

**BOOK REVIEW: DAVID MATHER *PAROLE IN NEW ZEALAND – LAW AND PRACTICE*  
(THOMSON REUTERS, WELLINGTON, 2016)**

WARREN BROOKBANKS\*

I. GENERAL

Judge David Mather has compiled a valuable account of parole law in New Zealand. This is a first in an area of penal law that has grown in importance in recent years. Judge Mather's interest in this area of criminal practice arose out of his appointment as a member and panel convenor of the New Zealand Parole Board in 2012, and having presided in the summary criminal jurisdiction over the same period. Judge Mather is well-qualified to have written this book, having also a long-held interest in prison and penal reform and having chaired, for five years during the 1990s, a trust providing halfway house accommodation for released prisoners.

This book fills an important gap in legal writing in an area of law which is strongly statute-based but which gives rise to many issues of interpretation and practice.

As the author notes in the introductory chapter, the first Parole Board in New Zealand was not created until 1954, although a statutory Prisons Board had existed since 1910. This Board had limited powers to determine sentence lengths and grant release on probation, but only in respect of offenders serving indefinite sentences. The establishment of the Parole Board in the Criminal Justice Act 1954 signalled the beginning of a new era in parole with a Board chaired by a Supreme Court Judge, with the Secretary of Justice and five other appointed members as the constituent body. It, nevertheless, had a limited recommendatory role, with only the Minister of Justice having the power to order release from prison.

However, these restrictions ceased with the creation of a new Parole Board in the Criminal Justice Act 1985. The new Board had jurisdiction extending to offenders serving life sentences, sentences of seven or more years, and preventive detainees. The 1985 reforms envisaged a Board comprising seven members, chaired by a High Court Judge and sharing a complementary jurisdiction with District Prison Boards which had a jurisdiction to consider parole for offenders serving sentences of less than seven years.

However, the enactment of the Parole Act 2002 led to the abolition of District Prison Boards and the creation of a newly-constituted Parole Board, based on a panel

---

\* Professor of Criminal Law and Justice Studies, AUT University, Auckland

structure to carry out its functions. The book describes the structure and operation of the Parole Board as it currently operates within the stand-alone statutory regime of the 2002 Act.

The second chapter outlines the most recent iteration of the establishment of the Parole Board which, as an independent statutory body, works closely with the Department of Corrections. It briefly describes the procedures and functions of the Board. Appointments are now made by the Governor-General on the recommendation of the Attorney-General. However, unlike in its previous incarnations, the Board no longer sits as a unitary body but as a series of panels of at least three members, chaired by a "panel convenor" or the chair of the Board. Under the Parole Act, the chair of the Board must be either a sitting or former High Court Judge, or a sitting or former District Court Judge. Panel convenors must be either sitting or former District Court Judges, but provision is also made for barristers of seven years standing to serve in that capacity.

## II. ELIGIBILITY

Parole eligibility is the subject of chapter 3. The chapter outlines the difference between determinate and indeterminate sentences, noting that as at 30 June 2015, 546 offenders were serving indeterminate life sentences in New Zealand prisons. Unsurprisingly, the vast number of these (542) were for murder, with one for manslaughter and three for drug offending. Determining eligibility for parole for both offenders serving determinate and indeterminate sentences is governed by particular provisions in the Parole Act and is dependent on a sound working understanding of a number of defined terms, including the "parole eligibility date" (PED), "non-parole period", "notional single sentence", "release date" and others. The chapter also briefly discusses the issue of parole eligibility following subsequent offending and the rules governing compassionate release, for which most applications to the Board are granted.

## III. CONSIDERATION FOR PAROLE

The issue of consideration for parole is the subject of ch 5. As the author notes, consideration for parole is not a question of individual application but a statutory right. The Board is required to consider all eligible offenders as soon as practicable after the PED. As the Courts have observed, prison sentences typically have two components, described as the 'penal' or 'punishment' part and the 'balance of the sentence' part. The penal part is what must be served for the 'just deserts' component of the offending, and until parole eligibility arises. The balance of the sentence part is the period from parole eligibility until the last day of the sentence. This part may still be served depending on whether the Parole Board determines it

would be unsafe or otherwise inappropriate to release the prisoner following completion of the punishment phase.

In “exceptional circumstances” the Parole Board Chair can refer a person for parole consideration where they have not reached their PED. The power of the Board to release following such referral is determined by the requirements of community safety and the interests of justice. Consideration of parole may also be postponed by an order of the Board where the Board is satisfied that the offender will not be suitable for release during the postponement period. The courts have indicated that changes in the offender’s risk profile are most likely to be determinative of release suitability.

The chapter also outlines the requirements for further consideration for parole. An important change in this regard, effective from 2 September 2015, is that the previous “statutory cycle” of 12 months has now been extended to any time over the following two years. Other factors, including the imposition of an additional prison sentence or where an offender is unlawfully at large, may also warrant a delay in parole consideration.

#### IV RELEASE CRITERIA

Chapter 5 examines the criteria for release on parole, the guiding principles for which are set out in ss 7 and 28(2) of the Act. These can be briefly summarised as: the paramountcy of safety of the community; parsimony (detention no longer than is consistent with community safety); information concerning decisions; victims’ rights; availability of support and supervision; and public interest in reintegration.

The issue of “undue risk” has been considered by the courts. This has been held to be a “deliberately elastic test”, insofar as each parole application must be evaluated in light of all factors relevant to the offender’s risk of offending<sup>1</sup>. However, as Judge Mather notes, the risk that the Board is competent to assess, at least in respect of offenders serving a finite sentence, is from the time parole is being considered until the sentence expiry date: “[a]ssessment of the risk of reoffending after the sentence expiry date is not part of the Board’s function.”<sup>2</sup> This is in contrast to risk assessment for offenders serving indeterminate sentences of imprisonment or preventive detention, for whom risk must be assessed in relation to the period for which they are subject to recall, namely, the remainder of their lives.

---

<sup>1</sup> *Edmonds v New Zealand Parole Board* [2015] NZHC 386 at [34].

<sup>2</sup> David Mather *Parole in New Zealand: Law and Practice* (Thomson Reuters, Wellington, 2016) at 25.

V. INFORMATION FOR PAROLE HEARINGS

This is the subject of the sixth chapter. As the author notes, the Board must make its decision on the basis of all relevant information available at the time, which may come from a range of sources, both written and oral. While oral information must “add significantly” to the available written information and be capable of being made available to offenders, it is routinely provided to the Board by offenders, counsel, family members and their supporters. Typically any or all of the following information sources may be available to the Board in making a parole decision: the Offender Detail Record (ODR); Offender’s RoC\*RoI score (risk assessment undertaking by Department of Corrections); judicial sentencing notes; police summary of facts/indictment, pre-sentence reports; full criminal history; and prior Board decisions. In addition, the Corrections Department routinely provides a detailed Parole Assessment Report (PAR) on every offender appearing before the Board, outlining the offender’s progress within the institution and detailing the offender’s release plan. Other relevant reports may include psychological, psychiatric and youth offender reports. Written victim submissions may also be considered in appropriate cases.

VI. RELEASING INFORMATION TO OFFENDERS

The provisions governing the release of information to inmates are fundamental to the parole process. They are considered in ch 7. In particular, under s 13 of the Act the Board is required to “take all reasonable steps” to ensure that information it receives relating to a decision by the Board is made available to the offender at least 5 days before the hearing, or as soon as is practicable before the hearing. The prejudicial effects of delay and fundamental rights to natural justice are implicated in the release of information, because of the need for an offender to be able to consider and respond to information at a hearing. While the Board also has power to withhold information in exceptional circumstances, this is typically in relation to victim submissions containing personal information which the victim wants withheld.

The Act also makes provision for “confidentiality orders” which can forbid disclosure or publication of particular information to anyone other than a Board member in any case where there is a perceived risk of danger to the source of the information or prejudice to the maintenance of the law. The implications of the Privacy Act 1993 and the Official Information Act 1982 are also considered in this chapter.

VI. THE PAROLE HEARING

This is the subject of ch 8. Understandably, the requirements for the provision of material to the Board and notice to affected parties prior to a hearing are quite prescriptive. Clearly, “relevant information” will include all relevant offender information, and available departmental and health professional reports, including, where appropriate, care co-ordinator reports under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (IDCCR Act) and any reports relevant to the Children, Young Persons, and their Families Act 1989. Notice should also be given to the offender, any victim, the prison manager, relevant officials under the Mental Health Act and IDCCR Act and the police.

Hearings may be attended physically or by remote access, with the agreement of the Board. They are to be run as an inquiry and in a manner that maximises free and frank oral presentations. As with hearings under the Mental Health (Compulsory Assessment and Treatment) Act 1992, the Board may regulate its own procedure, subject to relevant regulatory requirements. Typically, Board panels travel to prisons to conduct hearings in a designated room within the prison, although in recent years video-conferencing has become a more common mode of conducting hearings. These usually involve allocating half an hour for inmates serving determinate sentences and three-quarters of an hour for those serving indeterminate sentences. Inmates may, and commonly do, waive attendance at Board hearings, but this does not debar the Board from deliberating in the offender’s absence. Reasons for granting or declining parole are given and the date of the offender’s next appearance before the Board is given.

Offenders may, with the Board’s leave, be represented by counsel at a parole hearing, but can have legal representation as of right for postponement hearings, final recall hearings and in the case of a non-release order being sought. Offenders can have one or more support persons at a hearing, typically family/whanau or other supporters. Such people must be approved by prison authorities in advance of the hearing.

Corrections officers also routinely attend hearings, as may psychiatrists or psychologists who have had significant engagement with an offender. Their input provides useful additional information and clarification or correction of information that may have been provided to the Board. Legislation also makes provision for interpreters, including interpreters for deaf offenders, to be present where required.

The author usefully outlines the procedure for hearings which will be of value for counsel and supporting parties unfamiliar with the Parole Board practice. These include introductions of attending parties, the right to make submissions through

counsel, consideration of the views of victims, panel deliberation and oral communication of the Board's decision. Evidence may be given informally, although the right of the offender to challenge evidence and respond to it may be given by the Board. Hearings can also be adjourned to obtain additional information or to accommodate the unavailability of counsel or significant support people.

While decisions of the Board may be challenged on a judicial review application, this will seldom be successful where the Board has followed its statutory obligations and given a reasoned decision.

#### VIII. ASSESSING RISK

The New Zealand Parole Board has adopted the "Structured Decision-Making" methodology in dealing with parole applications. This approach, discussed in ch 9, involves making a systematic analysis of data from many sources in order to achieve consistency and to avoid biased, idiosyncratic or pretextual decisions. The strong focus, in this regard, is on actuarial data which is considered a more likely means of avoiding or minimising arbitrary decision-making. This may involve the use of reliable and well-validated assessment tools, which assess for different forms of risk. Offenders' scores on such assessments assist, but are not necessarily determinative of decision-making, which may also look to a range of other factors to determine risk. These might include:

- the circumstances of the offending,
- the offence and imprisonment history,
- the current charges,
- the offender's behaviour in prison, and
- the security classification.

Integrative steps taken to prepare offenders for transition back into the community are also considered by the Board, including such measures as approved leave, release to work and pre-release residence arrangements. At the end of the day overall assessment of risk is of paramount importance, in particular whether the defendant poses an undue risk of safety to the community.

#### IX. MENTAL HEALTH AND RELATED ISSUES

Chapter 10 deals with the issue of mental health and intellectual disability which, as Judge Mather notes, pose significant challenges to the criminal justice system. Offenders with significant mental health and intellectual disability histories regularly appear before the Board, which is dependent on the advice and assessments of health assessors, including psychiatrists, psychologists, and specialist assessors. As with risk assessment generally, the Board's principal concern is to determine

whether the offender's intellectual disability or mental illness creates an additional concern regarding undue risk to the safety of the community. This chapter discusses the various statutory measures for assessing insanity and unfitness to stand trial. Although such questions are not a direct concern of the Parole Board, they may be relevant where an offender has been found fit to stand trial following a hearing and ultimately sentenced to imprisonment, but is mentally fragile at the point of parole consideration. The chapter also considers the statutory framework for offenders convicted of a criminal offence but needing treatment in the hospital at the time of sentence and how prisons manage the needs of mentally disordered and intellectually disabled offenders.

#### X. RELEASE AND CONDITIONS

Release and conditions of release is the subject of ch 11. This is obviously an important feature of the parole provisions, and may involve quite complex calculations to determine the appropriate release date. The direction for release on parole may be amended or revoked, by the Board at its discretion, usually dictated by some event occurring between the hearing and the decision to release on parole. The nine standard release conditions automatically apply when an offender is released on parole and, in addition, the Board may specify special release conditions. These are detailed in the chapter. Residential restrictions may also apply, together with GPS monitoring in an appropriate case. A special condition relating to monitoring of compliance with release conditions can be imposed where the 'special circumstances of an offender' dictate that need. The Board is able to monitor compliance for up to 12 months from the date of release, where the offender is released on parole or compassionate release, and for six months from the date of release where the offender is released at the statutory release date. The chapter also considers how variation and discharge of conditions may be effective and what happens where a short-term sentence is imposed on a parolee. The chapter concludes with a discussion of the rules governing release at the statutory release date.

Chapter 12 is a brief discussion of what happens where a non-New Zealand citizen is served with a deportation order prior to parole eligibility date. The issue of extradition from New Zealand for a person charged with certain offences is also briefly discussed here.

#### XI. VICTIMS

In ch 13 there is an account of the Parole Board's obligations regarding victims. These apply only to victims of certain "specified offences", including some sexual offences and serious violence offences. In appropriate cases such victims are entitled

to notice in respect of certain hearings of the Parole Act and inclusion on the Victim Notification Register. The Board must then notify the victim of the offender's impending temporary release, escape from prison detention, death while in prison, convictions or sentences for breaching release conditions, and decisions on appeal quashing final report order. They are also entitled to notice of the sentence end date. As the author notes, the Board is especially mindful of concerns and views of victims and may go to great lengths to ensure that victims are involved appropriately in the parole process.

## XII. PRISON NETWORK AND PROGRAMMES

Chapters 14 and 15 deal respectively with the prison network and programmes in prisons. These provide an outline of location of New Zealand prisons and prison musters as at 31 December 2014. The total of male and female prisoners of 8641 had expanded to 9914 by 31 December 2016, and continues to rise. Chapter 15 provides a useful account of the different specialised rehabilitative programmes available in New Zealand prisons. Eighteen such programmes are available in prisons throughout the country, ranging from adult sex offender treatment programmes to young offender programmes available in Youth Units at two regional prisons.

## XIII. REVIEW AND APPEAL RIGHTS

Chapter 16 outlines the limited review and appeal rights under the Parole Act, which include a right of review of Board decisions and certain rights of appeal to the High Court. In addition, proceedings for judicial review and habeas corpus are available to offenders and are commonly exercised. The chapter outlines the principal cases involving prisoner applications, noting that there have been few successful judicial review applications. While there have been a number of habeas corpus applications involving prisoners since the Parole Act came into force, the courts generally favour judicial review over habeas corpus as a means of challenging parole decisions.

Recall to prison is the subject of ch 17. The power resides with the chief executive of Corrections, a probation officer or the Commissioner of Police. Typically such applications are made by probation officers, with the approval of senior managers. The grounds for recall are outlined, including the procedure for making an interim recall order, and the criteria for making a final recall order. The differentiation between the two types of orders is explained.



#### IV. EXTENDED SUPERVISION ORDERS

The final substantive chapter, ch 18, outlines the law governing extended supervision orders (ESO). This is an important jurisdiction of the Parole Act, which has been amended twice since ESOs were introduced in 2004. Originally targeting offenders who had completed sentences for sexual offences against children, the provisions now extend to both serious sexual and serious violent offences. The conditions of ESOs are outlined. The chapter concludes with a brief discussion of the provision in s 107 of the Parole Act that certain offenders not be released before the “applicable release date”.

#### XV. THE MEDIA

The final chapter, ch 19, briefly outlines the role of media in respect of parole hearings and how the Board deals with official information requests. Generally the Board encourages responsible media coverage of its decision-making, with all Board decisions being available under the Official Information Act 1982.

#### XVI. APPENDICES

The book also includes a number of appendices. Perhaps the most useful of these is Appendix 1, containing a full reproduction of the Parole Act 2002 and Appendix 5 which describes the various risk assessment tools used by Corrections. Other Appendices list prison statistics as at 31 December 2014, the New Zealand Prison Network, a Glossary of Abbreviations, Security Classification Placement Summary and resources dealing with the Parole process in New Zealand.

#### XVII. IN SUMMARY

This book provides an excellent summary of the main elements of parole in New Zealand. It is well laid out and provides a clear and systematic account of the Parole Board and its operation. It will be of value to students studying criminal justice, lawyers dealing with prisoners as clients, community corrections and corrections staff, and judicial officers wishing to familiarise themselves with the parole process in New Zealand. It will provide a useful supplement to more comprehensive accounts of the Parole Act like *Adams on Criminal Law – Sentencing*. It is a welcome addition to the available resources dealing with the New Zealand criminal justice system.