parolee from what might be very strict conditions on immediate release through to unrestricted life in the community as part of any preventive sentence. It also proposes permissive rather than restrictive condition setting and at 1.14 they're talking about there allowing a person to have unsupervised access to their own children under the age of 16 rather than applying blanket prohibitions against association with any child. So rather than proposing these restrictive "you can't" restrictive conditions which prohibit an action, they're rather looking at more permissive actions which will ensure that they can live an as prosocial and unrestrictive life as is possible.

From there I simply wish to offer some practical comments or considerations from my experience working before the Parole Board in terms of setting conditions for parolees generally. I noted in the Parole Board submissions that the Board was noted as being a very busy one, dealing with over 7,000 hearings a year – that was in the Parole Board submissions at paragraph 9 – with hearings of between 35 and 55 minutes in duration. I think this context is important. It encourages, in my submission, having to deal with such a large volume of parolees, it encourages a cautious approach and favours more onerous conditions. There is, in my submission, an aspect of reputational risk to the Parole Board and this is reflect, I think, in the Law Commission reports.

So at its heart there is a need for self-preservation and the protection of the community, of course, favours a cautious approach. So at its heart the imposition of onerous or perhaps unnecessary conditions reflects a fear, so while the risk of re-offending may be very low the harm that would be caused were a low-risk offender to re-offend would be catastrophically high. We see that commonly with homicides, particularly first-time offenders, who may have a very low RoC*RoI, a very low risk of re-offending, point 1, point 2, but of course the harm that could occur were they to re-offend is considered astronomical and the same submission applies to child sex offenders, understandably.

So there is a risk, in my submission, when one is considering the ongoing risk to the community, that it's vulnerable to being misused by the Board because of this climate of fear.

When a Board undertakes a parole hearing, the questions can be incredibly intimate for child sex offenders. They are routinely asked about sexual and other invasive thoughts about children and, of course, a very robust response is required before they are able to be deemed no longer an undue risk to the community.

It is common for a case manager in the parole assessment report to suggest a very large number of special conditions and these are commonly resisted by counsel, and I offer a few examples.

1220

So a parolee whereabouts condition may be resisted—by way of curfew—if the offending has occurred within a family relationship. So if the offending has occurred within the home, there is no nexus to there being a need for a curfew or keeping a child sex offender at home, but they are commonly included regardless of the fact that there's very limited nexus.

Just a comment in terms of the interests of victims generally. There is still, I think, a perceived, perhaps correct, risk of re-offending against the victims

again, particularly if there's been a longstanding relationship between an offender and his or her victims. There's also the idea that seeing the victims may be triggering for the offender and a third factor is that the risk to the community also includes a risk to the offender and the Parole Board may have whereabouts conditions to keep effectively the victims away from the offender but the only method they have to do that is to have a whereabouts conditions making sure that the offender lives separately.

WINKELMANN CJ:

So are you saying there's no sensibilities of the victim?

MS PRIEST:

No, there certainly are but I'm just saying there are actually a number of victim-related risks as well which –

WINKELMANN CJ:

So you're not excluding the possibility that the Board might impose conditions to protect the sensibilities of victims?

MS PRIEST:

Certainly not, but in my experience, particularly with child sex offenders, the fact that it might be triggering, the fact that that could in fact elevate risk purely either because it's triggering or actually with between that offender and that victim or the victim's family having, you know, ill wishes towards the parolee –

KÓS J:

So those are offender-related risks?

MS PRIEST:

They are but they're still deemed to be part of that risk to the community, the offender, who of course is part of that. So I just wished to, I think, make that observation from experience.

Of course, electronic monitoring is the most prohibitive type of condition and it's used for whereabouts in terms of GPS tracking or movements or for curfew. So that's simply to be used to monitor curfew at home. Again, where a child sex offender has offended in the home, we're going to be resisting a curfew, electronic or otherwise, and again where victims are perhaps 15 or 16 years of age that would often trigger the inclusion of a blanket not to associate with anyone under the age of 16 but that may prevent contact with preschool children, it may prevent living near a daycare which actually has no nexus to risk that we might perhaps see with paedophiles.

So nexus may be a given but, in my submission, proportionality becomes key, particularly in the scheme of EM conditions.

There is also an argument that fewer conditions are better. In a recent case where I was counsel to assist the Parole Board for a parolee who refused to engage, he had been released on conditions, he would breach them and then he would be charged with the breach and then reincarcerated. It was effectively this revolving door of him back through the prison system, and so by agreement and with – he didn't attend the hearing but by agreement we effectively crafted as few conditions as possible to ensure the maximum possibility of compliance and to prevent the idea that or to try and eliminate this revolving door of him returning through prison. Again, the decision to recall and the decision to prosecute for a breach is determined initially by Probation. They are the people who are filing the applications. Probation, of course, do not have the legal skill set to apply the Bill of Rights in the same way that lawyers or the Parole Board do and they can, in my experience, be particularly heavy-handed and, as I said, with child sex offenders and that reputational concern, that does apply to probation officers who, of course, do carry the weight of having to manage people who have committed very, very serious crimes, abhorrent crimes, within the community.

It is, of course, important not to overlook the impact on a parolee of even standard or minimal conditions. They must report to their probation officer. They must explain what's happening in their life. Their every decision is being

assessed or judged, questioned, assessed, by Probation. They must disclose every aspect of their lives. It is invasive and it is personal. For serious offending, of course, there are far more onerous special conditions which attach.

So just a very brief comment in my last two minutes on the factual application to Mr Grinder. A life for Mr Grinder who is now in his 60s with EM monitoring means that he has to ask his probation officer effectively for permission to move in the community. He lives in fear of breach and in fear of them being prosecuted for breach or being recalled which is something that he will live with for the rest of his life. Barring imprisonment, being subject to electronic monitoring is the most restrictive condition that can be imposed on a human.

As at the date he sought to have his electronic conditions removed, the Board has heard that the psychologist assessed him as low risk. It was not just that his conditions no longer had a nexus to lowering risk but rather that his risk of re-offending would increase in the context of loneliness, emotional collapse and isolation. So in short, in Mr Grinder's case we have the converse. The more restricted Mr Grinder was, the more despondent he became with living with oppressive conditions and there is an associated increase in re-offending risk.

Just to answer the first respondent's proposition that it's untenable to manage risk only at the level that it becomes undue, I do dispute that. The proportionality balancing test is not inherently unscientific or fraught as they submit. It relies on psychological assessments from experts and it is also noted, of course, that for any extended Board we have four Board members rather than three and there is a psychiatrist or a psychologist Board member on those Boards willing to obviously ask questions and assist making a real-time assessment during that Board hearing.

I just made one final comment in respect of the reinstatement of Mr Grinder's EM whereabouts condition, which was after his attendance at that model train event, it appears that he wasn't deemed to have breached his whereabouts condition, however, EM monitoring was reinstated, and I just wish to draw the

Court's attention to section 15A of the Act which defines the purpose of electronic monitoring. It is to deter the offender from breaching conditions that relate to whereabouts, and to monitor compliance with that condition, and so EM can only be used for whereabouts. It can't be used for anything else. So the submission is in the absence of any breach of a whereabouts condition, the reinstatement of it, in my submission, is contrary to the asserted purpose of 15A. I think that was the only point I wished to make on statutory interpretation. I'll leave that to the others.

So in conclusion, the successful reintegration of offenders, including child sex offenders, is in the best interests of offenders, victims and the community. The imposition of conditions must be evidence based, minimising the risk of recidivism but developing offenders into prosocial citizens. There is no place, in my submission, for fear-driven logic. The notion that an offender may offend in the future despite being assessed as low risk of re-offending and not an undue risk to the community, in my submission, cannot justify restricting the liberties of offenders who are making genuine efforts to rehabilitate and to reintegrate into society. EM restrictions must have a clear nexus to risk and must be proportionate and that's that they require strong justification, in my submission, given their impact on fundamental rights, therefore the Parole Act must, and can be, read consistently with the New Zealand Bill of Rights Act by importing that undue risk test throughout. This is endorsed by the Law Association.

Does the Court have any questions?

WINKELMANN CJ:

Thank you, Ms Priest. Ms Thode, or is it junior counsel? Mr Wall?

1230

MR WALL:

May it please the Court, these submissions are presented on behalf of the members of the New Zealand Criminal Bar Association and before I begin I would like to echo the words of Ms Casey KC at the start who acknowledged

the passing of Mr Ewen KC who was a member of the executive committee of the Criminal Bar Association, is much missed and our members were particularly touched by the steps that members of this Court took for his call to the Inner Bar.

WINKELMANN CJ:
Thank you, Mr Wall.

MR WALL:
I would like to be quite brief in my submissions because much of the heavy lifting was done just before the morning adjournment in terms of the rights-based analysis towards section 7(2)(a) and the position in our submissions could be summed up that if section 7(2)(a) provides a proportionality enquiry, it needs to be given meaning. There needs to be some risk threshold in there that gives proper meaning and quality to the rights that are engaged and that proper meaning to rights cannot be achieved if the risk threshold is set at non-zero. So, there has to be some risk threshold or profile to which the interests of the community are pitched against and that sufficient quality and meaning is derived from the undue risk threshold.

It is not a term that's magically plucked out of the air. It's what operates at the time of the release and the wording used earlier is that these are conditions of release. So, the release is conditional on these requirements and at that point in time undue risk is the operative threshold, undue risk is the operative threshold at the point of recall and it is a standard that provides symmetry amongst all men, consistency and certainty in terms of the decisions that are made. It provides a degree of certainty for a person who is subject to those intrusive conditions. They will know where they stand and they will know that when decisions are being made about the variation or discharge of those conditions, that they're not arbitrary. That they are pitched against a consistent standard that applied at the time of their release.

And so when we all acknowledge that these conditions engage various rights, a cascade of rights was described by Ms Casey, but they also engage concerns

about parolees' privacy and if a non-zero standard is to be applied as to whether those conditions remain or go, that would amount to an arbitrary interference on parolees' rights to privacy as set out or affirmed in article 17(1) of the ICCPR.

So we get to this point in terms of interpreting the content of section 7(2)(a) for a rights-based analysis, and unlike the Court of Appeal there needs to be some proper substance in what we are balancing here.

KÓS J:
May I ask you.

MR WALL:
Yes, Sir.

KÓS J:
Justice Gwyn's concluding directions at paragraph 130 of the High Court judgment, have you considered that and do you agree with the terms which she expressed?

MR WALL:
That they are designed to get a person to some point? Yes.

KÓS J:
So you endorse paragraph 130 of the High Court judgment?

MR WALL:
Pull it up, make sure, Sir.

KÓS J:
Please do.

WINKELMANN CJ:
It's very impressive if you just recalled what it said.

MR WALL:

There were two components of – in the Court of Appeal.

KÓS J:

Two elements, that's right. We focused on the first one but there's also the second.

ELLEN FRANCE J:

Could we put it on the screen?

MR WALL:

Was that paragraph 130? I might be thinking of…

KÓS J:

Yes, 130.

WINKELMANN CJ:

It's the second limb Justice Kós is referring you to.

MR WALL:

Yes, Sir.

KÓS J:

You endorse that?

WINKELMANN CJ:

That relates to the second ground of review, does it? I was just wondering what happened to the second ground of review which was that it didn't have – wasn't the second ground of review that it didn't have proper regard to contemporaneous evidence, that the Board did not? "Unreasonable finding of fact/wrong weight on expert assessments"?

MR WALL:

Probably outside of my lane to wade into that.

WINKELMANN CJ:

Because that was found – did the Court of Appeal deal with that issue?

MR WALL:

I think that's something that the first respondent might be able to address. I'd feel uncomfortable wading into that.

WINKELMANN CJ:

Ms Casey can tell us right now.

MS CASEY KC:

My understanding, and the Attorney-General will correct me if I'm wrong, but the appeal was only related to the second ground of review which was the one upheld.

WINKELMANN CJ:

So that's standing, that finding stands.

MS CASEY KC:

And…

WINKELMANN CJ:

And that relates to the contemporaneous evidence part of the…

MS CASEY KC:

Actually, my understanding was no, that was more a direction in fact that given that it was a reconsideration it was important under the Parole Act that it was based on updated evidence. So rather than sending it back to be assessed as at the information available at the time of the decision clearly the Court was giving permission to do a sensible up-to-date, but my friend will correct me if I'm wrong on that.

MS GRIFFIN:

I'm happy to address that, Ma'am, when I speak.

WINKELMANN CJ:

Excellent, thank you.

WILLIAMS J:

Do you think it's necessary, picking up on having a conversation with Justice Kós via you, Mr Wall – I'm not doing that. Ms Casey's argument was really that the idea of reasonable, necessary and proportionate was baked in to the idea of undue risk, right?

MR WALL:

Correct.

WILLIAMS J:

So it was not necessary for Justice Gwyn to have said special conditions, "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", was simply continuation to ensure he does not represent an ongoing, an undue risk, right?

MR WALL:

I think it's just a different way of articulating the typical proportionality analysis and –

WILLIAMS J:

Yes, you've just got to be careful that you're not doubling up and making it look as if undue risk somehow has a special meaning because you're adding extra proportionality, extra necessity and extra reasonableness.

MR WALL:

Quite right, Sir.

WINKELMANN CJ:

I didn't understand Ms Casey to be putting the entirety of the proportionality exercise of undue risk.

WILLIAMS J:

I thought she had.

WINKELMANN CJ:

But anyway, because I had understood that undue risk was necessary in a proportionality exercise to – because it must be a different thing because it's necessary, it's a space holder, because otherwise the risk – yes, it's a space holder but you also look at the extent of the impingement of rights so the proportionality exercise still has its normal shape. It's just allowing – yes, I think that's right but anyway Ms Casey may be able to clarify it on reply, clarify if I'm confused.

1240

MR WALL:

If I understand the questions correctly that we – that is a description of the overall proportionality enquiry that is undertaken here, that there has to be a rational connection, so a legitimate goal, there has to be a rational connection, that there is a clash between protected rights and the condition that was applied, and that when –

WILLIAMS J:

And risk, yes.

MR WALL:

And that when you balance them up, that's the guts in the engine room of the proportionality and that occurs within section 7(2)(a). But it can't operate properly unless you have a proper counterweight, because the weight –

WILLIAMS J:

Right, I get that, and "undue", you say, does that lifting?

MR WALL:

That's right, that's right, it is the –

WILLIAMS J:

So, if it's not undue, then it's disproportionate or unreasonable or unnecessary, or all three perhaps?

MR WALL:

And if the two options –

WILLIAMS J:

Sorry, if it is undue, no, if it's not undue, I get so many negatives there.

MR WALL:

That's all right. If the two options are that you are pitting the importance of the right against some sort of risk that animates this guess, and the two options are either undue risk or non-zero risk, it is an undue risk threshold that gives the proper counterweight to then give meaning to the protected rights and that really is the argument in a nutshell. Now, if you get to that point and consider that that interpretation is viable, it doesn't strain the language of the Parole Act to the point that it's off the cards, then section 6 requires that interpretation to be preferred because it is more calculated to towards upholding those rights.

WILLIAMS J:

One does get the impression from reading section 7 and section 15 that they were cast with a BORA frame of mind, because they seem to be, you know, they speak to rational object directly in section 15 and in section 7 and to proportionality in 7(2)(a).

MR WALL:

And that's a perfectly good framework, but you need the content at that engine room stage to properly conduct a balance. Otherwise, you just have an austere balancing of somebody's rights against non-zero risk and –

WILLIAMS J:

Why didn't 7(2)(a) say "undue"? Why didn't 7(2)(a) use undue, provide us with a nice bright-line?

MR WALL:

It's a good question. It doesn't say non-zero risk either, but that's how it's been applied.

WINKELMANN CJ:

Doesn't say risk, doesn't say risk, does it?

MR WALL:

It doesn't even say –

WILLIAMS J:

It talks – speaks of community.

MR WALL:

It says: "... consistent with the safety of the community." Now –

WILLIAMS J:

Yes, but why was it not struck, why did it not set the proportionality test, the line, at undue risk there, because that's where you'd expect to see it?

MILLER J:

Perhaps because it requires only of the Board that the conditions be consistent with the safety of the community. In other words, it leaves a fairly large degree of judgement.

MR WALL:

That's one way of looking at it and in terms of the way that it was interpreted in this case, where the risk profile was effectively non-zero, it's just not sufficient.

WILLIAMS J:

Well, on that, on that reading of it, it would be.

MR WALL:

Which wouldn't be enough to properly vindicate the rights of people like Mr Grinder's.

WINKELMANN CJ:

Well, it wouldn't be, because the whole of our framework of law is that broad discretions are subject to obligations under the Bill of Rights Act, so.

MR WALL:

And I think that's the –

WILLIAMS J:

Yes, but if the – the point really is, if sections 15 and 7 were cast with an eye to BORA, and they seem to have been, because they have been drafted with that rational object, rational connection to an appropriate social object and then a proportionality, why didn't the draftsperson just come out and draw the line for everything, not just for recall and release?

MR WALL:

It's probably an argument that's more directly engaged by the parties on that particular point.

WILLIAMS J:

It's pretty central to your submission.

MR WALL:

Which – and the point reached prior to the adjournment was that in order to – you apply section 5 to understand the meaning of section 7(2)(a).

WILLIAMS J:

You go at it again with BORA in mind, okay.

MR WALL:

But then I would fall back to the position that on a functional level when the decision – when there is a symmetry between decisions that are made at the time of release and the application of the conditions which apply that threshold and then when it comes for recall that it makes sense that that same threshold be applied to the variation and discharge of those conditions.

WILLIAMS J:

Yes, your case is that if you don't approach it that way you'll get a distortion in what appears to be a carefully constructed system.

MR WALL:

That's right, Sir.

WILLIAMS J:

Right.

KÓS J:

It may be that there's no practical difference. It may be that the decision of the Parole Board to release back into the community because there's no undue risk is because that is consistent with the safety of the community and that what then happens over time is that a safety – as, sorry, as risk reduces with positive prosocial rehabilitation, the expectation then is you have to start ballasting some of the conditions because the risk reduces. The community's safety is consistent with a reduced risk but actually some of the conditions that were originally imposed have to be discharged. Is that really what you're, you're contending for? I mean, it's dynamic, isn't it? Risk changes.

MR WALL:

Yes.

KÓS J:

And at each review, you have to assess, as Justice Gwyn said in her second condition, you have to assess risk according to contemporary risk evidence.

MR WALL:

Yes, Sir. And the – for a person in the position who is applying for the variation discharge of those conditions, they will know where they stand despite the dynamic risk profile they may have over time, but they know what the benchmark was at the time of their release and so will those who are providing

evidence in the reports that go towards those decisions. So, it improves the consistency for that particular parolee, but also the consistency in the decision-making across the board for all when the same standard is being applied and that someone isn't having thrown back to them, well, it's not that there's no risk, and that being the standard that is applicable to these types of cases.

WINKELMANN CJ:

Right, thank you.

MR WALL:

Thank you, your Honours.

WINKELMANN CJ:

Thank you, Mr Wall. Ms Griffin.

MS GRIFFIN:

Apologies, your Honours, trying to set up all these materials is never easy, moving benches. If you'll just give me a minute also to pay tribute to Mr Ewen KC in the way that my colleagues have done. I feel that it is most appropriate that I do so because it was Mr Ewen KC and I that started this case together on opposite sides. We marvelled at the time that it was just the two of us with Justice Gwyn and then we looked around and had all these friends join us and all you wonderful people up on the Bench here today. Mr Ewen loved that, as I am sure you would appreciate. He said to me after the Court of Appeal hearing, when it all got more interesting with so many people involved and I'd said to him: "We'd had a great hearing, Douglas, the both of us." And he said: "The fat lady hasn't sung yet, Charlotte." And I said to him: "Who are you calling a fat lady, Douglas." And so then he laughed and we parted company and then so if today we hear some opera music coming from the gallery, we will know who is responsible for that.

WILLIAMS J:

He never called us wonderful people, so I appreciate that.

MS GRIFFIN:

You're most welcome Sir.

WILLIAMS J:

In fact, I think he called us the Casino.

MS GRIFFIN:

I think he always knew we would end up here and so it is with great sadness, as Ms Casey said, that Mr Ewen KC is not here today.

WILLIAMS J:

Yes.

MS GRIFFIN:

Now, if I can just very quickly deal with your Honour Justice Winkelmann's question about what happened there with paragraph 130(b) in the High Court decision.

WINKELMANN CJ:

Yes.

1250

MS GRIFFIN:

That most certainly is connected to the second ground of review and Justice Gwyn's finding on that ground of review which we argued fully in front of her on the basis that the Board there, of course, had taken into account and given weight to the 2018 and 2017 psychological reports. Now Justice Gwyn didn't rule that that was impermissible for it to do so but she was most concerned that there wasn't at least equal weighting or relative weighting given to the more updated evidence and so in her referral back, when we talked about relief, that was her Honour's crafting of that that the Board must consider contemporary evidence when looking at risk on a reconsideration.

Now when the process begun by which this matter would be subject to an appeal in the Court of Appeal, the process that was begun by the Crown Law Office and the Solicitor-General very early, certainly was not influenced by the Board's involvement in that, I'll just make clear, the decision was made to let Mr Grinder have the fruits of his victory essentially there, that he would get his reconsideration. The appeal was going to be purely on this matter of the relevance of the undue risk test. You'll see that from what became my notice of cross-appeal filed on the last day for filing which was intended to be the notice of appeal, and that is at 101.0038 of the case on appeal. You'll see there at 2.2 in respect to the second ground of review that all that was sought was the quashings of the finding in the High Court on the second ground of review to the extent those findings relate to the test of "undue risk" under section 7(3) of the Act. So the actual factual outcome was to stand, and, of course, Mr Grinder did get his reconsideration on the basis of those questions set out by Justice Gwyn and that was conducted in January 2023 and he was successful at that reconsideration in having the EM conditions removed at that time.

So does that answer your question, your Honour, about the status of that second ground of review?

WINKELMANN CJ:

Yes, thank you.

MS GRIFFIN:

Now I wanted to, before getting in more substantively about the issues that were traversed here this morning and given we've only got eight minutes before the lunch break, I thought it might be helpful to actually look at the conditions that exist now so we know what's there and the conditions on release because my ears pricked up this morning when Ms Casey mentioned things like examination of Mr Grinder's telephone and computer and all these things and the general thrust of the submissions about the extent of this overly restrictive regime on Mr Grinder. The reason I want to do it –

WINKELMANN CJ:

I think she was speaking generally when she talked about those matters, but…

MS GRIFFIN:

Generally, yes, but certainly related to Mr Grinder and it is true that he did start with those sorts of things, and so if you go to the release decision of the Board of 1 March 2019 at 201.0001 of the bundle, the actual conditions are here at 201.0003 and here you will see at 13 over the page, on the last page, in the list of conditions at 1 to 14, this is what Ms Casey was talking about: "Upon request, to make available to" – your Honours, I'll wait till it's come up.

KÓS J:

I think we're in the wrong document.

MS GRIFFIN:

You need to be on 201.004, Mr Zhang is looking for, and it is the release decision of the Board, 1 March 2019. I don't envy Mr Zhang at all. I couldn't bear the pressure.

WILLIAMS J:

It's not helping I don't think.

KÓS J:

It's so much easier being counsel addressing.

MS GRIFFIN:

Mr Zhang will get his 10 minutes at the end of my submissions. I meant to say that before, your Honours, so –

WINKELMANN CJ:

We appreciate that, thanks, Ms Griffin.

MS GRIFFIN:

The condition I was referring to is number (13) and this is what Ms Casey was referring to earlier this morning, just so you can see how that would be worded.

So here it's: "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." So here quite a restrictive condition, starts that way from the very beginning of his release as part of that package suite of conditions.

You will also see there are a number of other conditions there. I'll just quickly – I won't read them through but I'll tell you their numbers. So take note of number (1), number (3), number (4), number (5) and number (14), conditions of (13). These are the conditions that have been left now to expire. So if we go over to the latest decision of the Board just to see what the conditions are today, that's at page 202.0040 for Mr Zhang. This is the decision of 28 March 2024, I believe.

WINKELMANN CJ:

202 point?

MS GRIFFIN:

202.0040. That's paragraph 14: "His special conditions are as follows". We have eight left. Those numbers that I referred you to are all gone. Some of those numbers I referred you to do include quite restrictive things like curfews. Now between this happening, of course, Mr Grinder lost his electronic monitoring condition at that reconsideration hearing in January 2023 that he was not then subject to until December 2023, so there was an interim period of time where there was another less condition. It then came back into place after December 2023 when Mr Grinder was subject to a breach charge of his whereabouts condition. So my friend, Ms Priest's, submission to you just before about some incongruity with section 15A here, in my submission that doesn't quite work, given the nature of the circumstances that was facing Mr Grinder at the time that the Board re-imposed that condition for the balance of the life of his special conditions which at that point was until 31 March 2024, and the breach charge was unresolved.

Then, of course, the Board had to consider when it made its decision here on the 28th of March what to do in terms of the conditions as a whole and at that point of time electronic monitoring is back in the mix, so it makes a fresh decision on a fresh variation application from Mr Grinder's probation officer who had sought seven of the conditions to continue, plus then the Board added here, if you turn over the page at number (8), that Mr Grinder would submit to psychological assessment. That was consented to. That was an order so that updating reports could be provided to the Board because, of course, that is medical treatment. There is also two other changes at (3). This is the whereabouts condition.

Mr Zhang, we are on 202.0040 on the ClickShare, special conditions listed at 14(c). 202.0040 is the page number and it is the Board's decision of 28 March 2024. So we are at special condition (3) there. This is the whereabouts condition. Now this is the problem with electronic versions. It's not as easy to flick back and forward between the hard copy and that but if you were able to flick back to the 2019 decision you will see a difference in its wording from that at paragraph 10 on page 201.004. Now the difference, I'll tell you what it is so you can see, are the words that have been entered after "Probation Officer" from the second line that say: "where children under the age of 16 years gather". Those words are absent from the version of the whereabouts condition in 2019 at release. In my submission, this is just a further crafting of it to make its purpose clear.

WINKELMANN CJ:

Is it possible just to give us a marked-up copy of the original one with the additional, you know…

MS GRIFFIN:

Absolutely.

WINKELMANN CJ:

Yes, that would just be easier than us trying to –

MS GRIFFIN:

Yes, and then you will have it. Absolutely, I can do that after the hearing, no problem.

The only other change other than bit is what Ms Casey referred to which is the non-association condition that was extended to families and we have discussed that already.

WILLIAMS J:

Can you just help me with the decision that was made after Justice Gwyn's decision that dropped…

MS GRIFFIN:

The reconsideration decision?

WILLIAMS J:

Yes, that dropped the electronic monitoring. Did it drop the whereabouts too or did whereabouts stay in place?

MS GRIFFIN:

No, Sir. So the whereabouts condition stays in place. This is a very useful decision for your Honours to read because the Board is, even if just from a methodological approach, because the Board is attempting to apply the test that Justice Gwyn said that it must do and in doing so it describes why it says the whereabouts condition stays and what that relates to undue risk, of course.

I note it's 1 o'clock. Would it suit your Honours to stop?

WINKELMANN CJ:

We'll take the lunch adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.17 PM

MS GRIFFIN:

Thank you Ma'am. Your Honours, I just want to briefly finish one point on the conditions that we were looking at, given it relates to what was asked this morning of the status of Mr Grinder, and I have been in contact with the Department of Corrections about it. I'll briefly do that very quickly then if your Honours permit me just to give you a little bit of a road map of the next 45 minutes, I'd like to spend five minutes or so just doing a little bit of a reset here somewhat on the case as the Attorney-General sees it in light of what we have heard in this morning's submission. I would then plan to delve straight into the thorny issue of risk. I am sure you will have many, many questions about that. I certainly expect you to take me to task on them, and so please do.

I intend to be quite nimble for you, rather than take you to multiple different documents, so hopefully that can speed things up. I would then hope to finish, just before 3.00 hopefully, so that my friend Mr Zhang can present to you on, he intends to talk to you for about 10 minutes on two particular decisions in the courts below, not in this case, but the two decisions, *Gilmour v Department of Corrections* and *Miller v New Zealand Parole Board* that have come the closest to looking at this issue of statutory interpretation. They're not complete answers, but Mr Zhang will discuss with you about how he finds those helpful and worthy of your Honour's consideration here.

So with that in mind, the point that I wanted to go back to –

WINKELMANN CJ:

Well can I just indicate, for my part what I really need to hear the answer from you on this as to Ms Casey's nine, without any threshold, so if it's no risk, section 7(2)(a) is reduced to mere rational connection. That's what I need to – and you don't have to answer it now – that's, to my mind, the critical question for you to answer.

MS GRIFFIN:

I certainly intend to answer that Ma'am.

WINKELMANN CJ:

Thank you.

KÓS J:

I think that's 4(g) actually, not nine.

WINKELMANN CJ:

Yes, I'm sorry, 4(g).

MS GRIFFIN:

Yes, I certainly intend to answer that Ma'am at a high level point which I will come to when we delve into risk, is that the Attorney-General's submission has never been that the matter is about no risk from the High Court through to now, and that is not –

WINKELMANN CJ:

No, I mean obviously implicitly, and Justice Young's point was that no risk, he's saying it's not no risk, so it's any risk is the threshold I think that is your argument.

MS GRIFFIN:

Not any risk Ma'am. So let's, we'll get to that.

WINKELMANN CJ:

Okay, good.

MS GRIFFIN:

So the high level point is yes, there's quite a bit to unpack through there, and we will certainly get there. So very quickly on the last point that we were at, we were looking at, this is the 28 March [2024] decision of the Board, where Mr Grinder's current special conditions are located. For Mr Zhang that's at 202.0040 for the ClickShare.

1420

The relevant condition, now I need to be careful here, also talking with Ms Casey about this, given the suppression orders likely in place with respect to victims and families, at 14(5) that is a relevant condition, I won't read it out, given the live share. The issue that arose in, this morning was whether or not Mr Grinder is now in contact with the person he wishes to be in contact with. I am advised by the Department of Corrections that their notes indicates that he certainly is and has had frequent contact, and Ms Casey has confirmed that the exception sought has been approved. I haven't got final confirmation from Corrections that it has been approved, the probation officer is not actually available right now.

WINKELMANN CJ:

I suppose the question we're asking is, on what grounds does contact have to be permitted on each occasion, or is it a blanket permission?

MS GRIFFIN:

My understanding is that it is blanket in the sense that for this particular person the approval is that contact is approved. No doubt there may be circumstances when that may need to be clarified if other people are going to be around. But if it's just Mr Grinder with that person, they understand that is blanket.

The issue that arose in submissions with Ms Casey just before she finished was this notion of the principle of legality point. Why is it that the probation officer is somehow doing this and it's not the Board fixing up this condition, and the Panel Convenor on the section 67 review didn't correct it there. Well the answer to that really is, in condition (5) there, the last line where the Board has structured the condition to be in this way, unless you have the prior written approval of a probation officer. And you will see in looking at special conditions, many of them are like that, and that gives effect to the functions of probation officers there, so the Board is not continually having to look at detail.

WINKELMANN CJ:

But it's a more nuanced task for the Board, though, isn't it. It can't confer, it can't spread everything into a sort of broad discretion conferred on the probation officers, that when really critical decisions are being made by a probation officer all the time, which really impact in a big way, so that's – such as this – you might say, well that's not appropriate.

WILLIAMS J:

It's called unlawful subdelegation.

WINKELMANN CJ:

Yes, and also –

WILLIAMS J:

At least it was when I did public law about 500 years ago.

WINKELMANN CJ:

And also it's not prescribed by law for the purpose of section 5, it's too – and another way of putting it, it's arbitrary, not in an intention sense, but it's just the law operating in an arbitrary way.

MS GRIFFIN:

Well Ma'am I would, a few points on that. Certainly that delegated power to make it more efficient there, yes, that is always going to be subject to principles of legality as to whether it's being appropriate. Framed in a sufficiently clear way, within the scope of the power, all of those types of things, so of course if the Board mis-steps there, that's going to be subject to challenge. No doubt about that. But here in suggesting that it's arbitrary, or extra legal, or the matters that your Honour said, there is nothing here to suggest that the Board is saying that the probation officer cannot come back to it on a variation application if what is particularly sought on the request, with respect to that condition, is a step too far, or too complicated, or unable to be managed, and the Board can then deal with it under another section 56(2).

WINKELMANN CJ:

I think you missed the point that Ms Casey's making.

MS GRIFFIN:

Please Ma'am, what is the point.

WINKELMANN CJ:

Ms Casey is making the point that there is something, that something this vital, the core interest for the person, the substantial on the right shouldn't be left to the probation officer to decide on a case-by-case basis. That's too much of a delegation. It's also too onerous for the person who's subject to it, and there's an access to justice, a third limb is the access to justice implications, and them being left to challenge it. So when it's pointed out to the Board that this is operationally difficult and extremely oppressive, then they shouldn't say, well the probation officer can deal with it. They should deal with it through the condition.

MS GRIFFIN:

Well, Ma'am, I think we do need to be careful because we don't have the transcript of this hearing for a start. In order to get into what the Board did or didn't say about how this condition would work. Now there isn't anything in the decision here about the people that Mr Grinder wished to have contact with, versus this particular aspect of the condition. That appears to have come out on review with the Panel Convenor. So it could be that your Honours' points are more directed towards how the Panel Convenor dealt with that issue, rather than the upfront crafting that the Board did there, and providing for this exception mechanism if there needed to be, and that exception mechanism is very similar to that that operates in the others, like in the whereabouts conditions, and just the general victims, non-association –

WINKELMANN CJ:

Yes, well Ms Casey was establishing, approaching on a general basis though, that over-delegation can be problematic when it impinges on core aspects of a person's life and their rights.

MS GRIFFIN:

Certainly Ma'am, I just don't accept that that is so in this particular case.

KÓS J:

If the probation officer declined to give approval, what step can be taken then? Is there some sort of informal panel review or…

MS GRIFFIN:

So say Mr Grinder sought the approval, and the probation officer said no, so there would be two avenues. Mr Grinder could himself seek a review under section 56(1), not a review sorry, a variation application directly to the Board. "The probation officer didn't do this for me, your conditions said it would, I seek a variation on X, Y, Z, bases." So that's one full hearing basis. The other would be straight judicial review, obviously, because it's an exercise of a statutory power that the probation or – certainly a reviewable decision.

KÓS J:

So it's perhaps a slight pity there isn't some more informal process to review probation officer decisions.

MS GRIFFIN:

Not, well, there wasn't anything to prevent Mr Grinder saying "I disagree with that decision, I want it reviewed by your manager" within the construct of a government department. But there isn't, as far as I'm aware, a formal policy review for that. But in a sense it's by-the-by. It has been granted.

MILLER J:

If you were going to challenge this condition, it would be on the basis that the Board ought not to have prohibited contact with victims, because that's what it has done generally, subject to an exception where the probation officer says it's okay. It is not strictly a subdelegation of the Board's powers.

MS GRIFFIN:

Yes Sir, as a general principle. I mean the point is, is that this condition around victims is consented to in terms of the victims, it was the expansion to families that was the issue there, and so in and of itself that decision by the Board there can be challenged off its own face without even reference to the probation officer at all, and so there's a double-barrelled way Mr Grinder can attack the problem, by trying through the probation officer, and through the Board, so yes Sir, I accept that.

The other final point there to make on that, and I appreciate your Honour Justice Winkelmann will have potentially a different view on whether this is possible or not, but the Board might not have provided an exception either. It might have put the blunt condition in, no contact. So one might look at that to say that's the signal there that these things can bend to the circumstances, and there's the first route to do so rather than coming directly back to the Board, because as my friend Mr Smith will submit, there are multiple, multiple hearings before the Board, a very, very busy Board, and here, for example, you wouldn't necessarily want the Board to be seeing someone on preventive detention regularly all the time if we're talking about reintegration and being back into the community. You don't want to be hauling an offender back before the Board all the time.

WINKELMANN CJ:

Doesn't that cut both ways though.

MS GRIFFIN:

Yes, absolutely.

WINKELMANN CJ:

Offenders having to go to the parole officer for every aspect of his life.

MS GRIFFIN:

I think the difference is –

WINKELMANN CJ:

And then on your pathway if he doesn't like the parole officer's approach he has to go to the Board, or seek judicial reviews. So it's –

MS GRIFFIN:

Of course.

WINKELMANN CJ:

There is a design issue for the Board isn't there, in it?

MS GRIFFIN:

I think it's very difficult to craft the perfect condition, yes. There's always going to be issues like that, relationship issues or otherwise. Those, in the end, come down to the individual factual circumstances in every particular case, in another case, an earlier lifespan of Mr Grinder's special conditions he has a very good relationship with his probation officer, and that's all clear through the decisions, and all of his requests for approvals were granted essentially because they're all reasonable and they worked through together. So these things are always going to depend, I suppose, on a relationship basis. But that, yes, Ma'am, is the risk, if you don't have it through a purely structured decision-making process made by the Board, but there are practical implications to putting that in, in which I would say the Act has not set up.

WILLIAMS J:

These human realities, the requirement of good relationships with people exercising power over you and so forth, the bumpiness of real life is all the more reason why the conditions need to be tightly constrained, because if it goes badly, it could, the result could be a trampling all over this person's life. Just, you know, a probation officer having a bad day. The probation officer doesn't like the guy, or this person having a bad day. One does get the sense that whatever the product should be of Parole Board assessments, it would be better if it was a little more nuanced than "don't, don't, don't, unless". I know that's a more general proposition.

MS GRIFFIN:

Well I suppose, Sir, the ultimate protection still would always be going back to the Board under section 56(1) by the offender himself if things are not working as intended with the probation officer, if that is going wrong. So there is still access to the Board because if you look at the wording of section 56(1), the offender may apply for a variation at any time.

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WILLIAMS J:

Yes, yes, I understand that.

MS GRIFFIN:

And so that is a protection that is there.

WILLIAMS J:

It just, it seems to me… this isn't a live issue here, but it's such a constrained and rule-based approach to this, where I would have thought someone of this person's age and attitude, a kind of more of a care-plan approach might have worked more effectively for everybody.

MS GRIFFIN:

Yes.

WILLIAMS J:

Including Probation.

MS GRIFFIN:

Sir, I would say in the mental health space, too, supported decision-making –

WILLIAMS J:

Exactly, that was the example I had in mind.

MS GRIFFIN:

– would be a gazillion times better than compulsory treatment and those types of forced mechanisms, but we have the Act as it is structured which has it here,

in terms of the processes that are available, and I would simply say on this point that there isn't an illegality in the Board specifying an exception to a condition that it sets. Now, it could get the exception wrong, certainly, if you then drill down to the detail, but the high level point about it there, what the Board there is trying to do, to provide for the functions of the probation officer, because fundamentally, it is the probation officer there with that relationship with Mr Grinder, the probation officer that's that first line of defence in keeping the offender away from undue risk and the risk of recall and we are going to get into risk, I know, but that's what they're there trying to do, to keep the offender on that path of reintegration.

So it does make sense, from that pragmatic perspective and a relationship perspective, that you go to the person there who's charged with those day-to-day functions, rather than the overarching more quasi-judicial scenario in front of the Board to upend a condition altogether as the first attempt. So, it's a –

WILLIAMS J:
My point is it would have saved Ewen a lot of bother if the condition had been a bit more nuanced and no victims or their families. Because there was, in this case, although it didn't come out until much later, an obvious problem with that.

MS GRIFFIN:
Yes Sir and it's –

WILLIAMS J:
Would have been better if it had come out then and perhaps that's just because this, this is all done so quickly.

MS GRIFFIN:
And you can, you can see, Sir, how this happens, when it happens quickly, because this came through from victims' submissions themselves. So we get back into your Honour's point earlier in the day today about those intersecting or competing victims' interests that are worth – worthy of equal of weighting or

value within a broad proportionality assessment and here we have one, that it's quite a good example because it's giving credence to a victims' interest that they have submitted that they sorely want because of the effect on them, but what Ms Casey here is submitting is that the impact on Mr Grinder is also severe and that the impact on him affects his reintegration and, as we have seen through the psychological reports, when the offender's reintegration is upended or affected in a particular way, that has a bearing on risk.

WINKELMANN CJ:

Yes, we understand all this, so.

MS GRIFFIN:

Yes. So, no and my point –

WINKELMANN CJ:

If we – we'll allow you to get back to your submissions, I think we have taken you a long way away.

MS GRIFFIN:

Okay, thank you, Ma'am. So, the bit that I wanted to go to, just spend a short period of time, is this resetting a little bit of some of the themes and the, and the tones that we have from the Attorney-General's submission. We have had a lot of quite highly-charged language. Things like "screwing them down tighter, as tight as we wish", notions of –

WINKELMANN CJ:

Well, we discount – you can count on us not to get too worried about the language.

MS GRIFFIN:

Yes, Ma'am, "completely unfettered discretions", things like that. At no point is the Attorney-General, even the Board, suggesting that these tests that the Board has to apply operate in such a way. The proportionality analysis would kill them, effectively, if that was being done. The other side to it though,

what we're hearing, is that this notion that the Board is relying on there being zero risk before it will recalibrate certain conditions and relying on a statement here in the 2021 variation decision where the chairperson there said whatever the level of risk is, it is not no-risk and what was submitted there in the High Court by myself and through there into the Court of Appeal, was that essentially this was a factual position set up by the chairperson, rather than a legal proposition about the actual test.

Now, I say that as a submission, because it's a very short decision, you can't see how it's filtering out through here, but it is otherwise a byline –

WINKELMANN CJ:

Well, what we're really concerned, what we're really concerned about is what you say is the proper position.

MS GRIFFIN:

That, that no risk is the wrong test. That that is certainly not the benchmark or the bright-line by which the Board would ever measure its decisions and here, this certainly came up in the Court of Appeal and was submitted at length, that when questioned on this point the Attorney-General submitted there that the risk would have to be real, certainly more than a de minimis risk, certainly more than negligible, but attaching labels such as undue risk where the Parole Act itself has carefully delineated when this particular test applies and I think it is fair to say that the Act has tried very hard to get that right as to where it applies, whether it is mis-stepped or not is for your Honours, but it certainly has not left that as a singular proposition in one place of the Act.

But here, in the context of this proportionality test that we're applying, and when you look at it across various other applications of proportionality tests like this, for some reason, in this context of parole with an indeterminate sentence offender, we are particularly talking about this defined term relating to risk, that undue risk has some magic to it, that it has some particular meaning that in itself will be a self-fulfilling prophecy and defeat the answer on a proportionality analysis.

WINKELMANN CJ:

Well, Ms Casey's point is, firstly, statutory interpretation and for my part I find the Parole Act not that carefully structured, but her second argument is really that that undue risk is something that the Parole Board can work with, it pervades the Act and it's simply, it's a space holder in the proportionality exercise. So, I think reference was made to *D* where it was genuine risk, so it's a notion that it's not, it's not a de minimis risk that is being managed, it's a genuine risk.

MS GRIFFIN:

Yes.

WINKELMANN CJ:

Or a real risk.

MS GRIFFIN:

Yes, Ma'am, a real risk, though all those sorts of labels –

WINKELMANN CJ:

So what, well, what's –

MS GRIFFIN:

– you come to the point saying what actually are we achieving here by the labels?

WINKELMANN CJ:

Well, could I ask you, how would you distinguish that from undue risk?

MS GRIFFIN:

Well, I suppose undue risk here is a term of art that is expressly defined, compared to a construct there, such as genuine risk. So undue risk has a particular test under test section 7(3).

WILLIAMS J:

But wouldn't it be the same if the word was real? I mean if you read the definition, section 7(3), you'd be worried if it wasn't the, the likelihood and the seriousness, I mean, that's, this is not rocket science.

MS GRIFFIN:

Yes Sir, and so –

WILLIAMS J:

So and if, even if it said "real risk" and defined it that way, no one would miss a beat.

MS GRIFFIN:

We'd be having the same argument, yes.

WINKELMANN CJ:

But I just don't understand why you're fighting so hard, because actually in some ways what his – what is prepared to be accepted gives more content to, to (3): "...**undue risk**, the person must consider both— (a) the likelihood of further offending; and (b) the nature and seriousness of any likely subsequent offending."

KÓS J:

That's not a definition.

WINKELMANN CJ:

That's not a, yes, it's not a definition, it's just a risk assessment.

MS GRIFFIN:

It's mandatory considerations as such, mandatory relevant considerations.

WINKELMANN CJ:

Yes, it's risk assessment so if we didn't use that, which isn't all that helpful as I said at the start, if we said a real risk of further offending, or a genuine risk, or what's wrong with that, if you hold that space in the proportionality exercise?

MS GRIFFIN:

Because I think, Ma'am, if we – let's go back to what Ms Casey said about section 7(1).

WINKELMANN CJ:

Well, what I'm trying to understand is why, why the Attorney-General is fighting so hard against the idea of undue risk which I have not and still don't really understand why it is being argued on this basis, but why is that? Is it because you just say it's not useful because it's actually not a level of risk, it's actually an assessment?

MS GRIFFIN:

Yes, there are many aspects of that. First, of course, on a pure statutory interpretation exercise, as I have gone through in my written submissions, I don't intend to go through that in detail with you now.

WINKELMANN CJ:

Thank you for that.

MS GRIFFIN:

You will see how we – the Attorney-General has said the Act has crafted in such a way that it doesn't apply here. I'm happy to leave that in the submissions, I understand your Honour has read them. So that's one aspect to it there and that prior to, of course, this hearing and this case, this matter had not been decided, had not been determined or elucidated at any sort of high level in terms of what the standard, what standard, if there was a threshold of risk, how that applied and that had never been challenged before in the Board's decisions until Mr Ewen filed this proceeding. So it, it's in that sense, it's precedential, it's a first, it's then worthy of proper consideration and elucidation. So there, from a Crown perspective, if you're looking for why does it matter, that matters, to make sure it's properly heard.

The other side, of course, is what your Honour said. It's not that helpful as a term, because risk – and I want to refer to something that Lord Diplock said about risk.

WINKELMANN CJ:

Well, can I just ask you then, are you agreeing with the appellant?

MS GRIFFIN:

No, Ma'am.

WINKELMANN CJ:

Because the appellant says that when you do this, that it's a proportionality exercise under section 7 and you have to look, you have to hold space for risk, so it can't just be any risk, it has to be a risk of – it has to be a risk that takes into account the seriousness of the offending and the likelihood and, and it has to be, I think it's Ms Casey who said this, although it might have been Ms Priest, it has to be, I think it was Ms Priest, under (d), it has to be a genuine risk that you're managing, not some evidence-based genuine risk, not an insurance or, you know, belts-and-braces type approach.

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So what's wrong with that. What's wrong with giving the Parole Board some sort of sense about how the proportionality exercise under section 7 operates?

MS GRIFFIN:

Because, Ma'am, I'd throw the question back to say, what does it actually do in the proportionality exercise? If we accept that risk is relevant, if we accept that questions of likelihood of re-offending is relevant, all of these are factors that go into the mix when you look at a proportionality test. They go on the side of Mr Grinder who gets, runs to the Board to say, "my risk wasn't rising, I didn't, or at least until December 2020, I didn't breach any conditions, I was compliant to the probation officer, no issue has arisen, how can you say that these whereabouts conditions are still necessary?"

Now, if the answer is purely that concept, on the basis of what his risk says, and undue risk is so important as a bright-line, so important as this guideline in that proportionality assessment, that that then skews the other side to that equation in terms of the purposes to which these particular conditions at issue, particularly the whereabouts conditions have been set, and why have they been set.

WINKELMANN CJ:

I'm not really following your point. I don't understand what you're saying.

WILLIAMS J:

Yes, I don't understand that. What's the skew?

MS GRIFFIN:

Well, because you're saying that undue risk is so controlling, that it's almost a complete answer, right. So if you say –

WINKELMANN CJ:

No, let's put undue risk to one side. Let's just, can you just tell me what you say the proportionality exercise is under section 7, because I think I've lost what your point is.

MS GRIFFIN:

So the point would be here under section 7(2)(a), the proportionality analysis would be very much like what you would see in a section 5, minimal impairment justification.

WINKELMANN CJ:

So what about the risks. So what…

MS GRIFFIN:

Risk is relevant, I don't dispute that.

WINKELMANN CJ:

No, no but how do you, because the convenor said, it's not no risk, and that justifies this condition, and that looks, doesn't look like a conventional proportionality exercise.

MS GRIFFIN:

No Ma'am. So I would say that, if that is the legal position set up, that is wrong. No risk is not the standard unless you're going to use, if there's no risk then release the conditions, right.

WINKELMANN CJ:

Because that sounds like a, it sounds like, it may be a de minimis risk, but it's not no risk, so we're entitled to impose this condition.

MS GRIFFIN:

Ma'am, I am certainly happy to say that the risk should be real, and measurable.

WILLIAMS J:

So no real risk?

MS GRIFFIN:

Well we're probably saying the same thing Sir there, in circles, yes and –

WILLIAMS J:

Well that's the problem.

MS GRIFFIN:

And that's the problem with labels, yes.

WILLIAMS J:

No real risk, is that your test, no real risk?

MS GRIFFIN:

I guess it's putting the "no" in front of the "real", is what –

WILLIAMS J:

Well that's, I'm trying to get the rubber to hit the road here.

MS GRIFFIN:

Yes, yes, if you're looking at the proportionality analysis under section 7(2)(a) there will be, you're looking at minimal impairment and whether the conditions ought to no longer continue because they have lasted longer, beyond their purpose, they're more onerous, too restrictive, there are other less intrusive options. Risk is relevant to that, certainly, in terms of what sort of risk are we talking about, in any given individual case. There are all sorts of ways in which risk will change and evolve as opposed to saying it's particularly within this window of how undue risk is confined in the construct of a variation application while the offender is out on parole. The Board has to look at so many other factors.

WILLIAMS J:

So we're agreed, aren't we, that the safety of the community is the paramount consideration?

MS GRIFFIN:

Yes Sir.

WILLIAMS J:

Right so safety is the – that necessary, by its, those very words tell us that risk is at the centre here, because we are predicting into the future the wellbeing of the community, which means the only, the most important thing we're doing here is assessing risk.

MS GRIFFIN:

Yes Sir, risk is integral here, but can I just –

WILLIAMS J:

Okay so then how much risk is the next question.

MS GRIFFIN:

So can I just extrapolate that out just a little bit to see what they're doing?

WILLIAMS J:

I'll let you extrapolate once you answer that question, because it does seem to me to be a question that is deserving of a direct and clear answer.

MS GRIFFIN:

Yes Sir. So how much risk is there, and I've said Sir that the risk needs to be a *real* risk. So if you want to say no real risk, or real, it depends which answer you're giving, yes or no, on the variation.

WILLIAMS J:

Right, good, so you can't impose a condition if there's no real risk?

MS GRIFFIN:

You can't impose a condition if there's no – a

WILLIAMS J:

You can't impose a condition if the offender presents no real risk.

MS GRIFFIN:

Well…

WINKELMANN CJ:

Or is not rationally connected to a real risk.

MS GRIFFIN:

First, are we talking about in the context of a release decision or a variation decision, on this, because I do think these are distinct questions.

KÓS J:

Exactly.

MS GRIFFIN:

So on a release decision, yes, here the Parole Board's ultimate test is at section 28(2): "... undue risk to the safety of the community or any [other] person." In answering that assessment under section 28(2), when setting the conditions, you must be able to fit it within that.

WILLIAMS J:

Yes, but that's easy because that says undue risk.

MS GRIFFIN:

Mhm.

WILLIAMS J:

I'm talking about the more difficult situations where you say the standard is no real risk.

MS GRIFFIN:

I'm saying –

WILLIAMS J:

I'm not sure in reality that there is any difference between those two things.

MS GRIFFIN:

What I'm saying Sir, is when is the Parole Board required to lift a condition, post-release, right?

WILLIAMS J:

Right.

MS GRIFFIN:

And that methodology, it is not purely answered by establishing what level of risk there is, one way or another.

WILLIAMS J:

Oh, so de minimis risk –

MS GRIFFIN:

That methodology has more to it. That doesn't mean that it takes away from the issues that you said, that risk is integral to the safety of the community, but it's, it's not – you can't say if there's no real risk the condition must be lifted, because if we look at intersecting conditions between section 15(2)(a) and through to (d), we've talked about here where victims' conditions can relate to risk, these things –

WILLIAMS J:

Yes, that's all, that's well understood and there'll be situations where the interests of victims don't really go to risk.

MS GRIFFIN:

Absolutely.

WILLIAMS J:

But they are nonetheless relevant, they'll be at the margins and they don't really affect the structure and purpose of this Act, they're just – I think of them as important matters to the side of the central role of this Act which is protecting the community through risk assessment. There are other things too, the interests of victims and ESOs and things like that. The core of this Act is protecting the community through wise assessment of risk.

MS GRIFFIN:

Sir, I would say the core of this Act, at its heart, stripped back, is to ensure an enduring and successful parole. That's at its heart and the safety of the community as part of that comes from the reintegration of the offender, the restoration of mana, back to their whānau, all of these aspects and when that is achieved you also simultaneously achieve the safety of the community there of which the offender is a part.

WILLIAMS J:

So you don't –

MS GRIFFIN:

And then conditions no longer be – are needed at, there's a point in time, where they can be lifted, the special conditions, not –

WILLIAMS J:

You don't agree that risk is at the core of this Act?

MS GRIFFIN:

Certainly Sir, I agree risk is integral, I agree it is at the centre here, but what I'm saying, the core purpose is about managing a successful and enduring parole and how do we do that, how has the Act decided that ought to be done, when we are looking here at the variation power? And the bit that I wanted to extrapolate out a bit, if your Honour will just permit me to do that for a moment and I am very conscious that Mr Zhang needs to speak.

If we look at the safety of the community thing that your Honour referred to and we look at section 7(1) and my friend Ms Casey submitted, Parliament has already decided that if an offender does not pose an undue risk then it is acceptable for them to be in the community. Yes, release, I agree with that, so sure. The question becomes, but how do we maintain them there? Because the counterpart is return to prison when risk rises to undue, so part of the process, Sir, this is the hard work of the Board and the hard work of the Probation Service, part of the process here with the setting of conditions and the monitoring and variation of them, is they are not just designed to reduce risk below the level of undue, that particular bright-line, but in their design is also to stop the offender from getting back there. So, while their risk, we hope, everyone hopes, may be decreasing and who wouldn't want it to decrease as far as possible and Mr Grinder has done well there, what you don't want is the risk to start rising. Now, I see your Honour's face.

WINKELMANN CJ:

I've just been thinking, part of our problem is that the decision here seems so hard to map onto what you're saying, I suppose that may be part of our problem, but it is hard to accept – obviously what you're saying is right, that the conditions

must not only keep people safe, the offender and the community safe while they're in the community, but they must also assist them towards being, to being rehabilitated and long term safe in the community – but it is hard to see that you need to muck around too much with the notion, simple notion of risk in relation to conditions like whereabouts or EMO, that they're, they're simply risk management techniques.

MS GRIFFIN:

But I think Ma'am, and this is what I've tried to postulate the answer to his Honour Justice Williams, that the issue here, if we, if we just think in the variation space for a minute, is when is the Board either required to or entitled to lift a condition and when must that happen under a proportionality analysis? On the appellant's argument, it must happen when you've got that answer on risk. That – so there's no proportionality left there, you've got an answer.

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WINKELMANN CJ:

I think that might be an artificial casting of their argument, because their argument is that you have to undertake a proportionality exercise to be sure that risk, that conditions which are very restrictive of freedom are justified for the purposes of section 5 and isn't that really a proposition that we can all agree is a – is common ground, that conditions that are on their own terms very restricting of freedoms, substantial freedoms, should be justified for purposes of section 5?

MS GRIFFIN:

Yes Ma'am, but undue risk may be completely irrelevant to that because you may say it's not even justified if the person's a very high risk, the condition could be so bad.

WINKELMANN CJ:

No, no, well, if you just pause for a moment and think about the question I have just asked, is – mean, is that a common ground between the appellant and the

respondent, that questions that significant conditions must be justified, that restrict rights in a significant way, must be justified for purposes of section 5?

MS GRIFFIN:

Yes Ma'am, because I would say, as your Honour Justice Williams said, that comes through in the test in section 7(2)(a) and the purpose of setting special conditions in section 15.

WINKELMANN CJ:

So then if we –

MS GRIFFIN:

So if it imports section 5.

WINKELMANN CJ:

Yes.

MS GRIFFIN:

I wouldn't suggest section 5 is applied in a different way either.

WINKELMANN CJ:

No, so –

MS GRIFFIN:

That this is a rights-consistent methodology.

WINKELMANN CJ:

So if we get – move on and the condition is clearly, and these two conditions are clearly imposed to manage risk, they're not rehabilitation conditions, they're risk conditions and they're both clearly quite onerous, very onerous. So then the Board has to undertake a proportionality exercise in respect of both of them and it thinks about risk in relation to them.

MS GRIFFIN:

Yes, yes.

WINKELMANN CJ:

And then when it thinks about risk, what does it ask itself about risk? Ms Casey says it asks itself "undue risk" and I think, as I said to her, I think that's onerous for her point of view because, and it's not something you want, but undue risk takes into account not just the risk of offending but the seriousness of the offending if it occurs.

MS GRIFFIN:

That's right.

WINKELMANN CJ:

So it's quite a nice concept, honestly, for the proportionality exercise and I'm not sure why you're resisting it so hard. But if you take, you look at the risk in that sense, and she says and you can't look at – it's not not, it's not not no risk because not not no risk is de minimis risk, it must be real or genuine risk that it's responding to.

MS GRIFFIN:

I think and I – look, this is the –

WINKELMANN CJ:

So are you accepting that point?

MS GRIFFIN:

Ma'am, one of the difficulties in this case, is it looks simple when you first pick it up and you read it, and this is the third time I've argued it and it gets more and more difficult to argue each time, not just for me, for Mr Ewen, for the other side, too, and that's why you have now two split decisions.

WINKELMANN CJ:

I mean, I, for my part –

MS GRIFFIN:

The concepts are – the concepts themselves, that you get tongue-tied over are you talking about no undue risk or risk, this here, and it becomes difficult to articulate exactly what your Honour there is getting at, but the important thing that I would say here is you need to be able to be satisfied that if you are saying that if the Board concludes the offender remains on parole, not an undue risk to the safety of the community, say three years in or wherever when the variation comes in, he remains at that status, nothing has changed that, though the conditions are in place, that because of that, this means that the answer on whether the conditions stay in place are no longer proportionate and necessary.

So the Board then has to go through an exercise of saying, but are those conditions actually holding the offender in this status of dipping them below undue risk and is removing them, at this point in time, a bridge too far right now? And that's why when you look at special conditions they are temporal. So here, you had two monitoring decisions of the Board very early on. As Ms Casey said, quite logical. They say, we say, no reason to remove these conditions, even though Mr Grinder is doing exactly the same things at that point in time in his parole as he is three years later, so nothing has changed.

WINKELMANN CJ:

So can I just take you back, can I just take you back to my question? When you look at a substantial, when the Board is looking at something as serious as EMO combined with significant whereabouts, what's – you tell me the exercise the Board has to go through? Because I am just finding it hard to understand the point.

MS GRIFFIN:

What do you mean, Ma'am, and so I have a disconnect.

WINKELMANN CJ:

So what's – describe the proportionality exercise, the section 5 exercise that they go through, because we should be able to do that, shouldn't we?

MS GRIFFIN:

Absolutely, the test, so that it should be necessary, absolutely; it should be reasonable; it should be rational connection to the actual offending. So, if you had a whereabouts condition, just as Ms Priest said before, where there is actually no risk of the person meeting strangers, children unknown to them before because it is all interfamilial, then the connection's potentially not there at all. So there is all of those parts of the section 5 test there. Then there's minimal impairment, has the – is the EM condition the least –

WINKELMANN CJ:

So where's the size of the risk in that?

MS GRIFFIN:

I beg your pardon Ma'am?

WINKELMANN CJ:

Where's the size of the risk in that, where you just went through the things?

MS GRIFFIN:

Well at each step of the way the Board will have to say, "what is the person's risk?" What I am saying ultimately is pitching it within the specific context of the statutory test that has been tailored towards – well, let's just say at least fundamentally tailored towards release and recall decisions, even if your Honour see different areas in the margins. Trying to push it into that framework the Attorney-General says, and the Board says as well, is not helpful to them. What they want is look risk square in the face, decide what it is, then analyse based on what they think the condition should or shouldn't be, whether it's necessary, proportionate, reasonable, could it be done another way.

So if you look at the reconsideration decision in January 2023, what happens? They do what your Honour says there and the EM condition is lifted, but the whereabouts condition stays because they still view that as a significant protective factor holding the offender in that pattern during this temporal period of the special conditions. Now you might disagree with that outcome.

You might think they came to the wrong answer on that, but the methodology essentially doesn't need to change there in looking at it.

WINKELMANN CJ:

Well it may need a change if not no risk is endorsed as the appropriate standard, which is what the appeal is on the basis of, the Court of Appeal has.

MS GRIFFIN:

But perhaps Ma'am, one of that – I remember Justice Wylie in the Court of Appeal scratching his head and he looked at us and said: "Well we're looking at your Honour Justice Williams' decision in *Patterson*," and he said: "This test is applied all the time" in terms of sentencing. We look at risk, do all of this. No one there is talking about a defined term of undue risk. We are just looking at what is the risk, how does it then filter through the assessment they made, and the same under the Bail Act 2000.

WINKELMANN CJ:

But the undue risk is not a scientific thing, which is why I can't understand why the Attorney-General is resisting it so much. It's just stating in statutory form what judges do all the time, and for my part I don't see this as complex. I just see it as section 5 and section 7 –

MS GRIFFIN:

I agree with you Ma'am, it's section 5. There's no distance between us there, that section 5 must be applied through section 7(2)(a).

KÓS J:

Can I ask a sort of a – to reason by analogy. I see risk as being like a thermometer, and there's an acceptable temperature that is not undue risk, which means that the person is released into the community, and as he rehabilitates the temperature falls, and some headroom develops in the thermometer which is acceptable. The question then becomes on a variation. If you take out one of those conditions that kept the temperature down below the one that he may not exceed, which is the undue risk level for section 28.

If you take out one of those conditions, what will the effect of that be? Will it cause the temperature to rise to a level which gets close to what is an unacceptable risk? Isn't that how one should think about risk?

MS GRIFFIN:

Yes Sir.

KÓS J:

Isn't it really like a thermometer and the question is what, when you vary things, either because of the dynamics, the rehabilitation, or because you take away a condition, what is the effect of that on the scale of risk.

MS GRIFFIN:

Yes Sir, and that is why the Board in this case urges looking at it in terms of the package of conditions.

KÓS J:

Certainly.

MS GRIFFIN:

Not to ignore the restrictive nature of particular conditions within it, but how do they all work together, and when you look at them together, you may actually be able to quite easily identify ones that stand out as misnomers. That don't need to be there because they're not working in harmony with the particular purpose through which those restrictive conditions there have been set.

KÓS J:

Well, for a start their removal may either cause the temperature to rise, or actually reduce, because they may be getting in the way of rehabilitation.

MS GRIFFIN:

That's right, and so the probation officers there are looking at it, they're saying they want to manage the person at the lowest possible level to avoid that headspace there. To avoid the need to file a recall application. The thing I

wanted to refer you to in terms of what Lord Diplock said about risk, and it is in some ways apt for Mr Grinder, given the life cycle of his parole now, is that Lord Diplock said risk is a noumenon, and what he meant is that a noumenon is the opposite of a phenomenon. It is an intellectual intuition, not some objective material thing which maybe observed. So it's not the same as reaching a conclusion about a factual event affecting Mr Grinder. In a legal context it is a concept which can only be assessed by a value judgment.

WINKELMANN CJ:

Yes, I mean I think that the complexity of this case is the decision which overlays what you say the Board did, which is hard to reconcile with what you say the Board did.

MS GRIFFIN:

One thing I would say on –

WINKELMANN CJ:

Because the evidence they had before it suggested to them that releasing the restrictions would be more consistent with long-term safety in the community, and, but they maintain them in a way which suggested that they were seeing that as kind of an insurance-type approach, a belts-and-braces approach, and it looks like the wrong approach.

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MS GRIFFIN:

I would say they did it on the basis of the conditions were set as that significant protective factor, that language that they used, if we want a byline for what their thinking is around it.

WINKELMANN CJ:

Yes, but what about the fact they were setting them in the face of their own probation officers opposing it and psychological evidence that it was more protective of him in the community to release them?

MS GRIFFIN:

Absolutely, Ma'am, and that's what made it a difficult application in the High Court for those reasons. But in reality, that decision of the Board doesn't – isn't there anymore in the same way that it was. It has been reconsidered. It will be reconsidered again. So the –

WINKELMANN CJ:

Yes, but what we're asking ourselves is what standard they applied and was it the right one and their outcome looks like they applied the wrong standard.

MS GRIFFIN:

I have certainly accepted that if the legal standard applied, if it's not a factual conclusion as I, as I submitted it was, if the legal standard applied was that it was it needed to be no risk, that that is wrong and that the Attorney-General is not submitting that that is how the Board should conduct its proportionality assessment when it's looking at the relevance of risk as a mandatory consideration.

WILLIAMS J:

That does tend to suggest, doesn't it, that the suggestion by –

MS GRIFFIN:

I am conscious of the time Sir.

WILLIAMS J:

– the appellants and the interveners was that an adjective needs to be added to sharpen up the assessment. Because the real danger here is in our big, overstretched system, you'll get system slippage which is the imposition of disproportionate restrictions unthinkingly because it gets increasingly convenient, that's the great danger in all systems that operate like this and the other side is simply saying add an adjective in so we do the best we can to avoid that.

MS GRIFFIN:

But Sir, I still, I still come back to, again, the Sentencing Act scenario in *Patterson* as an analogy here, when you look at it. It's not needed in –

WILLIAMS J:

Yes, well, the Sentencing Act is beset by hundreds if not thousands of appellate decisions.

MS GRIFFIN:

Sure.

WILLIAMS J:

That constrain and nuance and sophisticate – sorry, bad verb – the process. The Parole Act is not like that.

MS GRIFFIN:

And that, in itself, is a problem with the structure of the Act in terms of appeal rights, not in terms of this test the Board is applying, Sir, that's a different public law question, about whether the Act provides sufficient rights of review and, and appeal and, and, yes, then this court may certainly wish to put protections in place there, in response to that, but that issue is not the cause of this problem as such.

WILLIAMS J:

Well, the suggestion is that it is because there's an adjective missing that would discipline an over-busy Parole Board, that's the essence of this case. You say no adjective, although you're prepare to live with "real".

MS GRIFFIN:

Only because you have to be able to say what is it you're talking about, so you have to be able to describe the risk, right, you can't just say it's nothing.

WILLIAMS J:

That's right. That's right, that's essentially the question here.

MS GRIFFIN:

So you have to describe it, yes. But –

WILLIAMS J:

The worry is that when Sir Ron Young said it's not no risk, worry is that that was the test, that just, you know, unthinkingly slipped in.

MS GRIFFIN:

Yes Sir, and hence again that why the decision there and not there now. Perhaps it helps to look at paragraph – I'm very conscious of the time – paragraph 44 of the Court of Appeal decision in terms of how they summarised this point about how the test works.

WILLIAMS J:

Yes, no, I've read that very closely, because you – it's in the submissions.

MS GRIFFIN:

Yes. And yes, Sir, and so –

WILLIAMS J:

But all Justice Mallon does there is say you haven't taken into account the consequences, right, but that's actually provided in section 7(3).

MS GRIFFIN:

True, well, to be fair to Justice Mallon, she is the Judge who decided *Vincent*, she is very skilled in the undue risk area, so this is not a byline from her, not a throwaway statement.

WILLIAMS J:

But she says, yes, but she says it can't be undue risk because you're allowed to take into account unlikely but catastrophic events.

MS GRIFFIN:

Yes.

WILLIAMS J:

Well, of course you are. Section 7(3) says you are required to.

MS GRIFFIN:

Yes Sir.

WILLIAMS J:

So what's lost?

MS GRIFFIN:

I think it's two things. Ultimately it is a sense that this test is not all about a risk assessment, it is not the only feature of the proportionality exercise and to pitch it in a way that it becomes controlling is problematic, so and that is for your Honours, of course, to delineate that.

WILLIAMS J:

How do you deal with paramountcy then?

MS GRIFFIN:

Well, the paramountcy – that's actually taken off undue risk as a label from section 7(1) in terms of the paramountcy principle, it refers to safety of the community.

WILLIAMS J:

Yes, but that's, I mean, that, that's risk. How could it be anything else? Ask Lord Diplock.

MS GRIFFIN:

Yes, well, that's the noumenon, isn't it, that's this thing.

WILLIAMS J:

Yes, that's a new word, I'll have to look that up.

WINKELMANN CJ:

Can I, can I ask you a question, if you then made clear that your remarks were limited to those parts of the conditions which were dealing with risk, because these are clearly dealing with risk, they're not –

MS GRIFFIN:

Oh, sorry, Ma'am, I didn't hear the first sent –

WINKELMANN CJ:

If you made clear that the adjective, adjectival approach that Justice Williams is suggesting is limited to conditions which are dealing –

WILLIAMS J:

Ms Casey.

WINKELMANN CJ:

Ms Casey suggested, you described as adjectival, Ms Casey suggested the approach where we needed to describe a concept – if you limited that comment to those conditions imposed which were restrictive, because it's – that's restrictive conditions generally speaking that are directed to risk, I suppose it's restrictive to require someone to go to rehabilitation but things, the whereabouts, the EMO conditions, if you made clear that it was limited in that day, what's the problem? It still gives you room to move on, on rehabilitation?

MS GRIFFIN:

That is the position that Mr Ewen KC, for example, put in the Court of Appeal and that it had always been my understanding of the argument there for the appellant as well. So, so I do understand the point, but the high level point on that is what the Attorney-General submitted before, that the Parole Act itself doesn't filter the undue risk tests through all forms of decision-making and I think your Honours have accepted that there in the exchange here with Justice Williams.

WINKELMANN CJ:

Yes.

MS GRIFFIN:

So if we carve out the other parts of the special condition framework to say that undue risk doesn't necessarily act as a filtering mechanism to the imp – to the imposition of those types of conditions, and so conditions can operate almost like a two-part system, for different adjectives and different purposes and you only have undue risk in the risk of re-offending part. That is what Mr Ewen ultimately sought in the Court of Appeal and that is one interpretational answer to how the Parole Act is written. I can't deny that such an answer is a way to read the statute. The question still – your Honours are still left with the question is whether or not that is correct, whether or not it is set up that way and intended to be that way.

WINKELMANN CJ:

Well, risk obviously must cover –

ELLEN FRANCE J:

Sorry, in terms of paragraph 44, is your concern with undue risk, that being the adjective, is your concern that that means you can't do what Justice Mallon refers to there, assist with stabilising the offender so that their risk level does not rise?

MS GRIFFIN:

Yes, so it's the notion of wanting to calibrate conditions that are about risk of reoffending, not no, not really low-level rubbish risk, but still a risk based on the fact that we are dealing with a serious recidivist sex offender, so you want to calibrate conditions here that may not necessarily be relevant to touching that threshold of undue risk right now and this is what Justice Mallon is getting at, that they can move across a broader aspect of purposes so long as they are proportionate, reasonable, minimum impairment, all of those section 5 considerations.

WINKELMANN CJ:

I think it's just everyone's at cross-purposes, because, well, I don't think they are at cross-purposes, Ms Casey is not saying that every condition has to respond to risk because some of them are responding to rehabilitation.

MS GRIFFIN:

Well, Ms Casey did say that originally in her submissions at paragraph 71 and seems to have released that today, in the sense, other than leave it for another day, but that there was a substantial implication from the sections that that was there and so this, that's the battle ground, isn't it.

WINKELMANN CJ:

And the other cross-purpose seems to be, because it's hard to see how these conditions are not to do with risk level but rather to stabilising the offender against the background of the reports that were received. So, I mean, and as you say –

MS GRIFFIN:

You mean the impact of them.

WINKELMANN CJ:

Yes, as you say, that was, that was conceded and released but we continue to deal with that fact situation.

MS GRIFFIN:

But Ma'am, that point, that very point you made, is actually something where that you could actually show you may disagree with the Board's outcome in terms of how it applied the proportionality assessment based on what it knew about risk level being low risk of re-offending and the impact of those conditions, you can do all of that work within section 7(2)(a) and come to the conclusion that your Honour wants, that actually what the Board did was create a destabilising effect for the offender, without talking about undue risk at all. You could just talk about the fact the reports say low risk of re-offending, serious

impact on the offender, other ways to do this without EM conditions, boom, boom, boom, disproportionate.

WINKELMANN CJ:
Well, you're talking about risk.

WILLIAMS J:
Well, depends on what –

MS GRIFFIN:
I am conscious of the time, your Honours.

WILLIAMS J:
Yes, but this is important so I think we should play it out.

MS GRIFFIN:
Certainly, Sir.

WILLIAMS J:
Whether it's low doesn't give you your answer.

MS GRIFFIN:
That's true.

WILLIAMS J:
Because you have to also think about consequences. Even a low risk of a very serious consequence could in some circumstances be undue.

MS GRIFFIN:
Yes Sir.

WILLIAMS J:
And that'll need to be triangulated against the nature of the condition.

MS GRIFFIN:

Yes Sir.

WILLIAMS J:

For example, a whereabouts condition may be seen as much less impositional, at least peripherally impositional, that's not the right word –

WINKELMANN CJ:

Marginal.

WILLIAMS J:

Unnecessarily impositional than a bracelet.

MS GRIFFIN:

Yes Sir, and so the whereabouts condition was left without the bracelet, yes.
1510

WILLIAMS J:

Right, so – that's right, so undue has to be assessed against all of those variables. It's not just you're low, you're out. It's you're low, but you're a very serious offender and this, this imposition is not so disproportionate that it shouldn't be applied to you anyway.

MS GRIFFIN:

Yes Sir and that's exactly what would happen on release, because, absolutely, because it – low, low risk of re-offending, high risk of re-offending, all that is not the answer on whether that means undue –

WILLIAMS J:

Correct.

MS GRIFFIN:

– depending on the conditions, yes.

WINKELMANN CJ:

And that's captured, that's captured in the concept of undue risk, strangely enough.

WILLIAMS J:

Correct. That's the point here, what you're arguing for is undue risk.

WINKELMANN CJ:

Anyway.

WILLIAMS J:

And you're arguing for it very well.

MILLER J:

Can I ask a question please?

MS GRIFFIN:

Yes Sir.

MILLER J:

What we see in this Act is that it's necessary to look at a particular condition standing alone. Section 15(2) requires that of us and so, too, does the provision allowing an offender to ask for discharge of a condition. So, under 15(2)(a) when we're looking at risk of re-offending, let's just focus on that.

MS GRIFFIN:

Yes Sir.

MILLER J:

You can see, you would presumably accept, that there must be a rational connection between the condition and the risk of offending?

MS GRIFFIN:

Yes Sir.

MILLER J:

That is to say, you need to assess what is that risk, –

MS GRIFFIN:

Yes, whatever level it is, yes.

MILLER J:

You need to look at the condition, you need to gauge what its impact would be on the risk of re-offending. Is the Crown's position that when you step back, you then have to look at all of the conditions together and see what is their collective impact on risk? In other words, is this, is this the point of we're parting company because it does seem to me, in common with other members of the Bench here, that the overall question is whether this person poses an undue risk in the community, that's the basis on which they get released or recalled and I can understand the Board wanting a flexibility to say we've got a suite of conditions here that serve not only this purpose but also the rehabilitative ones and the assessment has to apply to the group of conditions. For any specific condition, it's a different test, it is, is there a rational connection. Is that condition, in itself, justified?

MS GRIFFIN:

Yes. You have to be able to justify the imposition of –

MILLER J:

Right.

MS GRIFFIN:

– or the continuation or otherwise of that specific condition, yes. But I agree with your Honour here that there still needs to be the ability on that the – say let's call it the final conclusion of the decision, on the variation decision, to be able to stand back and say what is the impact, taking that one condition, in light of the package of conditions and circumstances facing us with this offender, which will be many and varied, and if you look at the reconsideration decision, in a sense where we said in the Court of Appeal that if the High Court decision

stands, what the Board did there in the reconsideration decision in January 2023, is it found a way to work within the concept of undue risk as Justice Gwyn set it out to be, while saying we cannot do this condition-by-condition approach as well, we need to be able to stand back and look at risk broadly here as it affects the operation of all of these conditions, the reintegrative, rehabilitative aspects, the victims' side of things. Here, we have a victims' condition that does, as we have looked at, touch on matters relating to risk in terms of the risk to Mr Grinder's reintegration, the effect on him. So the proportionality assessment is quite a broad one and –

WINKELMANN CJ:

Is your real concern then that to avoid any approach which cuts out the ability to look at the rehabilitative purpose and the meeting the reasonable concerns of victims?

MS GRIFFIN:

Yes Ma'am, I think there is danger in saying it's irrelevant to those other aspects of special conditions, of the test under section 15(2).

WINKELMANN CJ:

But that's your real concern with the approach that Justice Gwyn took?

MS GRIFFIN:

Well, Ma'am, because if you did that, it – saying it's a real concern there, there are lots of issues obviously, but if you did that, Ma'am, you are setting up quite a divide between how you would otherwise assess the rationality and reasonableness of the conditions at (2)(b) and (c) compared to how you must do them under (a) and while I don't dispute what his Honour Justice Miller there said about there the – in terms of looking at the ones relating to risk of re-offending and rational connection based on that particular risk and all of those things, it doesn't mean questions like that are going to be totally irrelevant in the victims' space depending on the circumstances and I think this condition that we've got here a little bit gets us into where the problems arise when it

conflicts with rehabilitation interests, and so the Board, that doesn't mean the Board has got it right here, either –

WINKELMANN CJ:

But how is –

MS GRIFFIN:

– but what my submission will be is the Board needs to stand back and look at what is happening.

WINKELMANN CJ:

Oh, conflict, so, yes, okay.

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MS GRIFFIN:

Yes, what is happening from the imposition of all these things to different purposes and those purposes should sit in harmony and so when we're deciding what these legislative tests are, that needs to be kept in mind so that actually it's a coherent scheme that this court is setting out for the Board to apply. And perhaps that's a good point for me to end on. I don't know if there is still time for Mr Zhang to do his – yes?

WINKELMANN CJ:

I think, yes, yes, very quickly, Mr Zhang.

MR ZHANG:

May it please the Court. I apprehend I will not fare much better than my senior in persuading your Honours on the AG's position, but I do have –

WINKELMANN CJ:

No, we haven't – we're just trying to understand the argument, Mr Zhang, so do not be –

MS GRIFFIN:

Fat lady hasn't sung.

WILLIAMS J:

It is not over until that lady sings.

MR ZHANG:

I do have some submissions to make today.

WINKELMANN CJ:

Yes, Mr Zhang.

MR ZHANG:

And they are in relation to the two discreet cases that were considered by the Court of Appeal and they are *Gilmour v Chief Executive of the Department of Corrections* and I won't take your Honour through the decision in any great detail but they are located at tab 14 on the – in, within the joint bundle and the second decision is *Miller v The New Zealand Parole Board* and that's at tab 17 of the joint bundle. And I propose to begin with *Gilmour* first because in my submission that's the most apposite decision relevant to the issues on appeal today, unless the Court would prefer otherwise.

WINKELMANN CJ:

No, go ahead Mr Zhang.

MR ZHANG:

And of course, *Gilmour* I accept was determined in a slightly different factual context on a different power under the Parole Act; however, I would stress to your Honours that the real value lies in the Court of Appeal's analysis and approach to their – to the approach in interpreting section 43(1)(c) of the Parole Act and if I could take your Honour's to paragraph 43 – 34 of the judgment, there is where I think you'd find the gold, because the Court of Appeal holds explicitly, well, held 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." And behind that statement is a recognition of Parliament's intent that as they have drafted the Parole Act they were very mindful and very explicit as to when the undue risk test applies and who applies them.

WINKELMANN CJ:

Are you relying on your senior counsel to drive this?

MR ZHANG:

Yes, yes, and I appreciate that –

WINKELMANN CJ:

Because she's letting you down.

MR ZHANG:

And I appreciate that's not a very weighty submission given the discussions that preceded, but those are – that is the Attorney-General's position on appeal and –

WINKELMANN CJ:

I think Ms Hensman going to help us.

MS GRIFFIN:

Imogen saved me.

WINKELMANN CJ:

Hensman is going help us. So?

MR ZHANG:

Yes and so the Court makes the point there at paragraph 34 and perhaps we don't need to go there immediately, but – in the Grinder Court of Appeal decision.

KÓS J:

Gilmour.

MR ZHANG:

Gilmour, sorry.

WINKELMANN CJ:

Gilmour.

MR ZHANG:

Gilmour, yes. And later on in that same paragraph, perhaps we shall wait 'til the decision comes onboard. The Court later on then makes the point that the circumstances in which the parole officer in that case, and by analogy the Board in this case: "...may make an assessment of 'undue risk' ... are explicitly defined and are limited in nature." And in contrast they refer then to section 60(2), 61(a) and section 107P(3)(a) because in those decisions –

MILLER J:

So which paragraphs are you referring to now?

MR ZHANG:

That's also in paragraph 34.

MILLER J:

Right.

MR ZHANG:

Where the Court says: "There are two scenarios in which it is envisaged that parole officers may make an assessment of 'undue risk'." So at footnote 21 they reference the provisions in the Parole Act, that the Act explicitly directs the parole officer to do so.

WINKELMANN CJ:

And what do you draw from that?

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MR ZHANG:

So what I draw from that is the Act was explicit in who and when the undue risk test is applied and the inverse of that proposition is that omissions are also intentional. So, I'm proposing to extrapolate that analysis to apply it to the issue

on appeal and, and proffer the proposition that, in this case, because section 56 and 57 do not explicitly direct the Parole Board to apply and assess the undue risk when determining an application to discharge or vary special conditions, it follows that it's not a mandatory requirement and it's not an error for them to do so. That's the central analysis that I draw from the *Gilmour* decision.

WINKELMANN CJ:

Yes, we got that

MR ZHANG:

And then briefly then touching on *Miller*. *Miller* demonstrates that where there is that, this rare example of ambiguity and the Act omitting to direct certain actors to consider and apply the undue risk threshold, then it may in certain circumstances be necessary by implication to read undue risk threshold despite the explicit nature of the Act and why *Miller* was decided in that way was because the decision that the Board's power to make a final recall order under section 56 doesn't explicitly refer to the undue risk threshold but it's so integral to the liberty of the prisoner that a determination of the final recall order determines whether they are released back into the community, or remain back, or remain within prison.

And that's a type of situation where you may expect a purposive approach to necessarily read the threshold of undue risk into a power of the Parole Act where the liberty of the prisoner is at stake, and the Attorney-General's position today is that we're in a different camp when it comes to deciding whether to discharge or vary special conditions because regardless of how the application is determined, Mr Grinder will still remain in the community, his ultimate liberty is not at stake and therefore, if your Honours accept that the omissions are intentional, then the Board is not required to consider the undue risk threshold. That is the propositions I draw from *Miller* and *Gilmour*.

So unless there are any further questions, that's the submissions on that.

ELLEN FRANCE J:

Just in relation to that, might there not be a spectrum? So, some conditions might take you quite close to or equate to detention, or at least quite significant constraints on, say, your freedom of movement?

MR ZHANG:

Yes. Perhaps the, the question that – of whether is, if this – I accept that it's likely on a spectrum, but the question before the Court today is whether, whether the undue risk threshold which, which perhaps is at the cap of that spectrum must always be applied when considering a risk and our answer to that is no, on the text and on the purpose of the Act and as perhaps suggested by the cases I've gone through.

WILLIAMS J:

That assumes that undue risk is itself is static line. Because undue has to be measured, doesn't it, against the nature of the imposition, because some things may be – as you say, some things may be undue because the imposition is so great, but some things may be undue even though the imposition is less. It's a matter of assessing each situation, isn't it?

MR ZHANG:

I don't dispute that the Parole Board needs to assess every application on a case-by-case basis.

MR WILLIAMS:

But it has to think about "undue" by reference to the facts in a particular case. It's not a single line.

WINKELMANN CJ:

Undue in terms of what? Undue to the community?

WILLIAMS J:

Risk.

WINKELMANN CJ:

Undue to the risk? Undue – yes, yes.

WILLIAMS J:

Undue risk to the community.

MR ZHANG:

That is the question that is before the Court and my senior has endeavoured to persuade your Honours that that is not the case and I don't think I can take that point any further.

WINKELMANN CJ:

I just think it's interesting that "undue risk" is not actually defined, all you are told is what you are to take into account.

KÓS J:

No, that's right.

WINKELMANN CJ:

And everybody acts like it's defined but it's not.

KÓS J:

Yes.

WINKELMANN CJ:

Seems quite useful when they say what you have to take into account, I think you will have taken into account in any circumstance.

KÓS J:

Pretty obvious, isn't it.

WINKELMANN CJ:

Yes. So anyway, thank you, Mr Zhang.

MR ZHANG:

May it please the Court, thank you.

WILLIAMS J:

You did very well, Mr Zhang, and your learned senior was terrible on the computer.

WINKELMANN CJ:

Yes, well, now we know why she was so anxious about that, at the outset.

MS GRIFFIN:

I'll just leave.

WINKELMANN CJ:

Right, Mr Smith.

MR SMITH:

Thank you, your Honour. It's – I will be brief and, as directed look through the operational lens, and I also want to appropriately acknowledge Mr Ewen and the significant contribution he has made not only to this case and, and how it's got here but more generally to the profession of the Human Rights Bar. So he will, I'm sure, be watching over this with great interest.

WILLIAMS J:

Yes.

WINKELMANN CJ:

He'll be very pleased you think so.

MR SMITH:

I won't share what our last exchange was, not relating to this case.

The two themes that I want to talk to through that operational lens, just firstly to give the Court a sense of the, the considerations that the Board takes into account in imposing conditions and the different ways in which that or the

dimensions of that can be used to calibrate ultimately proportionate outcomes on an individual conditions basis, or in terms of conditions, the suite. Then secondly, I want, for what assistance I can provide, to, to speak briefly to the proportionality assessment and the question of adjectives.

The first point, so I thought it, it's come up in the course, so but I won't go to and it's not appropriate for me to go to evidential documents in a case on appeal, but some of these things will be familiar in terms of just what the Board is looking at, in terms of the techniques to calibrate proportionate outcomes for special conditions and I've identified four of those, if your Honours think about it at a conceptual level. The first is actually a choice of special conditions, so what, what is the condition, is it a condition directed, for instance, at whereabouts or electronic monitoring.

Secondly, there's the actual wording of the condition as set, how tightly or, or otherwise what the focus of it is and there is discretion as to that wording and, in terms of what Ms Griffin took the Court to earlier, you can see that the wording changes in different assessments across time by the Board of, in substance, the same condition.

Thirdly, there's the question of, and sometimes the inclusion of, an exemption, or an approvals process for probation officers, the – your Honour Justice Williams' word the – or terminology, the unlawful delegations, potential point.

Then fourthly, there's the length of the conditions themselves and another way in which I think of this is whether or not they have some sunset clauses is a concept, not a term of art, in the Parole Act which you saw, for instance, with the first suite of conditions upon the release in 2019 where there were sunset clauses to the lengths of some of them.

So those, if your Honours stand back and think about it conceptually in terms of what the Parole Board is able to do with, at least operationally, subject to the decision of this Court, with special conditions, it has discretion to tailor, in terms

of your Honour Justice Williams' point earlier, to tailor to the fact and context of the particular issues, the evidential, the record of proceeding before the Board and the conditions that are proposed, it has the ability to tailor the conditions across those four parameters, vectors, components, if you think about it in that way.

And I wanted to highlight that, firstly, for the reason that's what it does and you'll see that in some of the special conditions if – that you've been taken to it when you read the decisions of the Board for Mr Grinder and, secondly, that's if this Court is to consider in the course of its judgment what is the framework there is, if you remove some of those parameters, some of those limbs, that seems to me will potentially, if not dependent on the condition and the fact and context circumstance, inevitably impact on the ability in a practical and legal operational sense.

1530

WINKELMANN CJ:

Do you mean remove the Parole Board's ability to operate in those four parameters, or do you mean in this particular case, because I don't think it's suggested.

MR SMITH:

No, in a broader sense. So for instance, and the focus of that point really is if this Court was to say that there is inevitably unlawful subdelegation of the power that's reposed in the Board.

WINKELMANN CJ:

I don't think anyone's, we couldn't really say that. It's not been pleaded and that would be quite a big call.

MR SMITH:

No, but I just wanted to highlight it because those are all, if you think about the different conventions to, ultimately the ability, and just narrowing it through a particular special condition to strike the right balance, the proportionate balance

in the circumstances. If we are going to remove abilities to incorporate aspects that have the potential to achieve a more proportionate outcome, then there will just be implications for the ability of the Board to do that in a general sense and the implications.

WINKELMANN CJ:

Yes, but if the Board is given a clear indication that a condition is operating oppressively, and they accept that, then it's better for them to amend it rather than to leave it to be fiddled around on a case-by-case basis by a parole officer. That was what the discussion was, but it hasn't really been pleaded in this case, or argued.

MR SMITH:

No, I accept that, and that's the reason why I'm, from an operational, through an operational lens just identifying the full extent of the ability of the Board reflected in what you can see in the evidential record before this Court of how it ultimately seeks to achieve more proportionate outcomes, and if you just focus on that parole order, probation officer, sorry, exemptions point, there are – and I won't linger on this too long, because as your Honour the Chief Justice recognises it's not squarely in terms of the pleaded issues before this Court – but it is contextually relevant to understanding the tools that are available to the Board to ultimately strike these proportionate outcomes that we're all, and I don't think I overstate it in saying there is a shared interest in getting the legal framework right, hence here we are to be able to do that.

WINKELMANN CJ:

Quite so.

MR SMITH:

But if you look in the Act itself, so there's two provisions, one relating to the standard conditions, and one relating to the special conditions, that actually in terms of the empowering statutory language, and I won't take your Honours there, but sections 14(1)(c) in respect of standard conditions, and section 15(3A)(a), they both envisage conditions that will have the ability for

probation officers to exercise discretion as a component of that condition if and to the extent that it's set, and I've referred to, I think from memory in written submissions for the Board, two New Zealand decisions, both from memory High Court decisions, the *Pengelly v New Zealand Parole Board* [2023] NZHC 3768 and *Wilson v New Zealand Parole Board* [2012] NZHC 2247 decisions that are in the joint bundle. We can see the High Court judges respectively there referring to that as a safety valve that helps to ensure proportionate outcomes. The ability for exemptions to be exercised through the discretion that's being conferred, delegated.

WINKELMANN CJ:
Yes, it's a tricky balance for sure.

MR SMITH:
That's right, and the other –

WILLIAMS J:
I think the probation officers are even busier than the Parole Board.

MR SMITH:
And I accept, well, I accept that that's probably the case.

WILLIAMS J:
Anyway that's not for resolution here.

MR SMITH:
No, the only, there is one other authority, that again I don't want to go to, that touches on this and my chambers colleague Mr Butler would be happy with me mentioning it, given that it's a decision of the Northern Ireland Kings Bench, and it's the *Mackle, Re Application for Judicial Review* [2023] NIKB 13 decision at tab 31 of the joint bundle, and if your Honours, and I don't invite your Honours to go there now, but at paragraphs 53 to 55 there is an assessment of the proportionality of a condition that impacts, restricts the ability of an offender to travel as part of parole, and that's looked at through a proportionality lens, one

of the things that the Court is looking at is how helpful is it in ultimately ensuring a proportionate outcome to have the ability for approvals to be sought and granted to, in terms of Ms Casey's metaphor, to screw it slightly back up, rather than potentially back down, in terms of the conduct or the behaviour, the actions of the condition is, or the requirement is directed at.

The other and final ingredient to note there is that in addition to the way in which an individual special condition is set, in terms of those four dimensions to it, if there are problems, and this is a really important feature of the Parole Act, there's the ability in subsections (1) and (2) of section 56 for at any time either the offender or a probation officer to apply to vary, so you've got a, in that sense, there is a safety valve and a check and balance to over-breadth in conditions through that. It doesn't, I'm not saying that that is the answer to the concerns that have rightly been identified with aspects of the regime and its impact of preventive detention offenders, but it is at least one safety valve that is part of the, the overall package for, for ensuring proportionality.

Now, turning to proportionality and the second thing that I wanted to briefly speak to, the Board set out in paragraph 4, and it has the prominence at the outset of the submissions, because it is so important, the way in which the Board understands the proportionality test to apply and that is anchored to sections 7 and 15 and just picking up, because no mention has been made of it, the, I think it was your Honour Justice Williams this morning, or at least before lunch, was exploring, well, to what extent is section 7 and section – your Honour, the Chief Justice, I think, might have been as well – are section 7 and 15 doing in substance what the Bill of Rights Act would be doing anyway, and his Honour Justice Simon France was required to consider that very issue in the – one of Phillip Smith's proceedings and the judgment in the High Court for that is behind tab 25 of the joint bundle and I won't go there, but the key paragraphs are 16, 36 to 39 and 45 to 46 and –

WINKELMANN CJ:

Which case, sorry?

MR SMITH:

Smith v The New Zealand Parole Board [2018] NZHC 955, at tab 25 of the joint bundle, and his Honour's –

WILLIAMS J:

Sorry, you're going to have to give me the paragraphs again.

MR SMITH:

Sorry, I'll go slower, paragraph 16.

WILLIAMS J:

Yes.

MR SMITH:

Paragraphs 36 to 39.

WILLIAMS J:

Yes.

MR SMITH:

And 45 to 46.

WILLIAMS J:

Thank you.

MR SMITH:

And his Honour Justice Simon France's conclusion there was that because of the operation of and the content of sections 15 and 7, you would have a proportionality test of the kind that the Bill of Rights would mandate done through the statute itself, so to, if they were properly applied, there wasn't a separate and discrete role for the Bill of Rights analysis to do, because in terms of your Justice Williams' exploration of that topic, it was – it's already integrated within the, the focus and the requirements that are set by those provisions.

Now, in fairness, I should identify and do, that the context there was an application for release on parole, so it was a circumstance where the undue risk test expressly applied, but that was within that context, that was his Honour Justice Simon France's reasoning.

Does it make a – and I want to confront and give a clear answer for the Board on, well, why are we, firstly, does it make a difference that we don't have the adjective, the why we're here in that sense, and I thought a helpful way into that is, which has been explored by the Court with –

WINKELMANN CJ:
So can I just clarify, did you say paragraph 4 of your submissions sets out the approach the Board takes to proportionality?

MR SMITH:
Yes and that's reflecting sections 7 and 15, I'll make sure I've got that right.

WINKELMANN CJ:
So you're referring the Bill of – the proportionality as the fettering.

MR SMITH:
So the structured proportionality approach that we say applies that mirrors in substance what the Bill of Rights Act would require, or subject to argument about that, is what is set out there with those four dimensions.

WINKELMANN CJ:
I know, I was just querying why it's referred to as "fettering", but that's your Bill of Rights Act in that assessment.

KÓS J:
It's really the sentence beginning "provided" I think.

WINKELMANN CJ:
Yes.

MR SMITH:

So the fettering is a response, without citing it, to my learned friend Ms Casey's submissions –

WINKELMANN CJ:

Okay, I see.

MR SMITH:

– which refer to the Board's discretion being an "untethered" one and the Board says, well, it's not. The tethering, or in administrative law terms the fettering, is through, at least in my mind in administrative law terms, the fettering is through sections 7 and 15 and how they ultimately integrate and inform those four proportionality-based assessments, which critically have looked to rational nexus, which look to a justification between the risk that's assessed and the particular condition and the extent to which it appropriately addressed that risk, and then looks to overall proportionality, so the – it's in your key ingredients that you'd expect to find within section 5 itself.

1540

Now, in terms of, I thought a helpful way, having highlighted that into the issue is through this Court's decision in *D*, and the question there, the statutory test there, and it's set out, I don't intend to go to the decision, but the relevant provision section 9 is quoted under paragraph 20 of the judgment and that was just a risk simpliciter test, and the majority judgment of this Court read risk as requiring a real or genuine risk, and the Board would accept that that would be appropriate here, if it's not undue, it would be a real or genuine risk.

WILLIAMS J:

They're probably the same thing, though, aren't they?

MR SMITH:

And that's my bigger point. The question really flows out of…

WILLIAMS J:

"Is it a risk worth taking?"

WINKELMANN CJ:

It just seems to me that it's not the real thing, which is why, the same thing, which is why I keep on – it's not the real thing either – it's why I keep on going.

WILLIAMS J:

That was Coke.

WINKELMANN CJ:

I wouldn't mind a glass of Coke actually. It's why I keep on going back to it. I just think we're all, this appeal is beset with kind of floaty premises and cross-purposes, because "undue risk" is defined as, you're not, it's not a definition of "undue risk" it's just some sort of guidance on how you do a risk assessment.

MR SMITH:

Which reflects what I would say is just the common law position.

WINKELMANN CJ:

I just don't know why one would fight so hard to say that's not what you do when you're looking at risk.

MR SMITH:

Yes, from the Board's perspective there is no dispute about that, and her Honour Justice Glazebrook in *D* reached that conclusion at paragraph 263 of her judgment. That defining the risk assessment there, as I say, without any adjective preceding risk, as involving looking at both the level of risk recidivism and the seriousness of the consequences, ie probability of realisation and magnitude if it is realised, which is exactly what section 7(3) is directed at, and that is –

KÓS J:

That's just risk analysis.

MR SMITH:

Yes, precisely. And this, confronting your Honour the Chief Justice's question, and trying to understand why are we, given that there is a degree of textual, or open textedness for undue as a concept or something else as an adjective that we might place before risk, why the Board, and this is ultimately a contestable issue, why the Board maintains the position that there is a difference is for the reasons –

WINKELMANN CJ:

The position that there is a difference from what?

MR SMITH:

– between undue and what will be a real and genuine, which is what I'm accepting would be the alternative, is that there is, and it's, this is one of the problems that I found since getting involved in this appeal, we're talking about risk in the abstract, in terms of these tests a little bit, and I appreciate there's the application question that the Court is concerned about, but I don't think it's appropriate for me to make submissions on, but the Board's view is that there's light between that real and genuine risk and undue risk, and in the sense that in theory there is relatively, speaking on a real and genuine in comparison to undue risk test, there is relatively more flexibility for the Board to address dynamic risk to make it less likely, in terms of the structure and scheme of the Act as a whole, that you have to reach to recall with all of the problems for offenders and ultimately reintegration associated with recall, and –

WILLIAMS J:

I think that – sorry, you finish your "and".

MR SMITH:

No, I'm happy to…

WILLIAMS J:

Okay.

KÓS J:

But there's a fundamental difference. One has a sanction in it, "undue", first it's "real". That is to say, one is – both are based on a probability, which is one of the two elements of risk analysis. But one of them says it is a risk of such a degree that we would not take it, that's the undue; as opposed to real and genuine. That's simply a probability assessment.

MR SMITH:

Well that's –

WILLIAMS J:

But it's an important, there is an important difference. One sharpens up the analysis and the other absolves the decider of a decision about whether the risk is worth taking, and I'm not sure whether that's a good idea for a Parole Board to be absolved of that. It does seem to me that the tasks of those people on the Parole Board is just that. "Is this worth taking?"

WINKELMANN CJ:

Yes, that's why I keep on thinking that the appellant's arguing against its own interests in arguing for undue risk, but, mmm.

WILLIAMS J:

Anyway, you've got four questions there.

MR SMITH:

Just before finishing with the offer that I intend to extend, is to make the point that if your Honours come at it through *D* in terms of the way in which risk simpliciter as a concept was approached there, it does include both the probabilities and the magnitude. So in that sense it would be no different to undue risk.

WILLIAMS J:

Except one's more honest, it seems to me. The test is more honest. "Am I prepared to take it?" There's a certain ownership there that's not in what we call the untethered version of that risk assessment.

MR SMITH:

Well I accept that to an extent but the, if one stands back the very process of the Board making decisions and expressing its view –

WINKELMANN CJ:

They're both assessments.

MR SINCLAIR:

– is honestly giving its view for right or wrong in a predictive sense, and in that sense does the, what is the objective, and if that is the nature and the substantive outcome of the product of the Board's decision, does it make a difference for the objective?

WILLIAMS J:

Well it would have made it unlikely that in the 2021 or 2019 decision the "not know" risk would have been in the judgment, whatever the result would have been.

MR SMITH:

Yes, and I accept that there is an issue as to, is that, this is my friend Ms Griffin's point, when you read the decision fairly as a whole in light of the record of proceeding, and the usual judicial review administrative law way, is that the fair way to read that decision, and then there is the, so that's one important point there. The second important point there is from that data set of one can we extrapolate that that is the approach that is being taken by the Board all of the time, and that's certainly the premise of some of the submissions that the Court had this morning, and I would, for the Board, caution you against, from a data set of one, extrapolating that that is the appropriate approach that's taken. Because even when you look across the decisions here, and you read all of the

decisions that are before the Court in the case of appeal, they are not, they are more nuanced and so it's not, it's not zero risk therefore you have the conditions, and one way of testing in a practical sense the correctness of that is to ask, well if that was the approach, why did the electronic monitoring condition go for at least a period of time because zero risk it's then one would think it would have been maintained. But that's getting perilously close if not on the wrong side of –

WINKELMANN CJ:

Can I ask you two questions. One is, what's your offer that you're going to come to? The second is, can you tell me exactly what it is about the paragraph, is it 44, of Justice Gwyn's judgment, the Parole Board –

KÓS J:

No, Court of Appeal.

WINKELMANN CJ:

Sorry, no it's…

WILLIAMS J:

Paragraph 44 of Justice Mallon?

WINKELMANN CJ:

No, sorry, 130 of Justice Gwyn. What it is, exactly it is about the – so two things. First the offer, or second the offer, whichever order you want to approach it – and secondly, what is it about 130 which is unworkable for Parole Board?

MR SMITH:

I take it in reverse order, the hardest and easiest, which is finishing with the offer. The – paragraph 130 of the High Court judgment has got the adjective of "undue" there and that's the, that is the, well it's a dispute between the parties, but otherwise if you remove that adjective then it's quite aligned, and that seems to me, since when I've been involved in this proceeding from the Court of Appeal

on that, that is the argument and the key issue, whether undue is there with the implications of that, and that –

WINKELMANN CJ:

So you would put in there instead "a real or genuine risk to the community". What would you put in there instead?

MR SMITH:

The – just looking at it in terms of how we've expressed the proportionality framework. I would frame paragraph (a) up as, in terms of the end of it, replace "does not represent an undue risk to the community" with "that does not represent a risk to the community that's not justified by the balance that's being struck through this conditions".

WINKELMANN CJ:

Really? No, I don't think you mean that.

1550

KÓS J:

Well you've got to mean something like that, because you need a tipping point.

MR SMITH:

Yes.

KÓS J:

And real and genuine risk doesn't have a tipping point. It doesn't have the sanction of them that I was talking about before.

MR SMITH:

Well that –

KÓS J:

So you've got to add something to "real and genuine".

WINKELMANN CJ:

But not balance, because that's circuitous if you add it back in the conditions on the tail end of it, isn't it?

MR SMITH:

Yes, in fact, I'd go back a step, without wanting to dodge the question, the –

WINKELMANN CJ:

You might want to take a pause to think about it.

MR SMITH:

In terms of standing back, so there's the workload in terms of operationally has been set out in a practical sense in the submissions, and one of the dangers here in terms of just the quantity of that workload and I appreciate your Honour Justice Williams' point that probably is a magnified workload implications issue for probation officers, is that there is a risk of over-judicialising the expectations and the requirements for the Board in terms of what you expect to see in their decisions and –

WINKELMANN CJ:

Well, there have been some helpful suggestions there.

WILLIAMS J:

It's probably, I want to do my reply.

WINKELMANN CJ:

She doesn't have a right to reply.

WILLIAMS J:

Oh no it's not your reply.

MR SMITH:

No. So what I would say needs to be done is, and I'll come back to 130(a) in a moment, is you need to go through that. The Board needs to go through the process of asking the four proportionality questions that we've set out in

paragraph 4 of our written submissions, and having gone through that process you're ultimately going to say, well, for each of the special conditions they are appropriately justified or not.

WINKELMANN CJ:

Yes, but what that hides is the risk threshold which is – so rubber hits the road at 130(a), did you think you need some time for it? I mean –

MR SMITH:

Yes, I –

WINKELMANN CJ:

I don't think you do, shouldn't you? Because it's the nub of the appeal really, whether it's not no risk or – perhaps we'll go to your offer and then you might – the idea may come into your mind when you're not being cross-examined by me. So what's your offer, Mr Smith?

MR SMITH:

The offer, the simple question is, in terms of the request for an updated record of proceeding, I'm happy on behalf of the Board to undertake to get the record of proceeding for the more relevant decisions and co-ordinate with counsel to file that, which in terms of the question at the start of the day, if the Court is still interested.

WINKELMANN CJ:

Yes.

MR SMITH:

Having the full record of proceedings associated with the more recent decisions that –

WINKELMANN CJ:

We are.

MR SMITH:

– are in the irrelevant decisions section of the case on appeal.

WINKELMANN CJ:

I don't think the risk is over-judicialising it, because all we're talking about is what's the requirement of section 5 of the Parole Board and it must have a requirement under section 5 when it does these things.

MR SMITH:

Yes.

WINKELMANN CJ:

And I do think it's a fair point to give, to attach some adjective to risk is always seen as necessary, is all the case law you look at it, it's not, it's not no risk, so –

MR SMITH:

Yes.

WILLIAMS J:

And, and I completely agree that over-judicialising decisions in a big system like this can sometimes achieve the opposite of what is wanting to be achieved.

MR SMITH:

Yes.

WILLIAMS J:

But you can under-judicialise this, and that's when you get system creep.

MR SMITH:

Yes and I don't, I don't disagree with that point.

KÓS J:

The big difference between your paragraph 4 and Justice Gwyn's paragraph 130 is your words in your third consideration: "(iii) are consistent with the safety of the community." She requires more than that.

MR SMITH:

Yes, I'd accept that.

WINKELMANN CJ:

Because "consistent with the safety of the community" has got a lot in it and she's putting it in Bill of Rights terms which is helpful. So, you are not prepared, I'm not asking you to accept real risk or genuine risk at this point, because you want to think through it more?

MR SMITH:

Yes. I think if the Court is not going to force me, it's – that is, I accept that that is at the heart of the appeal and that is if we're focused on asking and answering the question of what is the test posed in section 130, that's the – it's the critical point that the Court needs to answer, and the question then is, as your Honour or the Chief Justice says, is there, is there a different adjective that can go before "undue" there or is – does it need to be restructured and from my part and I know this is not a direct answer to the question, but what this Court could do in its judgment is to say that in this context the proportionality framework is this, and it's the contest as to it, which may or may not look like paragraph 4 of my submissions for the Board, and then the question which would flow out of that, and the judgment for this Court, would be, is there anything above and beyond that that would be required in order to give appropriate guidance for the, ultimately the Board and all stakeholders in Parole Board decisions and Parole Board processes, and there I would submit that you don't need to go further than that, having set out what the test is, and then there would be assistance provided in, there's that separate question of having identified the correct legal framework when your Honours apply that to the particular facts of the decisions that are subject of the judicial review, you may or may not find error in the application having identified the correct legal test and that will help to identify indirectly the requirements that flow out of the application of the proportionality framework as it's been identified.

WILLIAMS J:

And I suppose we have to be careful in whatever we say to remember that 90% of the cases that come before the Parole Board are not as difficult as this one.

MR SMITH:

Yes, and that, further to that point the variation powers apply to determinate sentence offenders, as well as indeterminate sentence offenders.

WILLIAMS J:

Exactly, yes.

MR SMITH:

And it's, there is, and this is a point that flows out of, there are those English cases in the early 2000s, which we've grappled with a little bit in New Zealand, including that *Regina (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 decision, where the difficult issue that the House of Lords was confronting was where you've got school employees making rights-implication decisions for students on a really regular basis, to what extent do we expect and require them to follow a particular methodology in order to have legitimacy, and that led to the aptly named "Misbehaving" decision, *Belfast City Council v Miss Behavin' Ltd* [2007] UKHL 19, [2007] 1 WLR 1420, where the issue there was, and it's grappled with by his Honour Justice Simon France in the *Smith* decision, where questions of rights compliance, or ultimately questions of legality for the Court alone to determine as a matter of correctness, subject to all of those big issues like discretionary area of judgement, and deference, if one likes that term, I don't. Subject to all of that is that the outcome that's more important, or prescribing a particular methodology with the workability implications of having that methodology prescribed, and that will, that goes centrally to your Honour Justice Williams' point about well what, what are the, we've got to bear in mind that the answer that this Court gives to the correct interpretation of the variation powers, unless the Court –

WINKELMANN CJ:

But having said that, section 5 does require you to identify the objective that you're attempting to, and I think that it would be of assistance to give some – I mean the law suggests to date, as you have conceded, that it's real or genuine risk.

MR SMITH:

Yes.

WINKELMANN CJ:

If it's not undue risk, which is itself a reasonably contentless concept anyway, it's something, it's a methodology of risk assessment as defined, then it must be something else?

MR SMITH:

Yes.

WINKELMANN CJ:

All right. Thank you, Mr Smith. I don't think anybody else has got any questions. Ms Casey, you'll be very brief in reply?

MS CASEY KC:

I'll do my best Ma'am.

WINKELMANN CJ:

That was a statement of hope.

MS CASEY KC:

For me as well. And it's the conversation through the afternoon has evolved and I'll try and not go over matters that have already been covered. I would like to start though, just at the very last exchange with my learned friend. We're not over-judicialising the Parole Board to ask them to do their analysis directed under section 7(2)(a) of the Parole Act. All we're arguing about is does that concept consistent with the safety of the community, or not more onerous and

consistent with the safety of community. We're just arguing about the content of that, and we say it's got a threshold in there somewhere, and I'll come back to why we say "undue" in a minute, but it's there and it's not asking too much of them to do their job.

There are some small points I'd like to make in reply before I move on to the substance, or some bigger points with the Attorney-General and Parole Board's submissions. First of all, the response to *Gilmour* and *Miller*, as in our written submissions, and I won't repeat it there, but it is responded to.

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Secondly your Honours, with the discussion about the special condition that came in after these decisions under judicial review relating to contact with certain people, a couple of points to make. There's no pleading about any of this, of course, because this all happened after the decisions under review. So the decisions under review are overturned by the High Court. They go back to the Parole Board. The EM condition is lifted. This is all in the chronology. The EM condition is lifted. The Parole Board appeals, there's an appeal. The Court of Appeal overturns the High Court decision. If I'm getting this right. There is a claim that the appellant is in breach of his conditions, and the EM condition comes back within a month after the Court of Appeal decision overturning the High Court decision. That claim of breach of conditions is withdrawn. There was no breach of conditions, and we then get the next decision where the Board assesses and maintains the EM decision, and I've touched on that in my submissions if I may, and I do want to go there because I didn't go there this morning, but we are looking at, in my submissions, it's just a summary way of saying what happened as, my apologies…

MILLER J:

While you're looking for that, what the notice of appeal, or the application for leave to appeal sought was reinstatement of the High Court decision, which itself ordered a reconsideration, which had already happened.

WINKELMANN CJ:

I was going to ask you about the remedy you said can appeal because things have gone on.

MS CASEY KC:

Yes, look I think the remedy we would seek on appeal is the reinstatement of the High Court decision, and a reconsideration in accordance with that, because what I'm trying to find, and I will shortly…

WILLIAMS J:

You should just get reinstatement if that were the outcome, reinstatement of the Parole Board's pre-reinstatement provision or decision.

MS CASEY KC:

No, we'd get another decision from the Parole Board making a lawful assessment of whether the intrusive conditions in the circumstances as they are at the time of the Parole Board decision, new decision, whether the intrusive decisions are justified in terms of meeting an undue risk threshold. So it is the same relief, it would just be…

MILLER J:

It's a review of the decisions which are now very much past tense on the part of the Parole Board, they've been substituted by subsequent decisions, so we're telling the Board to go back to its, what is it 2019 where it was decision, and reconsider that in light of what we have decided. Is that the position? Because we don't have an evidential basis for looking at the subsequent ones, do we?

MS CASEY KC:

You would ask them…

WINKELMANN CJ:

To make a fresh decision.

MS CASEY KC:

To make a fresh decision in the exact terms, pretty much, of paragraph 130 of Justice Gwyn's decision because it says, here's your, apply this legal threshold to the facts as they are at the time of your reconsideration. So it's still a valid response.

I'll jump myself around a bit. So if I may take you to – actually no I'll step back and do this slightly differently. So that's on the issue of relief. So the, what we might call the issue about the new condition that came in after this application for review, which was no – to extend the no association with victims, which had been there from the beginning, extending that out to a wider group. Now the impact of that was that it cut the appellant off from important people in his life, who were also important supports in his life, and it was unintentional, and it was done at speed, as I think one of your Honours referred to. The point of this was an illustration of what's happening in the system. Why is this case in front of you? Why are we here if it was as shiny and beautiful as my learned friend Ms Griffin described what was happening in the Parole Board, why are we here. Because that order was made, and it was grossly disproportionate? There was no suggestion that victims' interests or risk required it. It went to review where it wasn't urgent anymore and there was time to reconsider it, and what happened was, it was upheld as, no that's fine, because if there's any problem it can be sorted out at probation officer level. Just to be really clear, even in that context we're not talking about an illegality of delegation. What we're saying is that that condition was unlawful to start with and it wasn't fixed up on review and that is what is happening with the current understanding of the Board's function and it's approach to proportionality.

So to echo my learned friend Ms Griffin's words, does there need to be any change to the methodology of the Board? Yes. Why are we here? Because this lovely idea that section 7 and section 15 together are achieving section 5 BORA is not landing on the ground.

As your Honour the Chief Justice said, you can't actually map the Attorney-General's submissions as to what is going on with what is actually

going on and this is where I'd like to go to my submissions, because this is an easy place to see it, on page 24, because we have in effect and I'm – if I mis-phrase this, I will apologise, but the way I understood the Attorney's submissions was, well, we're not saying if they meant no risk, not no risk, well, that's an error of law. If they didn't do a proper section 5 analysis, well, that's an error of law and we say, yes, that's exactly what happened and that's why we're here, because the Court of Appeal upheld what the Parole Board did and they upheld the Probation – the Panel Convenor's ruling and the key part that you can see that is on my submissions on page 24 – actually, we might bring these up – and the Court of Appeal says and this is the quote there: "...offenders' rights ... will be curtailed ... [and] that may occur even when an offender is assessed as a low risk of offending and does not present an undue risk of [offending]." So, the Parole Board –

WINKELMANN CJ:

Where is that?

MS CASEY KC:

This is in paragraph 91 of my submissions, quoting from the Court of Appeal.

WINKELMANN CJ:

Yes, yes.

MS CASEY KC:

That's the reality of what the Court of Appeal has endorsed and that's what we're appealing. It's not what is reflected in the Attorney-General's descriptive in her submissions. Similarly, as I say in 92, that in upholding the Parole Board's decision, the Court of Appeal has endorsed whatever the current risk is, and it's no risk, not no risk, and if I could just add the third limb, I'm not sure if your Honour's have got my road map.

WINKELMANN CJ:

The difficulty with the Court of Appeal's statement there, is it's not clear if it's dealing with the significance of the risk of the condition in that risk assessment. So it might deal with that somewhere else, I don't think so.

MS CASEY KC:

The Court of Appeal is just saying this was a – this is a legitimate approach –

WINKELMANN CJ:

Okay.

MS CASEY KC:

– for the EM condition and the whereabouts condition, because those were the two that were at play. This is a legitimate approach from the Parole Board to say doesn't matter if you're nowhere near undue risk, these conditions will be justified with whatever that low to no threshold is.

KÓS J:

I don't think you can divorce that from paragraph 44, which is clearly derivative of and it doesn't fully express 44 which is more, more complex.

MS CASEY KC:

Yes, in a way, but it's still, it's making it clear you don't have to be anywhere near the undue risk to justify electronic monitoring or these intrusive aspects, however you phrase it. You don't have to be there. The Court of Appeal has endorsed you don't have to be there.

WILLIAMS J:

Well, one of the presumptions I've heard in the submissions that I'm not sure is right, is the idea that undue risk is, even in a particular set of facts, a constant line.

MS CASEY KC:

No, it's a beautifully flexible, fluid judgement for the expert Parole Board.

WILLIAMS J:

Right, so, you see, depending on the nature of a condition, a risk may be due or undue.

MS CASEY KC:

Yes.

WILLIAMS J:

And that's condition-by-condition.

MS CASEY KC:

Very possibly.

WILLIAMS J:

All right.

MS CASEY KC:

Depending on where you are targeting.

WILLIAMS J:

Because perhaps one of the problems with what you've quoted here in your submissions is that it seems – the Court seems to think that it's a single idea that you either climb up to or fall down from when, in fact, you're triangulating against the imposition of the condition itself.

MS CASEY KC:

If I may, can I, before I answer that, can I just put my third limb in here which is, if the Court has got my road map, on the top of page 2 I've got the quote from the Panel Convenor as well, just to close the loop as to what we're talking about. So, the Panel Convenor here affirms the decision and says that: "... conditions such as [electronic monitoring] can be used simply to enhance risk mitigation for an offender who is already assessed as falling well below the undue risk threshold."

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WILLIAMS J:

See that may be okay, if it's a small non-intrusive condition and it –

MS CASEY KC:

Nobody will mind, but that's not what this case was about, and that's not what this case *is* about. It's about the intrusive ones.

WILLIAMS J:

Well, it's important that we underscore that's not what this case is about, because then it gets quite hard for you to run.

MS CASEY KC:

No, actually, your Honour, it doesn't and I was going to talk about this in the rehabilitation space and, and your Honour Justice France's question about is there a concern that if we adopt this undue risk threshold we sort of throw the baby out with the bathwater and can't do the rehabilitation. Rehabilitation conditions are standard conditions, they're in section 14. We're talking in this case about special conditions, whereas the standard conditions are presumptively justified, there may be situations where they become unjustified and there is a question they can be varied by the Board, but we are talking about special conditions here, the ones that the Board has to assess itself under section 7(2)(a). Rehabilitation isn't in that zone, other than the detail of what it is. There is, it's in section 14, is a standard condition.

So, it's not as complicated as it sounds but the concern that brought this appeal and this is why we take issue with – why we are saying to the Attorney and we endorse the response of what's the problem with this undue risk threshold, and the problem is the Parole Board, endorsed by the Court of Appeal, is giving express permission to itself to say we don't have to be anywhere near undue risk before we can impose these very, very onerous conditions and the reason why have touched on what happened after the decisions under review is because when you look at what the Board has done with its definition it is nothing like what my learned friends have described to you as the Board's approach and the Crown's approach and what is the right approach and this is

why we come and say we need guard rails, because section 7(2)(a) is turned into meaningless words with the current approach and I would like to take you quickly, if I may, just to my written submissions at – starting at page 6.

So, we start with the reconsideration which is discussed at paragraph 24, so this is the post-High Court reconsideration. Again, compliance has been good, engagement has been good, Corrections don't oppose the discharge of the EM condition and it goes. 25, the "whereabouts" condition. If you remember, your Honours, at the beginning of the day today, the whereabouts condition was directed at being at places where children are unsupervised by adults. The Court here – the Parole Board here says and this is the quote in 25, there's no evidence that he has ever gone near that, that's just not an issue and they say there isn't sufficient nexus to risk of offending, if that were the basis for this condition. But then they say, actually, we're pivoting, it's for a completely different reason, it's so that he can't mingle with parents. Same condition, it's lost its justification, but the Board says we can be still this intrusive for this different reason, okay.

KÓS J:

Well, I'm not sure it's very different, in fact, but we're going a bit beyond reply here, I think.

MS CASEY KC:

Well, your Honour, this is my reply to the Attorney-General.

KÓS J:

I mean, the point they're making here is, his method of making contact with children was indirect via parents.

MS CASEY KC:

Yes but that, and now I want to come down to the next decision, if I may, and this is where it comes to say, look, the Attorney-General's submissions are – do not reflect the reality of what the Board has done. Because the Board then, in March 2024, doesn't lift the EM condition, because of their view of the

relationship that he has with his current probation officer and that they expect a higher standard of engagement and that was, when you look at the decision, that was the reason why the EM condition was maintained. So in other words, it's not being directed to his compliance with whereabouts, it's not even directed to his relative risk, other than the Board says there's a bit of a risk if you're not getting on well with your probation officer, so we'll leave the EM condition there.

WILLIAMS J:
Well, they're really saying there's a trust issue here, aren't they? Because he didn't – he failed to disclose the situation to a partner of his.

MS CASEY KC:
He disclosed – no, he disclosed every – every element of his conditions were complied with.

WILLIAMS J:
No, no, to –

MS CASEY KC:
Including his disclosure.

WINKELMANN CJ:
He didn't disclose the details of his partner?

WILLIAMS J:
Of his relationship.

MS CASEY KC:
He didn't disclose the details of his – he disclosed the relationship, the probation officer wanted more information and so you're going to get these records, but I'm giving evidence from the Bar.

WILLIAMS J:
Sure.

MS CASEY KC:

He was concerned about his long-distance partner's privacy and said, no, I don't want you to run police checks on my partner. That's where that comes and EM is used as a discipline for that and if you have a de minimis to almost no threshold of risk, you've got a rational connection there. He's not being as co-operative with his probation officer as he should.

WILLIAMS J:

Well, he's hiding something.

MS CASEY KC:

Is he?

WILLIAMS J:

Well, that seems to be what they're saying. "We don't quite trust you yet."

MS CASEY KC:

"We don't quite trust you yet." Six years in, fully compliant, six years in, you're staying under electronic monitoring and this is, as reply, if I may say so, because this is the reality of what the Parole Board is saying we don't want a threshold for, because we want to be able to calibrate all these conditions so that we can maintain this level of control. Now, that could be the statutory framework. The appellant's argument, be in front of you today, is that it isn't. The statutory framework under section 7(2)(a) interpreted in light of the Bill of Rights Act just doesn't allow this.

So this is what the interpretation that the AG and the Parole Board are saying, just leave it to the Parole Board, they know what they're doing, this is how it plays and that's the only reason for going into those. We're not – those decisions aren't under review in front of this court, but they are illustrative of what does that lack of adjective or threshold in section 7(2)(a) result in.

So, coming through to the discussion about the desirability of being able to calibrate the full package when the offender is in the community and this comes,

if I may, between the – this is where we have the nice to have, you know, we could create a regime which says we can do pretty much anything as long as we're calibrating to sort of keep you and the community safe, versus actually the need to justify the intrusive decisions, and my learned friend referred, Ms Griffin referred to, you know, my reference to monitoring in the community, seeing if it is going all right in the first six months. That was right but now we're six years and now the Board is saying "and we're thinking another five years because we're not happy with how you're engaging with your current probation officer". Those are different points. So, yes, it might be nice to be doing everything that you can to absolutely manage risk in the least risk-adverse way but that ignores the fact that rights are at stake.

Your Honour Justice Miller, you asked the question about or you suggested that undue risk might be for the –

MILLER J:
Might attach to the package.

MS CASEY KC:
Attach to the package.

MILLER J:
It seemed to be symmetrical with the idea of release and recall.

MS CASEY KC:
Yes and, and that's absolutely the appellant's position. You have to assess the package but you also have to assess the individual conditions include – and particularly the highly intrusive ones – and section 7(2)(a), which is the proportionality test in the Act, does, uses the same threshold, and so we say, yes, it is the same, there has to be a threshold, you have to assess in the round, and the person, whether the person is undue risk and then when you're assessing the proportionality of the special condition, is it no more onerous, it's the same test.

And that leads me, your Honour, to the question of why is the appellant promoting undue risk when it may be we could be asking for more and better for offenders than this and the reasons are, one, because it's a statutory test that the Parole Board uses as its bread and butter, it is the expert assessment that this whole regime is going to. The second is that it's clearly understood by the Board and by everybody who engages in the parole system. Part of that goes to what my learned friend Ms Priest was talking about, it provides consistency for everybody in the system including the offender who knows what the threshold is. This is where I – how I get out, this is how I get out from under oppressive conditions or intrusive conditions, I've got to keep meeting that threshold.

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Anything else, with respect, is an open invitation to the Parole Board to redefine itself out of any threshold again but I would reserve, if I may, your Honour, that there may be situations including in preventive detention regimes, or where there are a – where a higher and different threshold is needed to meet section 5 of the Bill of Rights Act. We're talking minimum, this is the minimum level that the Parole Board needs to meet, not excluding a possibility that in other cases they may be higher.

Finally, just two last points, if I may. There was talk about, you know, this is a good policy approach for the Parole Board to be able to do this stuff in the community and this comes from both the Parole Board and the Attorney-General. The Law Commission doesn't agree. The Parole Board's policy approach that we should be able to have a very, very broad discretion to jiggle things around in the community isn't reflected in the Law Commission's report, in fact, they take the opposite position. They talk about the absolute focus of ensuring that special conditions are appropriately calibrated and proportional.

If I may, I will just give you the reference to the Law Commission's 2024 report on that which illustrates that. Actually, my learned friend has brought them up. So, paragraph 1.54, this is they talk – the Law Commission is saying, actually,

no, it's not we need special conditions through the Court, given their restrictiveness, it's critical that they have full appeal rights, that they be properly justified, noting also in the middle of this paragraph: “This is also the approach taken in all of the comparable jurisdictions.” And then you’ll get similar commentary which we don’t need to go to at paragraphs 1.69 and 1.70.

Then finally, your Honours, just going to my learned friend for the Parole Board’s paragraph 4 and the discussion just, just earlier was consistent with the safety of the community as, as the third limb. The appellant isn't asking for anything more than consistent with the safety of the community. The appellant is saying that this, what is consistent with the safety of the community asks a threshold test as does the proportionality assessment in my friend’s 4 and that’s where we say the threshold bites to.

KÓS J:

Sorry, are you saying that test and undue risk are the same test?

MS CASEY KC:

Can – what is an acceptable risk for the safety of the community obviously reads as an undue risk.

KÓS J:

Thank you.

MS CASEY KC:

So, your Honours, slightly over. Unless there are any questions, those are the –

WINKELMANN CJ:

And there is no issue of costs involved in this proceeding, is there, because of the legal aid?

MS CASEY KC:

Legal aid.

WINKELMANN CJ:

Yes.

MS CASEY KC:

Although I think Mr Grinder would probably like not to have the legal aid debt, if costs could be awarded in his favour should he be successful. Unless there is any further questions, those are the appellant's submissions.

WINKELMANN CJ:

Thank you, Ms Casey. Well, I thank all counsel for your excellent, excellent submissions and we'll take some time to consider our decision and retire.

COURT ADJOURNS: 4.23 PM