IN THE COURT OF APPEAL OF NEW ZEALAND

CA463/2013
[2014] NZCA 544

BETWEEN	ALLEN LOUIS HARRIMAN Appellant
AND	ATTORNEY-GENERAL First Respondent
	NEW ZEALAND PAROLE BOARD Second Respondent

Hearing:	29 July 2014
Court:	O'Regan P, Lang and Clifford JJ
Counsel:	Appellant in person C A Griffin and L M Inverarity for First Respondent K L Clark QC and V J Owen for Second Respondent
Judgment:	12 November 2014 at 12 pm

JUDGMENT OF THE COURT

A **The appeal is dismissed.**

B **The appellant must pay the respondents costs of $11,760, being the amount of security for costs held by the Registrar of the Court. That amount is to be divided evenly between the respondents unless they agree otherwise.**

REASONS OF THE COURT

(Given by O'Regan P)

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Introduction

[1] The appellant, Mr Harriman, is a serving prisoner. He appeals against a decision of Goddard J in which she dismissed his application for judicial review of certain actions by the first respondent, the Department of Corrections (the Department)[1] and the second respondent, the New Zealand Parole Board (the Board) arising from the disposition of his application for parole on 17 January 2012.[2] Other aspects of Mr Harriman's claims against the Department and the Board, including claims for damages for misfeasance in public office and breach of statutory duty and for compensation for breaches of the New Zealand Bill of Rights Act 1990 (Bill of Rights), have been severed from the judicial review claims and will be dealt with later.[3]

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1 The Attorney-General is sued in respect of the Department.
2 *Harriman v Attorney-General* [2013] NZHC 1516 [High Court decision].
3 *Harriman v Attorney-General* [2012] NZHC 2148.

Issues

[2] Goddard J distilled Mr Harriman's judicial review claims into three essential issues, which she defined as follows:[4]

> (a) the Department caused his first parole hearing to miscarry, by providing inaccurate and incomplete information to the Board;
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> (b) the Board's decision was unlawful, unreasonable and procedurally unfair, because the Board failed to properly determine his application for an unattended hearing and went on to make erroneous findings in its decision; and
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> (c) as a result his detention is now arbitrary and unlawful, in breach of [the Bill of Rights] and [the International Covenant on Civil and Political Rights].

[3] Goddard J found that none of the claims was made out, but she accepted that there was substance in some of the complaints raised by Mr Harriman about the way the process leading up to the Board's hearing of his application for parole had been managed. She declined to grant any relief.

[4] In this Court, Mr Harriman renewed the arguments he raised in the hearing before Goddard J. He listed a significant number of issues which he said arose from the High Court decision, but we consider that the matters at issue in the present appeal can best be dealt with by addressing the following issues:

> (a) Did the Department cause the 17 January 2012 parole hearing to miscarry by providing inaccurate or incomplete information to the Board?
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> (b) Was the Board's policy in relation to attended hearings lawful?
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> (c) Was the 17 January 2012 hearing tainted by unlawfulness or unfairness?
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> (d) What is the impact of subsequent developments?

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4 High Court decision, above n 2, at [3].

(e) Is Mr Harriman subject to arbitrary detention?

[5] In the event that any aspect of the appellant's case succeeds, the respondents argue that no relief should be granted because the 17 January 2012 decision has now been overtaken by events. Goddard J agreed, but Mr Harriman argues that she was in error in doing so.

[6] Before we turn to these issues, we set out the factual background. There was some dispute about matters of detail but we will set out the facts only to the level of specificity needed to address the issues that we are required to resolve.

Facts

[7] Mr Harriman is serving a sentence of 12 years' imprisonment (with a minimum period of imprisonment of six and a half years) for drug offences. He was sentenced in February 2007 and first became eligible for parole on 23 January 2012.

[8] Mr Harriman does not have a cordial relationship with the Department and appears to have a great deal of suspicion about both the Department and its employees.

[9] In preparation for the consideration of the possibility of parole, the Board sent Mr Harriman a letter on 1 September 2011, informing him that there would be a parole hearing on or about 16 January 2012. We will call this the 1 September letter. Enclosed with the 1 September letter was a booklet entitled "Your Hearing", explaining the parole hearing process.

[10] An officer of the Department who was a case manager within the Rehabilitation and Reintegration Services (RRS),[5] Ms Carrick, began preparation of a Parole Assessment Report (PAR). The PAR is a comprehensive plan intended to address issues relating to the safety of the community into which the offender may be released. An important aspect of the plan is the address at which the offender will reside if released and the other occupants of that address. This is an important requirement for the Board because it must not release an offender on parole unless it

[5] Now known as Rehabilitation and Employment.

is satisfied that the offender will not pose an undue risk to the safety of the community.[6]

[11] Ms Carrick obtained material from the Department's file and then, as part of the process of preparing the PAR, arranged an interview with Mr Harriman on 12 October 2011. As she was not an experienced case officer, she was accompanied at this interview by a principal case manager, Marc Staps. Ms Carrick and Mr Staps met with Mr Harriman, but he said he did not wish to participate in the interview and left very soon after arriving.[7] Mr Harriman was told the PAR would be completed without his input if he was not prepared to communicate with the relevant officers of the Department. Mr Harriman made complaints about the interview, protesting that he did not wish to participate in a "training exercise". His attitude to the proposed interview and the fact that he complained later illustrates the level of dysfunctionality in the relationship between him and the Department, which has dogged the efforts to have his parole situation resolved.[8]

[12] Mr Harriman said that the reason he refused to engage with the interview is that all of the information necessary for the parole hearing was held on the Department's files. He said that he told Ms Carrick and Mr Staps that his proposed post-release residential address would be provided directly to the Board in his written submissions. Ms Carrick did not recall him saying that.

[13] Ms Carrick then wrote a letter to Mr Harriman on 18 October 2011, explaining the parole process and asking him to reconsider his refusal to engage with an interview. He was asked to confirm whether he wished to proceed with an interview or not. He responded that he did not propose to enter into correspondence until his complaint was resolved.

[14] Mr Harriman sent written submissions to the Board on 9 December 2011. He said in the submission that he did not have an employment position but anticipated

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6 Parole Act 2002, s 28(2).

7 Mr Harriman said when he was summoned to the interview he was not told the names of the officers he was about to meet and they did not introduce themselves to him. The Judge made no finding on this and given that the interview was aborted, nothing turns on this.

8 There were two complaints. Goddard J found they were adequately responded to: High Court decision, above n 2, at [24]–[26].

that Work and Income New Zealand would assist him to find one. He stated that he had a residential address which he set out, along with a contact person and phone number. He requested an "unattended hearing" as provided for in s 48 of the Parole Act 2002. His reason for this was that "significant efficiencies are to be gained by holding an unattended hearing and that the matter be restricted to written submissions in the interests of greater accuracy and accountability". He concluded the submission with an invitation for members of the Board to raise questions in writing in clarification of any matters raised in the submission.

[15] The course of action pursued by Mr Harriman meant that he had notified the Board in his submissions of the release address, but this had not been the subject of any verification by the Department, which is seen by the Board as an essential step. In effect, Mr Harriman was seeking to deal directly with the Board and to avoid any interaction with the Department. Ms Carrick had, on 12 October 2011, presented Mr Harriman with a consent form authorising the Department to contact named persons. The purpose of this was stated on the form to be "to ensure that my [PAR] is completed as accurately and effectively as possible". Mr Harriman refused to sign it.[9] He told us he would have been prepared to have inquiries made by the Board but not the Department, but that is not the way the process works. Mr Harriman said his signing of the written submissions he sent to the Board was effectively an authorisation for the Board to make inquiries about his proposed post-release address. But not for the Department to do so.

[16] The PAR was completed on 23 November 2011. It was received by the Board on 30 November 2011. It was signed by Mr Staps as representative of the Department. Provision is made in PARs for the offender to sign. The PAR in this case was not signed by Mr Harriman but marked "Refused to participate in sign off". It did not contain any confirmation of the availability or appropriateness of the release address provided by Mr Harriman in his submissions. Rather, it said Mr Harriman had not proposed accommodation for release. It noted he needed accommodation approved by the Department and recommended he be referred to the

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[9] Mr Harriman told us that one of the reasons he did not sign the consent form was because the occupier of the address he proposed as a post-release residence had not, at the time, confirmed its availability. But he made it clear his continued refusal to consent was because he did not want the Department to make any inquiries about the proposed residence.

Reintegration Team for assistance. It noted that Mr Harriman did not have any proposed post-release employment arrangement.

[17] There was debate about when the Department received a copy of Mr Harriman's submission to the Board. The Department's position was that it received it after it was submitted to the Board, which was well after the PAR had been completed. Mr Harriman said that he had supplied a handwritten version of the submission to the Department two or three weeks before 9 December but this was not stated in any of his affidavits in this proceeding so there was no evidence that had occurred. The Department's position was that this information was not on its file for Mr Harriman at the time it would have been required to allow for details to be included in the PAR report and for the necessary checks to be made. We accept that was the case. Even if Mr Harriman's version of events were correct, that would still mean his comment to Ms Carrick and Mr Staps on 12 October that all relevant information was on file was factually incorrect. And even if the Department received the handwritten submission by, say, 18 November, as Mr Harriman claims, the PAR would have been substantially completed by then. There was nothing to alert Ms Carrick to the need to rewrite it in light of recently received information.

[18] As Goddard J noted, the absence of a report from the Department verifying public safety assurances and confirming the appropriateness of standard and special release conditions was a significant deficiency in the material before the Board.[10] This was because the Department is required to provide a report to the Board on such matters under s 43(1)(c) of the Parole Act.

[19] As noted earlier the position taken by Mr Harriman in his submission to the Board was that he wanted an unattended hearing. How the Board dealt with that is a matter of contention to which we will return later. For the purposes of this factual narrative, we simply outline what happened when the Board came to deal with Mr Harriman's application.

[20] On 13 December 2011, an officer of the Department had attended Mr Harriman in his cell and asked him to sign a waiver of attendance at the parole

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[10] High Court decision, above n 2, at [32].

hearing. This was a process adopted by the Board in situations where there was an attended hearing but the prisoner chose not to attend. Mr Harriman explained to the prison officer that he had asked for an unattended hearing under s 48 of the Parole Act and accordingly Mr Harriman refused to sign the waiver form. The prison officer noted on the form "Sect 48 Parole Act submission for unattended hearing 13 Dec 2011" and then signed the form.[11]

[21] This led to a degree of confusion on the day of the hearing. Board members were concerned about the lack of clarity in the position of the waiver and asked the Principal Corrections Officer, who was present at the hearing, to contact Mr Harriman and to clarify his position and offer him the opportunity to appear at the hearing. The Principal Corrections Officer contacted Mr Harriman by telephone. Mr Harriman informed him that he had not signed the waiver form and that his submissions were clear in seeking an unattended hearing under s 48.

[22] The Board then went ahead with the hearing and refused parole. The material aspect of the Board decision is the following paragraph:

> 3. The unusual aspect about this case is that Mr Harriman has made application to have an unattended hearing and, in line with that, has presented written submissions to us in support [of] his release on parole. Subsequent to filing that application, he has signed a waiver and further inquiries today indicate that he does not wish to appear before the Board. The difficulty from the Board's perspective is that Mr Harriman was not prepared to participate in the interview process for the preparation of the [PAR] or indeed provide any details of any release proposal. He also does not have any accommodation proposal and certainly there is no approved accommodation for him.

[23] The concluding paragraph of the decision said:

> 5. Taking all those matters into account, we do not in fact have a viable release proposal to consider and in light of that parole is declined. We must view Mr Harriman as being an undue risk to the safety of the community. If Mr Harriman wishes to be released on parole, then at the very least he needs to participate in the parole process. That would start with participating in the preparation of any [PAR] and formulating a release proposal.

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[11] Mr Harriman made a complaint about the prison officer signing the waiver form.

[24] Mr Harriman applied for a review of the Board's decision under s 67 of the Parole Act. The review was conducted by Judge Mahony.[12] He upheld aspects of Mr Harriman's application but concluded that the Board had adopted an approach that was compliant with s 28 of the Parole Act and its decision was lawful. He dismissed the application for review. Mr Harriman then commenced the present proceedings.

[25] Having filed the present proceedings, Mr Harriman also applied to the Board for an early parole hearing and was granted an early hearing by a decision of the Board dated 6 June 2012. It was necessary for a further PAR to be prepared for the purposes of the new hearing. Ms Carrick was again responsible for preparing this. She completed the PAR on 27 June 2012.

[26] Goddard J recorded that Mr Harriman had apparently attempted to withdraw from the early parole hearing after it had been set down, but it proceeded without him in attendance and parole was once again declined. The Board's decision included the following observation:

> The latest [PAR] tells us that Mr Harriman has again declined to participate in the parole assessment process. It means there has been no ability to verify his release proposal. In the Board's view nothing has changed since his appearance on 17 January 2012. In effect there is no viable release proposal for the Board to consider. On that basis Mr Harriman must be treated as still posing an undue risk to the safety of the community and parole is declined.

[27] Mr Harriman did not seek a s 67 review of this decision, nor did he seek judicial review.

[28] Counsel for the Board, Ms Clark QC, sought to adduce evidence of further parole decisions on 17 July 2013 and 11 June 2014 (after the decision of the High Court to which the present appeal relates). Mr Harriman objected to this. We did not consider it necessary to consider this information for the purposes of dealing with the present appeal. We were already aware that the parole process provides for regular assessments and Mr Harriman made it clear in his submissions in support of the present appeal that he had "abstained from any subsequent hearings until the judicial determination of the present matter is finalised".

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[12] Review decision of Judge P D Mahony, 13 March 2012 [Review decision].

[29] We now turn to the issues highlighted above at [4].

Did the Department cause the parole hearing to miscarry?

[30] In his submissions in this Court, Mr Harriman set out a long list of complaints about the way in which the Department had dealt with the preparations for the January 2012 parole hearing. There were 13 identified "dysfunctions". Many of these are trivial in nature and do not have any real bearing on the parole process. For example, Mr Harriman says that the Department officers who undertook the aborted PAR interview did not identify themselves or register their visit at the prison, that there was an error in the reference to the length of his sentence and that his complaints about the interview were not properly dealt with.

[31] Mr Harriman also argued that the Department had breached s 5(1)(d) of the Corrections Act 2004 because it had not provided information to the Board to assist its decision making. Section 5(1)(d) is a statement of one of the purposes of the "corrections system". The Chief Executive of the Department has a statutory function under s 8 of the Corrections Act to ensure the corrections system operates in accordance with the purposes set out in s 5 and the principles set out in s 6. However, the requirement for the Department to report to the Board is set out in s 43(1)(c) of the Parole Act and it is therefore the Parole Act which governs the PAR. Mr Harriman said the Department also breached s 6(1)(f)(ii) of the Corrections Act, which provides that one of the principles that guide the operation of the corrections system is that the corrections system must ensure fair treatment by ensuring decisions are taken in a fair and reasonable way and that access is provided to an effective complaints procedure. We do not see that provision as relating to decisions of the Board: rather it relates to decisions of the Department. It does not provide that the Department is responsible for decisions of the Board, which is independent of the Department.

[32] The key complaint about the PAR is about the failure to include details of the proposed residential address and employment arrangements. We find Mr Harriman's submissions on this aspect of the case puzzling. If he wanted to ensure that the Board had the necessary information to consider his application for release on

parole, he simply had to provide the information to the Department officers so that they could undertake the necessary investigations and assessment and include the information in the PAR. His refusal to engage with the Department officers prevented that happening. His answer to that was: "The information was on file". But until he completed his submission to the Board, it was not on file. And, if it was, it is hard to see what harm there could be in disclosing the information to the officers responsible for ensuring that it is presented in a useable way to the Board.

[33] Judicial review relates to the exercise of a statutory power of decision and the claim against the Department needs to be assessed in light of the reality that parole decisions are made by the Board, not the Department. We agree with counsel for the Department, Ms Griffin, that judicial review proceedings are not a mechanism for a general inquiry into the actions of the Department in preparing a PAR (and, less still, the conduct of the Department generally). The focus of the judicial review proceeding must be the exercise by the Board of its statutory power of decision in relation to Mr Harriman's parole application. So the issue in relation to the Department is whether any act or omission by it or its officers led the Board to make a reviewable error in its parole decision.

[34] Mr Harriman sought, in his claim against the Board, an order quashing the 17 January 2012 decision. In relation to the Department, he sought a mandatory order requiring the Department to provide to the Board the information relating to his proposed post-release address held on file and as outlined in his submission to the Board and its assessment of the suitability of that address.

[35] Mr Harriman's submissions in relation to the PAR focus on the fact that he did not want to participate in the interview process and thought it was unnecessary because the relevant information was already on the Department's file.

[36] In her submissions to this Court, Ms Griffin explained the Department's perspective on this as follows:

> The problem at the core of the appellant's claims involving the Department is the Department needs to know a prisoner's release proposal – where he is going to live, where he is going to work, etc – not just to record it in the completed PAR, but also to investigate its viability. Had the appellant

> provided his release address to Ms Carrick, she would have sent this address to Community Probation Services (CPS) for them to confirm its availability and to assess its appropriateness. To do this, CPS need to contact third parties, such as the owners or occupiers of any residential address. As the disclosure of private information is almost inevitable, the Department insists on prisoner's signed consent before such contact is made, to protect its officers and the relevant prisoner.

[37] The importance of the PAR to the parole process is demonstrated by reference to a number of the provisions of the Parole Act. In her judgment, Goddard J highlighted the following:[13]

(a) Section 7(1) which provides, as a guiding principle for the Board, "the paramount consideration for the Board in every case is the safety of the community".

(b) Section 7(2)(c) which requires that decisions be made by the Board on the basis of all relevant information that is available to it at the time.

(c) Section 14, which sets out the conditions that must be complied with by an offender after his or her release, if the release is made subject to the standard release conditions. These conditions include specific provisions relating to the residential address of the offender including a requirement that the offender must not reside at any address at which the probation officer has directed him or her not to reside,[14] that the offender must give the probation officer reasonable notice before moving to a new address within the same probation area,[15] and the offender must not move to a new residential address in another probation area without the prior written consent of a probation officer.[16] Other release conditions relate to the offender's employment or occupation,[17] and who the offender associates with.[18] Another important condition is the requirement that the offender take

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13 High Court decision, above n 2, at [10]–[16].
14 Subsection (1)(f).
15 Subsection (1)(e).
16 Subsection (1)(c).
17 Subsection (1)(g).
18 Subsection (1)(h).

part in a rehabilitative and reintegrative needs assessment if and when directed to do so by the probation officer.[19]

(d) In addition to the standard release conditions, s 15 provides for special conditions that may be imposed by the Board. Such conditions can include conditions relating to the offender's place of residence which may include a condition that the offender reside at a particular place and, generally, residential restrictions.[20]

(e) If residential restrictions are imposed under s 15(3)(ab), s 33 applies. Section 33(2) provides:

> An offender on whom residential restrictions are imposed is required—
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> (a) to stay at a specified residence:
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> (b) to be under the supervision of a probation officer and to cooperate with, and comply with any lawful direction given by, that probation officer:
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> (c) to be at the residence—
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> (i) at times specified by the Board; or
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> (ii) at all times:
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> (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions:
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> (e) to keep in his or her possession the licence issued under s 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.[21]

(f) Section 34, which provides that before the Board imposes residential restrictions, it must request and consider a report from the Chief Executive of the Department on the suitability of residential restrictions. This report must deal with matters such as the likelihood that the residential restrictions will prevent further offending and the

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19 Subsection (1)(i).
20 Section 15(3)(a) and (ab).
21 Section 53(3) provides that an offender released from prison must be issued with a licence which sets out details of any release conditions and, in particular, residential restrictions.

likelihood that the offender's rehabilitation and reintegration will be assisted by residential restrictions, as well as the suitability of the proposed residence, including the safety and welfare of the occupants of that residence where the offender is to reside.

(g) Section 35, which provides that the Board may impose residential restrictions only if it is satisfied on reasonable grounds that the residence in which the offender proposes to reside is suitable and that the relevant occupants understand the residential restrictions, consent to the offender residing at the residence in accordance with those conditions and have been informed of the right to withdraw consent at any time.

[38] We agree with Goddard J that these provisions emphasise the significance of the PAR and, in particular, the need for investigation of the proposed residential arrangements for the offender after release. The Board requires more than a notification from the offender of the proposed address.

[39] Mr Harriman did, of course, provide the address to the Board itself, and although he says he provided a handwritten copy of his submissions to Department officers, that did not occur in time for the necessary checking to take place (and, of course, there is the dispute as to whether it happened at all). We agree with Goddard J that it is not sufficient for a prisoner to simply provide an address direct to the Board without providing that address to RRS for checking as part of the prisoner's PAR.[22] In effect he deprived the Board of the information it required to assess properly his application for release on parole. He simply put the Board in the position where it did not have basic information that it required before it could allow the application. He has no one to blame but himself for that situation.

[40] This was compounded by his unwillingness to have an attended hearing and to actually attend it. If he had done so, he could, for example, have asked the Board to adjourn the hearing so his proposed post-release address could be checked.

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[22] At [69].

[41] We conclude that Goddard J was correct to find that the Department did not cause the parole hearing on 17 January 2012 to miscarry.

[42] In this Court, Mr Harriman argued that there is provision for additional information to be brought before the Board after the conclusion of a PAR on a "NZPB briefing sheet". He did not provide any detail of this, and there does not seem to be any indication that he asked for that to occur at the time.

[43] Much of the submission made by Mr Harriman in relation to this aspect of the appeal strayed into criticisms of the Board, which we will address later. In relation to the Department, the only other aspect which we need to address specifically is the complaint that a Department officer put before the Board a waiver form which had not been signed by Mr Harriman. We do not see any impropriety or error on the part of the Department in relation to the waiver form. The Department did not claim to the Board that the waiver form had been signed by Mr Harriman and it correctly recorded that Mr Harriman had asked for an unattended hearing, so that a form asking him to waive appearance at an attended hearing was inappropriate. We agree that there were problems with the way in which the Board dealt with the request for an unattended hearing but we do not consider that there was any impropriety or illegality in the actions of the Department in relation to the waiver form.

Was the Board's policy in relation to attended hearings lawful?

Mr Harriman's submission

[44] Mr Harriman's essential complaint is that the Board did not address his request for an unattended hearing and this meant that it proceeded with an attended hearing which, he says, deprived the Board of jurisdiction. He seeks a ruling that the attended hearing was unlawful and a direction that the process be recommenced.

[45] The Chair of the Board issued a policy direction in October 2011 as follows:[23]

> All hearings of the Board to consider the release of an offender on parole or to set release conditions shall be by way of attended hearing unless the Panel Convenor decides in a particular case that it is to be an unattended hearing.

[46] The policy was reflected in the wording of the Board's "Your Hearing" booklet provided to Mr Harriman with the 1 September letter.[24] It explained the types of hearing (attended and unattended) then stated:

> It is the Board's current policy to schedule all hearings as "attended". However you can still make submissions to the Board on whether the hearing should be "unattended" if you wish.

[47] Mr Harriman argued that this policy is contrary to the statutory scheme, which requires that a decision as to whether a particular application for release on parole should be dealt with at an attended hearing or an unattended hearing be made on a case by case basis. He argued that the policy was effectively an unlawful suspension of this requirement.

[48] Mr Harriman argued that the analysis of Judge Mahony was sound and should be upheld by this Court. While s 109(2) of the Parole Act gives the Board the function of developing "policies on how to discharge its functions" any such policies had to be in conformity with the statutory scheme. He noted that the requirement in s 45(1) of the Parole Act that the Panel Convenor can determine in each case whether a hearing will be an unattended hearing or an attended hearing was repeated in s 114(3)(a) of the Parole Act, which referred to one of the functions of the Panel Convenor being the function of deciding whether to hold attended or unattended hearings for any decision relating to release conditions or parole. He argued that the Board policy was ultra vires and that the exercise of the jurisdiction by the Board in the hearings that had taken place since the implementation of the policy had been vitiated.

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23 Section 109(2)(a) of the Parole Act provides that the functions of the Board include developing policies on how to discharge its functions under s 109, which in turn include the functions of considering and resolving applications by offenders to be released on parole (s 109(1)(a)).

24 Above at [9].

[49] Mr Harriman's position was upheld by Judge Mahony in his review of the Board's decision of January 2012. Judge Mahony said that the function of a Panel Convenor to determine whether a hearing be attended or unattended "is not a function which is amenable to a general policy or universal practice adopted by the Board".[25]

High Court decision

[50] Goddard J said the issue was whether the policy amounted to a fetter on the exercise of the Board's discretion in the discharge of its mandatory responsibilities under s 45 of the Parole Act (under which the Panel Convenor is required to decide whether a particular hearing will be an unattended hearing or an attended hearing).[26] She saw the critical issue as being whether the policy, as formulated, left room for individual discretion.[27] She considered it understandable in the interests of expedition and efficiency that a policy should be formulated given that the Board was required to hear about 5,000 cases a year. She also noted that the presumption in favour of an attended hearing emphasised the rights of the offender under s 27 of the Bill of Rights.[28]

[51] Goddard J was satisfied that the policy as formulated did leave room for the exercise of individual discretion, because of the rider to the policy that it would be an attended hearing in every case "unless the Panel Convenor decides in a particular case that it is to be an unattended hearing".[29] She was persuaded that the Board had not shut its ears unduly and had preserved an appropriate residual discretion to itself.[30]

Statutory scheme

[52] In order to evaluate Mr Harriman's submissions on the policy point, and also on the issue relating to his own application, we need to consider in some detail the statutory scheme.

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25 Review decision, above n 12, at [25].
26 High Court decision, above n 2, at [79].
27 At [82].
28 At [83].
29 At [84].
30 At [84].

[53] The procedures for hearings of the Board in relation to offenders being considered for parole are set out in ss 43–50 of the Parole Act.

[54] Section 43(1)(c) requires the Department to provide the Board with a report about the offender. There are no specific requirements as to the contents of this report, but given the matters which will need to be considered by the Board, in particular the standard conditions and the appropriateness of any special conditions, the report will obviously need to deal with issues such as the proposed residence of the offender, the need for residential restrictions, the proposed employment arrangements and so on.

[55] The Board is required under s 43(2) to notify the offender, victims and other interested parties that a hearing is pending. Any person who receives that notice (including the offender), may make submissions on the substantive matter to be decided and also "whether the hearing should be an unattended hearing or an attended hearing".[31]

[56] Section 44 requires the Department to provide information to a victim of the offending if requested.

[57] Section 45(1) provides:[32]

> The Panel Convenor who is allocated to conduct a particular hearing must decide whether that hearing will be an unattended hearing under section 48 or an attended hearing under section 49.

[58] The decision as to whether the hearing will be an unattended hearing or an attended hearing may not be made until after the Board has received the information referred to in s 43(1) from the Department and the date for making submissions under s 43(5) has passed.[33]

[59] It is clear that the decision as to whether a hearing will be an attended hearing or an unattended hearing is not simply a matter of choice for the offender. Rather, it is a matter to be determined by the Panel Convenor once the Board has before it the

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31 Section 43(5)(b).
32 Section 45(1) is repeated in s 114(3)(a).
33 Section 45(2).

background information it will require to deal with the application for parole and also knows whether any victim or other interested party wishes to participate in the hearing.

[60] There is no right to an unattended hearing, and the statutory scheme is geared towards ensuring that in most cases attended hearings are conducted. Sections 45(3) and (4) set out the criteria for determining whether a hearing will be an attended hearing or an unattended hearing.

[61] Section 45(3) allows the Panel Convenor to determine that a hearing will be an unattended hearing if he or she:

> … believes on reasonable grounds that the Board is able to make a proper decision on the basis of the information available to the Board, without the need for any person other than Board members to attend the hearing …

[62] The factors set out in s 45(4) include:

(a) Whether there are significant efficiencies to be gained by having one type of hearing rather than the other.[34]

(b) Whether the written submissions indicate that there are matters that warrant consideration at an attended hearing.[35]

[63] Mr Harriman emphasised in particular the reference to "significant efficiencies". He argued that such efficiencies would have been gained in the present case by the holding of an unattended hearing. However, it is clear that in this case there were matters in dispute because the PAR had not dealt with the essential elements of the issues before the Board, including residence and employment, and in Mr Harriman's absence these would not be able to be resolved.

[64] Section 45(5) requires that the decision on the type of hearing must be notified to the offender and any victim, among others.

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[34] Paragraph (c).
[35] Paragraph (d).

[65] Section 46 provides that an offender may seek a review of a decision to hold an unattended hearing. This must be carried out as soon as possible by a Panel Convenor other than the one who made the decision to hold an unattended hearing. It is notable that there is no equivalent entitlement to seek a review of a decision to have an attended hearing. This seems to confirm the position that an attended hearing is considered to be the type of hearing that best safeguards the interests of the offender and ensures fairness in the process, with an unattended hearing being permitted only where the issues are so confined that the greater safeguards inherent in an attended hearing are not necessary.

[66] Similarly, s 45(6) allows for a Panel Convenor to reconsider either before or during the unattended hearing that the hearing ought to be an attended hearing. There is no equivalent process to allow the converse to occur.

[67] Section 47 provides further confirmation that the attended hearing is the option seen by the legislature as best suited to provide for the rights of the offender. It provides that an offender whose application is to be considered at an unattended hearing be given an opportunity to be interviewed by a member of the Panel before the hearing. This same right is afforded to victims with the leave of the Board under s 50A. This appears to be designed to ensure that the unattended hearing does not unduly erode procedural fairness for the offender.

[68] Section 48 provides that the only people who may be present at an unattended hearing are the Board members, staff servicing the Board and "any other person whom the Board agrees in writing to allow to be present". Notably, the offender has no right to be present. This can be contrasted with s 49, dealing with attended hearings, where the offender is entitled to appear, make oral submissions, attend while others are making submissions (subject to some limitations to protect victims), be represented by counsel (with the Board's leave) and be accompanied by a support person.

Board's submission

[69] Ms Clark argued that the High Court Judge had correctly characterised the policy as leaving room for the exercise of individual discretion, and therefore was

not contrary to the statutory scheme. She relied on the following statement of the law in this Court's decision in *Criminal Bar Assoc of New Zealand Inc v Attorney-General*:[36]

> When a statute confers a discretion on a particular person, it cannot be altered by means other than a statutory amendment. The adoption of policy guidance might be administratively convenient for a decision maker, and can advance rule of law values such as consistency and certainty in decision making. However, a policy which guides the exercise of a discretion will inevitably fetter that discretion to some extent. If that policy guidance crosses the line between legally acceptable limits on the exercise of discretion and those which are not legally acceptable, it "fetters" the discretion and is unlawful.

Our analysis

[70] We see the present case as being in a different category from the situation in issue in *Criminal Bar Assoc of New Zealand Inc*. In the present case the problem is not that the decision maker is directed to exercise a discretion in a particular way by following a predetermined policy, but rather that adherence to the policy would mean that procedural steps which are required to be followed in each case are bypassed.

[71] As our summary of the statutory scheme illustrates, the Parole Act contemplates that the Panel Convenor will make a decision in every case as to whether a hearing is to be attended or unattended. We do not think that this step can be bypassed in particular cases, on the basis that a decision will be made only when an exception from the policy is seen to be necessary. We agree with the assessment of Judge Mahony in his review decision that the function of the Panel Convenor under s 45(1) is not a function which is amenable to a general policy or universal practice adopted by the Board, for example under s 109(2)(a). The Board's policy incorrectly indicated to Panel Conveners that in most circumstances a decision on hearing type was unnecessary and it was therefore unlawful.

[72] Accordingly, we conclude that, if the Panel Convenors of Board hearings bypass the requirement for a decision to be made about an attended or unattended hearing under ss 45(1) and 114(3)(a), then there will be a failure to follow the statutory requirement. On the other hand, if Panel Convenors do make a decision in

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[36] *Criminal Bar Assoc of New Zealand Inc v Attorney-General* [2013] NZCA 176, [2013] NZAR 1409 at [118].

each case as to whether there should be an attended or unattended hearing, we would not be concerned if they followed the Board's policy of favouring attended hearings, as long as they addressed their mind to the issue in each case. We agree with Goddard J and Ms Clark that the rider to the policy means it does not override the discretion to hold an unattended hearing if that is considered appropriate and in accordance with the Parole Act.

[73] Having said that, however, we agree with Goddard J that the policy of having an attended hearing as a default option was one which in most cases would be either neutral or advantageous for the offender, because it ensured that the process to be adopted had the higher level of natural justice requirements than the process for an unattended hearing. We see the failure to make a decision about an unattended hearing as therefore of only technical significance. We do not see it as depriving the Board of jurisdiction when embarking on an attended hearing.

[74] As we mentioned earlier, the adoption of the policy occurred only three months before Mr Harriman's parole hearing. The difficulties in following the policy were clearly set out in the review decision of Judge Mahony, which was dated 13 March 2012, that is only five months after the adoption of the policy. We do not know how Panel Convenors deal with other cases. But even if they do not make decisions about the nature of the hearing in advance of the hearing, the convening of the hearing on an attended basis would, in effect, be such a decision albeit made much later than the Act anticipates. And because an attended hearing makes greater provision for natural justice than an unattended hearing, it is very unlikely that the somewhat counter-intuitive stance taken by Mr Harriman would have arisen in other cases. In these circumstances we do not think that we need do more than state our finding on the argument put to us by Mr Harriman about the policy. Mr Harriman sought a declaration but we do not see it as necessary to formalise our finding in that way. The more important point in the context of the present case is the impact, if any, on Mr Harriman's application: whether any decision about the nature of the hearing was made and, if not, what consequences ensue. We now turn to that issue.

Was the January 2012 hearing tainted by unlawfulness or unfairness?

[75] Although Goddard J found that the policy of having attended hearings apart from exceptional cases was lawful, she found that there had been a failure to make a decision under s 45(1) in Mr Harriman's case as to whether the hearing should be an attended hearing or an unattended hearing. We agree that there was such a failure in this case, although in our case that is because we see the policy itself as unlawful and the implication of it in the present case as leading to a failure to carry out a procedural step required by the Parole Act.

Was the hearing an unattended hearing?

[76] However, Goddard J appeared to accept a submission from the Board's then counsel to the effect that the hearing on 17 January 2012 did end up being an unattended hearing, so that in effect Mr Harriman had got what he wanted. She referred to an argument made on behalf of the Board that the hearing was changed to an unattended hearing on the basis of Mr Harriman's particular circumstances once the Board was aware of them, so what was scheduled as an attended hearing became an unattended hearing.[37]

[77] The Judge described this as "the very late application of the policy" and said that the decision should have been made much earlier.[38] However, she saw the matter as moot because of the introduction to Parliament of the amending Bill removing the distinction between attended and unattended hearings.[39] Goddard J said this meant it was futile to grant relief to Mr Harriman beyond that already achieved in Judge Mahony's decision in the review of the Board's decision.[40]

[78] Mr Harriman argued that the omission of the Panel Convenor to make a decision as to whether the hearing was an unattended hearing or an attended hearing disadvantaged him. He said that the Board's decision should be set aside so that the process can be undertaken again in accordance with the statutory scheme.

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37 High Court decision, above n 2, at [87].
38 At [88].
39 Parole Amendment Bill 2012 (73).
40 At [88].

[79] For the Board, Ms Clark argued that Mr Harriman had got what he wanted, in that the hearing was conducted on the papers, precisely as he had requested. She said this indicated that, despite the policy in favour of attended hearings, the Board had determined to hold an unattended hearing and that there was therefore no practical consequence of the failure to follow the s 45 process in Mr Harriman's case.

[80] It is true that what took place was a hearing of the Board that was not attended by Mr Harriman. But we do not think that this was the "unattended hearing" that Mr Harriman asked for. In that respect, we differ from Goddard J. If it had been an unattended hearing, the Department staff would not have been present, but consistently with the process outlined in s 49 for attended hearings, Department staff were present at Mr Harriman's hearing. In our view, the hearing was an attended hearing (because in the absence of any decision to have an unattended hearing, the Board's policy that all hearings would be attended hearings applied). We agree with Judge Mahony's observation that it was "an attended hearing held at the prison which Mr Harriman chose not to attend".[41]

[81] That means the Panel Convenor or the Board must have decided to hold an attended hearing. Mr Harriman was not given written notice of this as required.[42] But the Board did arrange for Mr Harriman to be contacted by telephone and asked if he wanted to attend, so he was put on notice that the Board was conducting a hearing that he could attend which was, therefore, an attended hearing. This means the failure to comply with s 45(5) was not of practical significance.

[82] The Board referred in its decision to the fact that Mr Harriman had signed a waiver of his right to attend the hearing, and that could be relevant only if the hearing was an attended hearing. As Ms Clark accepted and as noted earlier, the Board was incorrect in saying that Mr Harriman had signed a waiver form: rather it had been signed by a prison officer who had noted on it that Mr Harriman had requested an unattended hearing. But we agree with Judge Mahony that this was of no great significance because the Board was correctly informed that Mr Harriman

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41 Review decision, above n 12, at [63].
42 Parole Act, s 45(5).

did not wish to attend.[43] Whether this was evidenced by a waiver form or not was not of any significance in terms of the statutory scheme for Board hearings.

Was Mr Harriman entitled to an unattended hearing?

[83] Mr Harriman's argument to us proceeded on the basis that the failure to make a decision under s 45(1) had been disadvantageous to him in that it had deprived him of his preferred option, an unattended hearing. In our view, that submission is based on a false premise, namely that an offender has a right to an unattended hearing if he or she requests one.

[84] As mentioned earlier, the statutory scheme proceeds on the basis that an attended hearing is the preferred option and the decision by the Board to have an unattended hearing is something which reduces the procedural protections for the offender and therefore needs to be justified by the circumstances. Mr Harriman's position in effect turned this presumption on its head, because he considered that his rights were better protected by an unattended hearing than an attended hearing. In particular, he said in his High Court affidavit that he believed attended hearings were unfair because:

(a) comments made in the hearing are not accurately reproduced in a written record;

(b) traditional procedural safeguards for offenders are ignored; and

(c) information provided by the Department (in particular RRS) is "biased".

[85] In his submissions to this Court, Mr Harriman said that he had sought an unattended hearing because:

> The Appellant is acutely aware of the vagaries of administrative dysfunction endemic to parole hearings, non-provision of transcribed proceedings and lack of accountability which render those hearings free of scrutiny.

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[43] Review decision, above n 12, at [33]–[34].

[86] However, as indicated earlier, we do not think Mr Harriman had a right or entitlement to an unattended hearing. He was entitled to ask for one, which he did, but there was no obligation on the Panel Convenor to determine that an unattended hearing should take place. If the Panel Convenor had applied the criteria in ss 45(3) and (4) after the PAR was received from the Department, we do not consider he would have concluded that an unattended hearing was appropriate in Mr Harriman's case. That is because of the absence of crucial information in the PAR about Mr Harriman's release plan, including a residential address that had been checked by the Department.

[87] We think that the Panel Convenor would have to have concluded, after reading the PAR and Mr Harriman's submission, that there were matters which could not be resolved without the presence of Mr Harriman. That conclusion would have led the Panel Convenor to determine that an unattended hearing would have been inappropriate.[44]

[88] In our view, therefore, the omission of the procedural step of determining whether to hold an unattended hearing did not deprive Mr Harriman of an unattended hearing because if that procedural step had been followed, the Panel Convenor would have been required to decline Mr Harriman's request for an unattended hearing.

Did the Board apply the wrong test?

[89] Mr Harriman argued that the Board had applied the wrong test in dismissing his application for parole at the 17 January 2012 hearing. The Board noted that it did not have a viable release proposal to consider, and concluded that it must view Mr Harriman "as being an undue risk to the safety of the community". Mr Harriman said this did not address the statutory test in s 28(2) of the Parole Act, which says that the Board may direct that an offender be released on parole:

> … only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence …

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44 Parole Act, s 45(4)(d).

[90] Mr Harriman's point was that the Board's decision indicated that he was an undue risk to the safety of the community, rather than that the Board did not have sufficient evidence to be satisfied that he was not.

[91] We accept Mr Harriman's submission so far as it goes, but we do not think it has any practical impact. What the Board was saying was that it did not have a viable release proposal, and that without a viable release proposal it was not in a position to make a positive finding under s 28(2). Any inaccuracy in the shorthand way this was expressed was of no practical moment.

[92] Mr Harriman also argued the Board erred in saying in its decision that he did not have "any accommodation proposal".[45] We accept his submission to the Board set out an address and contact person. So the Board's statement is not strictly correct. But the Board went on to note (correctly) that there was no "approved accommodation" and that was the key factor in its decision. So the incorrect reference to no accommodation proposal was of no moment.

Was the Board's decision inevitable?

[93] Mr Harriman took issue with Goddard J's statement that, in the absence of the material and critical information in the form of an approved release plan, the outcome of the Board's hearing on 17 January 2012 was "inevitable".[46] He said that the Board should have taken into account the fact that he had been pre-approved for Release to Work Programmes in the community and that he has a low RoCRoI index.[47]

[94] The Board did in fact note the latter aspect, but did not mention his pre-approval for work programmes. But the reality was that, in the absence of the basic information it needed to form a conclusion in favour of parole the Board simply stated in shorthand terms what the position was. No matter what the RoCRoI figure was or the pre-approval to undertake work in the community, there was simply no chance that Mr Harriman could be released until the Board had a viable release

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45 At [3] of the Board's decision, quoted at [22] above.
46 At [90].
47 An index used to assess an offender's risk of reoffending and risk of re-imprisonment.

proposal and Mr Harriman had, by his own failure to cooperate, deprived the Board of that crucial information. We agree with Goddard J that the Board's decision was inevitable.

Was the decision unlawful?

[95] Ms Clark's submissions that the procedural failings which occurred in this case did not render the Board's hearing void depended on her argument that Mr Harriman got what he wanted, that is an unattended hearing. We have found that he did not, in fact, get an unattended hearing. However, we have also found that Mr Harriman was not entitled to an unattended hearing. We have reached the view that, if s 45 had been followed, the decision would have been to hold an attended hearing. So we reach the same conclusion, that Mr Harriman got what he would otherwise have got, because he got an attended hearing at which he chose not to be present and that is what he would have got if s 45 had been followed.

Parole Amendment Bill

[96] Goddard J referred to the fact that the Parole Amendment Bill 2012 (73), then having its first reading in the House, was going to abolish the distinction between attended and unattended hearings and repeal ss 45–48 of the Parole Act.[48] She said this provided another basis for refusing relief. Mr Harriman took exception to this, arguing that the Judge had effectively involved the application of legislation that has not yet been enacted. The Parole Amendment Bill has now had its second reading, and the changes to the regime relating to unattended and attended hearings has remained essentially unchanged as a result of its select committee scrutiny.[49] However, it has not yet been passed.

[97] We do not think that the Judge said anything that would indicate she was applying a law that had yet to be passed. She was simply noting that changes were afoot that would make the subject matter of the case a thing of the past if the Bill became law and the regime for attended hearings and unattended hearings was abolished.

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48 Parole Amendment Bill 2012 (73-1).
49 Parole Amendment Bill 2012 (73-2).

Impact of subsequent developments

[98] Another reason for withholding relief argued by both Ms Griffin and Ms Clark was that subsequent developments have shown that the 17 January 2012 decision was now essentially of historical interest, because later developments had occupied the ground.

[99] Ms Clark sought to adduce fresh evidence of the decisions made by the Board in the period between the date of delivery of the High Court decision and the date of the hearing in this Court. For the reasons mentioned earlier, Mr Harriman objected to our considering this evidence and we did not find it necessary or helpful to do so.[50]

[100] By the time Goddard J came to consider the matter, the 17 January 2012 decision had been overtaken by another decision dated 7 August 2012. This had not been the subject of a review or judicial review proceedings. Mr Harriman argued before us that this was because he was not permitted to expand the present claim outside the parameters of the decision of Mallon J, which confined the present stage of the proceedings to judicial review of the 17 January 2012 decision.

[101] We do not think the direction by Mallon J about the conduct of the present proceedings would have prevented a fresh proceeding challenging the August 2012 decision. However, Mr Harriman should not see this as any form of encouragement on our part to commence further litigation. What he needs to do is to engage with the Board's processes so that it is placed in a position where it can release him on parole. As the Board's processes depend on receiving reports from the Department, as the Parole Act requires, this necessarily requires him to engage with the Department. If he directed his energy towards that endeavour, rather than to pursuing the present litigation, his chances of achieving his ultimate objective, namely release on parole, would be greatly enhanced.

[102] We do not consider there is any basis for providing the relief sought by Mr Harriman.

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[50] Above at [28].

Is Mr Harriman arbitrarily detained?

[103] For the reasons we have given, we do not consider that Mr Harriman is detained arbitrarily. He is a sentenced prisoner serving a sentence imposed lawfully. Until he is granted parole he retains that status. He argued that he had a right to be considered for parole when the minimum period of imprisonment imposed at sentencing expired. We agree. But we disagree with his contention that the hearing of 17 January 2012 did not meet that entitlement.

Summary

[104] The shortcomings in the PAR were caused by Mr Harriman and not by the Department, and the Department did not mislead the Board. There is no basis for any relief to be granted in respect of the Department.

[105] Panel Convenors must consider in every case whether a parole hearing should be an attended or unattended hearing. This step cannot be bypassed. The decision in each case can be guided by the Board's policy favouring attended hearings.

[106] The Board's hearing of 17 January 2012 was preceded by procedural error, in that no decision was made in advance of the hearing as to whether the hearing should proceed by way of an attended hearing or an unattended hearing. However, we do not consider that Mr Harriman had any right to an unattended hearing and we think that the Panel Convenor would have directed that there be an attended hearing if he had addressed his mind to the issue. That is because of the absence of key information in the PAR which meant that the hearing could not proceed because the Panel Convenor could not have believed on reasonable grounds that the Board was able to make a proper decision on the basis of the information that was then available to the Board and there were matters that warranted consideration at an attended hearing.[51] The Board decided (belatedly) at the date of the hearing to hold an attended hearing. Mr Harriman was not given written notice as he should have been but he was notified by telephone and offered the chance to attend.

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[51] Parole Act, ss 45(3) and (4)(d).

[107] While the Board was mistaken about the waiver form, there was no doubt that Mr Harriman had given a clear indication that he did not wish to attend the 17 January 2012 hearing. Whether or not this was evidenced by a waiver form was not legally significant.

[108] The Board proceeded by way of an attended hearing that Mr Harriman did not attend, and reached a conclusion that was legally open to it which, as Goddard J said, was the only available conclusion given Mr Harriman's refusal to cooperate with the preparation of the PAR.

[109] The procedural shortcomings leading up to the Board's hearing are not such that the Board lacked jurisdiction or that the Court should quash the Board's decision.

[110] In any event, relief in judicial review proceedings is discretionary and, given the subsequent and regular reconsiderations of Mr Harriman's parole status, the quashing of the 17 January 2012 decision would be pointless. But we urge all involved to ensure the next hearing does engage with the merits of Mr Harriman's parole application.

[111] Mr Harriman is not arbitrarily detained.

Result

[112] We dismiss the appeal.

Costs

[113] Costs should follow the event. But we recognise Mr Harriman is a serving prisoner and that his claim has identified some shortcomings in the parole process. Mr Harriman paid security for costs of $11,760. We consider justice would be done by ruling that costs equal to that amount be paid to the respondents. This should be shared between the respondents equally unless they agree otherwise.

Postscript

[114] We urge Mr Harriman, the Department and the Board to break the impasse that is causing the merits of Mr Harriman's parole position to remain unresolved.

[115] We do not underestimate the difficulties caused by Mr Harriman's stance. But, if Mr Harriman is not prepared to cooperate (and we hope he relents in that regard), we consider it should be possible to bring about a situation where his written submissions and the PAR could be brought to the Board's attention and the Board could then adjourn the hearing to give time for the necessary checks to be made of post-release residency and employment arrangements.

[116] We acknowledge Mr Harriman's refusal to consent to inquiries being made impedes such inquiries. But we note he told us that he considered the signing of a submission to the Board amounted to consent and we also note the broad authority given by s 43A of the Parole Act.

[117] It is undesirable that the true merits of Mr Harriman's parole status have never been subject to realistic evaluation. If this suggestion is followed we urge Mr Harriman to attend the adjourned hearing so he can engage directly with Board members.

[118] We do not intend to be critical of the Board but we think it has to be prepared to do what can be done within the confines of the statutory regime to break the impasse and deal with Mr Harriman's application for parole on its merits.

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