THE NEW ZEALAND PAROLE BOARD ITS INDEPENDENCE AND SOME DOMESTIC AND INTERNATIONAL LEGAL CHALLENGES.

TONY ELLIS[i]

Introduction

This paper will address 3 topics:

A—Independence of the New Zealand Parole Board, and the proposed Sentencing Council;

B—Heavier penalties provisions (Article 7 ECHR[ii] and Article 15 ICCPR[iii]);

C—The Legality of Interim Recall Hearings and Associated Rights.

Background—New Zealand Parole Board

The Parole Act 2002 created the New Zealand Parole Board ("NZPB").[iv] Prior to that major conceptual change to the approach to sentencing and parole, a Parole Board existed which had jurisdiction to deal with prisoners serving 7 years or more,[v] whilst a number of District Prison Boards dealt with those serving less than 7 years sentences.[vi] A High Court or District Court Judge, or a retired member of those benches now chairs the NZPB.[vii] The first Chairperson A. A.T Ellis QC[viii] was a retired High Court Judge, unlike the previous Parole Board, which had a serving High Court Judge, Heron J. The current Chairperson Judge D. J. Carruthers is the retired Chief District Court Judge. A considerable number of current District Court Judges sit as Conveners[ix] of the Board at various locations around the country, together with 2 of the 17 lay members. The Extended Board sits with 5 members, and customarily deals with difficult cases. The Chairperson, or a Convenor has the power to issue an interim recall order; otherwise a quorum is 3 members.

Members of the NZPB are appointed for a 3-year term.[x] Such a short term, which also coincides with New Zealand's triennial general election cycle, is the subject of concern expressed below. Until about a year ago, following a still ongoing Judicial Review,[xi] the NZPB shared an office building with the Department of Corrections, being housed on the same floor as the legal section of the Department.

The most major change brought about by the Parole Act 2002 Act was possible release at one-third of sentence rather than two-thirds. Whether this should have been retrospective is subject to challenge before the UN Human Rights Committee ("HRC").[xii] See point B below.

New Direction?

During the preparation of this paper the NZ Law Commission produced a final paper, Sentencing Guidelines and Reform[xiii] that advocates '*truth in sentencing*', a reversal of the 1/3 sentencing regime, longer prison sentences, and the establishment of a Sentencing Council. At a Ministry of Justice seminar entitled *Public Attitudes to Crime and Sentencing* held in Wellington[xiv] on 25 July 2006, this proposal had the support of Oxford Law Professor Julian Roberts, and Professor Mike Hough, Director of the Institute for Criminal Policy Research at King's College, London, guest presenters. The Professors said[xv] that they '*would thoroughly support the Law Commission's recommendations (to establish a sentencing council) in that regard*.' Prof Roberts further said[xvi] that, '*In most western jurisdictions, the maximum penalty structure was in a "chaotic state". A sentencing council would be able to rationalise the maximum penalty structure and would also be able to consider maximum penalties in new legislation in terms of the "master plan"*.'

This author does not agree. A culture has developed in New Zealand encouraging tougher sentencing. The 1992 referendum question had an almost 92% yes vote: *'Should there be a reform of the justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?*' Given the multi-concepts in the question, the result was perhaps not surprising, and neither was the lack of government response. However groups such as the Sensible Sentencing Trust[xvii] have become extremely vocal in the community, and command much media attention. An editorial in the New Zealand Civil Liberty, Newsletter 2004 stated:

> We now have a comprehensive study, conducted by the Ministry of Justice in December 2002,[xviii] on public perceptions about crime, which confirms that public perception is distorted. Key findings of the study were:
>
> - 83% of respondents wrongly believe that the crime rate had been increasing. In fact crime was down by almost 13% in the five years leading up to the date of the survey, 22 December 2003;
>
> - 2/3rds of the respondents overestimated the rate of household burglary believing that 20% or more of New Zealand households would be burgled in one year when the figure is closer to 7%;
>
> - Most respondents over-estimated the level of violent crime reported to the Police;
>
> - 2/3rds believe that half of all crime reported to Police involved violence or the threat of violence when the actual figure is nearer 9%;

- Respondents tended to underestimate the length of prison sentences with nearly half of those who took part in the survey underestimating the actual time a rapist would spend in prison;

- 57% of the respondents overestimated the rate of offending while an offender was on bail.

> The report establishes that the justification for the "tough on crime" approach is based on a widespread public misconception created through "tough on crime" political rhetoric and media coverage that tends to highlight extreme offending. During the three month time frame of a New Zealand survey, some 490 crime stories featured in three daily newspapers, with 90 relating to crimes of murder. The researchers in the study argued that the end result of distorted media coverage is not only a public which believes there is more violence in society than is the case, but also the perpetuation of the view that lenient sentencing is a cause. In contrast, where a "tell the truth" campaign is mounted, as in Finland,[xix] public opinions shift to more positive and realistic views on crime**.**

The President of the NZ Law Commission, Sir Geoffrey Palmer[xx] said when announcing the Commission's latest report:[xxi]

> Thirdly, punishment levels are not transparent. There is a great deal of misunderstanding about them and there is no process for debating them.
>
> Fourthly, the lack of a transparent policy makes the system unpredictable. That means that the resources required for the prison system cannot be effectively planned for and managed.
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> The fact is that, when the Government passes sentencing legislation, it must try to forecast the prison population and assess the likely impact on other aspects of the Corrections system. However, it does this largely in the dark. This is because it cannot predict how judicial sentencing practice will change in response to the legislation. Judicial discretion is important, but at present there is simply too little overall guidance as to the way in which it is to be exercised.

The real questions and underlying themes are first in my view the prison population, (which in the western world is second only to the US), and secondly, the perception of increased crime. See the following chart:

Comparative Study of Prison Population for New Zealand, England and Wales, Scotland, Australia and Canada[xxii]

COUNTRY	**Prison Population total** **(no. in penal institutions**	**Date**	**Estimated National Population**	**Prison Population Rate (per 100,000 of national**	**Source of Prison Population Total**

	incl. pre-trial detainees)			population)	
New Zealand	6,802	mid-04	4.06m	168	NPA, Asia-Pacific annual conference
England and Wales	75,320	25/02/05	53.02m	142	NPA
Scotland	6,742	25/02/05	5.11m	132	NPA
Australia	23,362	mid-04	19.9m	117	NPA, Asia-Pacific annual conference
Canada	36,389* *(Average daily population, including young offenders, 1/4/2002-31/3/2003)	02-03	31.44m	116	Statistics Canada

However calls for tougher sentencing have led to the Government announcing the establishment of a 'Sentencing Council', cited as '*the most significant structural innovation in the proposed reforms*' by the Minister of Justice, Mark Burton, who stated:[xxiii]

> A Council consisting of a mix of judicial and non-judicial members would broaden the base of responsibility for determining sentencing policy and promote sentencing consistency.
>
> The Sentencing Council would be responsible for issuing sentencing guidelines, which are a proven mechanism not only for promoting sentencing consistencies, but also for assisting in the management of penal resources in other jurisdictions.
>
> **The chief responsibility of the Sentencing Council would be to issue sentencing guidelines in relation to the whole range of criminal offences. Judges of the adult courts would be required to comply**

> **with the guidelines unless they were satisfied that it would be contrary to the public interest to do so.**
>
> **[Bold added]**

The concern that the Sentencing Council will inevitably curtail and repress judicial independence in performing its principal task is clearly illustrated from the Minister of Justice's speech. Judges will have to defer to a set of sentencing guidelines, which have been formulated in part by non-judicial members. Both judicial and non–judicial members are intended to be (not so subtlety) subject to executive *influence.* The sole caveat to such compliance is stated not to be based on concerns for the erosion of judicial independence, but public interest. The grave implications for Judicial Independence are tellingly shown in the Minister of Justice's further comment that:[xxiv]

> The two major objections to changing the status quo do not hold up under close scrutiny:
>
> In the sentencing context, judicial independence means that a judge must be free to decide individual cases without interference from other branches of Government. Accepting that proposition, it does not follow that judges should determine the overarching sentencing framework.

The place of executive power and influence in the sentencing framework raises serious policy issues, and the Doctrine of Separation of Powers. This latest review of sentencing and parole only 4 years after the last major review in my opinion shows that insufficient consideration has been given to the New Zealand political scene, the independence of the NZPB, and the constitutionality and independence of the proposed Sentencing Council. Trendy political amendments are no substitute for a principled approach.

A: Independence of the New Zealand Parole Board and the Proposed Sentencing Council

A Judicial Review still awaiting hearing in the New Zealand High Court raises the interesting question of whether the NZPB, and it predecessor are independent. The challenge had its genesis in the comment made by the majority on the HRC in *Rameka v NZ* discussing the merits of the case.[xxv]

> 7.3 **...**The Committee is of the view that the remaining authors have failed to show that the compulsory annual reviews of detention by the Parole Board, the decisions of which are subject to judicial review in the High Court and Court of Appeal, are insufficient to meet this standard. Accordingly, the remaining authors have not demonstrated, at the present time, that the future operation of the sentences they have begun to serve will amount to arbitrary detention, contrary to article 9, once the preventive aspect of their sentences commences.
>
> 7.4 Furthermore, in terms of the ability of the Parole Board to act in judicial fashion as a "court" and determine the lawfulness of continued detention under article 9, paragraph 4, of the Covenant, the Committee

> notes that the remaining authors have not advanced any reasons why the Board, as constituted by the State party's law, should be regarded as insufficiently independent, impartial or deficient in procedure for these purposes. The Committee notes, moreover, that the Parole Board's decision is subject to judicial review in the High Court and Court of Appeal…

The majority of the HRC decided that New Zealand's system of 'preventive detention', (Imprisonment for Public Protection "IPP" orders in England) by which convicted offenders who are considered to pose a serious risk to the safety of the community can be given an indeterminate (open-ended) sentence of imprisonment, violated article 9(4) of the Covenant.[xxvi] They also decided the challenge to the absence of rehabilitation courses were inadmissible for want of substantiation, because the authors had given insufficient particulars.[xxvii]

Geiringer[xxviii] comments on *Rameka* that three features of the case are worth emphasis. Firstly, of the sixteen members nine dissented. Of those nine, six were in favour of more breaches, and 3 in favour of none. She states that, '*The second feature worth comment is the circumscribed nature of the violation the Committee found to have been established. Rameka will go down in the annals of legal history as the first occasion on which a human rights treaty body held New Zealand in breach of one of the human rights treaties. The case is, though, just as significant for the breaches that were held not to be established.*'[xxix] *Geiringer* is of course correct that it is significant what was not established. However, frankly I had not considered the Parole Board independence point, and did not have the information on rehabilitative courses to effectively challenge them. The judicial review in *Miller* was brought about in an attempt partly to progress *Rameka* particularly on these Parole Board, and rehabilitative points. The judicial review (was initially) primarily based on the absence of rehabilitation, and Article 10(3) of the Covenant (a unique provision not reflected in the European Convention) which states that '*the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation*'.

The judicial review had migrated from an initial appeal from a postponement order whereby the consideration of Miller's parole was postponed for 3 years. That was not in my opinion a regular review for purposes of Article 9(4) of the Covenant (cf Article 5(4) ECHR).[xxx] That High Court Appeal was won, but the accompanying habeas corpus based on the rehabilitative courses was lost.

On appeal to the Court of Appeal on the habeas, it became apparent that a "member" of the Parole Board, Dr Chaplow[xxxi] was not what he seemed. I had asked him to give an affidavit as to the process on the rehabilitative training offered to sex offenders from a psychiatric perspective. He originally agreed and then changed his mind because of a *conflict of interest*. I had some difficulty with why an expert would be conflicted. An affidavit was subsequently provided where Dr Chaplow quite frankly admitted he had attended meetings of the NZPB as if he were a member, (he had been a member of the pre 2002 Board, but had

retired) and contributed to the Board's private deliberations, and 'decision making'. On receipt of that affidavit, the habeas was withdrawn, and a judicial review filed. As for Dr Chaplow the Parole Board website media states:[xxxii]

> **Solicitor-General's opinion on Dr David Chaplow's involvement in hearings**
>
> 21 July 2004
>
> The New Zealand Parole Board has received the Solicitor-General's opinion on the involvement of Dr David Chaplow in Board hearings.
>
> Dr Chaplow participated in Board hearings of difficult cases and gave his expert advice as a leading forensic psychiatrist.
>
> The Solicitor-General's opinion is that the participation of Dr Chaplow in the decision-making process of the Board was not authorised by the Parole Act 2002 and that offenders should be offered a rehearing if they felt aggrieved by Dr Chaplow's participation.
>
> Dr Chaplow was a member of the previous Board and since the establishment of the new NZPB two years ago, has been involved in 211 hearings, involving around 140 offenders.
>
> Of these offenders, the Board has identified 23 cases where a re-hearing has been offered …

It was somewhat disturbing that the Chairman, a retired High Court Judge could invite Dr Chaplow to stay on as a member, and numerous other Judges who sat with the Chairman on extended Boards did not demur. The judicial review pleadings allege that both the Parole Board (Pre 30 June 2002), and the NZPB were neither an independent nor an impartial tribunal—as they breached the Doctrine of Separation of Powers, exhibited a lack of independence and impartiality, and had the appearance of bias, and failed to comply with fair hearing rights. There are a large number of alleged reasons. Space prohibits a full analysis but the following will be briefly considered:[xxxiii]

- Lay members appointment are political and their term of office was too short; [PB & NZPB]
- There were insufficient guarantees against outside pressures on the lay members; [PB & NZPB]
- The structural interweaving of the Department and Board destroyed any appearance of independence, if not independence itself; [PB & NZPB]
- The psychological service of the Department provide on request of the Board psychological reports to the Board; [PB & NZPB]

- The psychological service of the Department provide intensive training to members of the Board [PB & NZPB]

The best example of political appointments is that of David Major. He was appointed to the old Parole Board by the then ruling National Government.[xxxiv] The Secretary of Justice responding to the Minister of Justice advised he had sought nominations from the Government Caucus, some approximately 20 members were nominated. The list was not compiled in alphabetical or any date received order. The first listed nomination was recorded as David Major was nominated by *'the Office of Prime Minister'* but not by the Prime Minister i.e a corporate rather than an individual nomination, and a clear example of executive sponsorship, and gerrymandering of the list. David Major was described as Chief Executive of the National Party, and a Salvation Army Officer of 21 years standing and the founding Chairperson of the Auckland Central Victims Support Programme. Subsequent approval, or at least no dissent was obtained from parties supporting the Government. The opposition was not consulted.

No consideration was given as to whether David Major had a conflict of interest at common law, or as described in the State Services Commission Guidelines on Board Appointments and Induction Guidelines referred to in the Cabinet Manual at Para 6.3[xxxv]. In my opinion as National Party Chief Executive, David Major had a conflict of interest. He also had a conflict of interest being a founder Chairman of the Auckland Central Victims Support Programme, or if that conflict was no longer current had the appearance of a conflict.

On 24 June 1999 the Minister of Justice sent the recommendation for appointment of David Major to the Governor-General. No reference whatsoever was made in the supporting papers sent to the Governor-General that the candidate David Major was Chief Executive of the National Party. David Major was described as a Salvation Army Officer of 21 years standing, the founding Chairman of the Auckland Central Victims Support Programme, an experienced teacher and a Rotarian. The failure of the Minister of Justice to provide the full details of David Major's status namely that he was Chief Executive of the National Party was not full and frank, and was not in accordance with the Minister's duties to keep the Governor-General fully informed as prescribed by the Letters Patent Constituting the Office of Governor-General of New Zealand,[xxxvi] and the Cabinet Office Manual paragraph 1.11. The failure of the Minister to supply the requisite information destroyed the independence of the process, and/or the appearance of independence of the process, and the appointment. The Governor-General appointed David Major *Minister of Religion* to be a member of the Parole Board on 24 June 1999. During his term in office David Major appeared in the Parole Board Annual Report as David Major, *Chief Executive of the National Party*.

The term of the appointments of Parole Board members was,[xxxvii] and NZPB still are 3-year terms (or less),[xxxviii] regrettably short, and unfortunately conveniently pandering to the 3-year electoral cycle in NZ, making political appointment or their appearance inevitable. In **Campbell and Fell v UK**[xxxix] in relation to Prison Boards of Visitors, the European Court of Human Rights

observed:

> 80. Members of Boards hold office for a term of three years or such less period as the Home Secretary may appoint (see paragraph 32 above). The term of office is admittedly relatively short but the Court notes that there is a very understandable reason: the members are unpaid (ibid.) and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer.

The important differences are here that Parole Boards, as will be seen, are subject to public pressure. National Party nominees at least such high ranking ones as David Major will not be re-nominated by the Labour Party. Why does a Political Party in government want its Chief Executive on the Parole Board? The two most obvious reasons are either as jobs for the boys, or to exert the party line. Neither is acceptable, and even if not true, an independent observer would not be convinced. Other nuances here are that the Department of Corrections itself, nominated six members fortunately not successfully, but joined with the Chairperson to seek re-appointment of a member, who is still currently a member of the New Zealand Parole Board. How Government Departments and entities such as the *Office of Prime Minister* can nominate for such positions is startling in itself. In **Thaler v Austria:**[xl]

> 30. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence…
>
> As to the question of "impartiality", there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 281, § 73).

What independence or impartiality is there with this type of appointment? Matters get worse when one considers the formal training run for members of the Board is organised by and provided by the Department of Corrections, particularly the Psychological Service. Senior psychological staff provide significant training. The reality being for a prisoner (lifer, or preventive detainee, or violent sexual offender) is that a positive psychological report is needed for release, or to prevent a s107 order.[xli] That training by the Department Officers,[xlii] and particularly the Psychologists, in my view irretrievably taints all Board members especially, as expert witnesses from the psychological service then give evidence before Parole Boards. Additionally sharing premises with the Department (until recently) does not give the appearance of independence, nor

does sharing staff, or computer facilities, or having email address such as *Firstname.lastname @corrections.govt.nz*. For instance *Leggatt*[xliii] comments:

> Relations with Government
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> > 2.20 There is no question of the Government improperly attempting to influence individual decisions. In that sense, tribunal decisions seem to us clearly impartial. But it cannot be said with confidence that they are demonstrably independent. Indeed the evidence is to the contrary. For most tribunals, departments provide administrative support, pay the salaries of members, pay their expenses, provide accommodation, provide IT support (which is often in the form of access to departmental systems), are responsible for some appointments, and promote the legislation which prescribes procedures to be followed. At best, such arrangements result in tribunals and their departments being, or appearing to be, common enterprises. At worst, they make the members of a tribunal feel that they have become identified with its sponsoring department, and they foster a culture in which the members feel that their prospects of more interesting work, of progression in the tribunal, and of appointments elsewhere depend on the departments against which the cases that they hear are brought. The danger is illustrated by a recent case which the United Kingdom lost in Strasbourg, on the ground that the judge had played an active role in the passage of the law under which the original planning decision was made and was therefore not seen to be independent

As discovery in the *Miller* judicial review is still continuing, and the documents relating to the appointment of members of the NZPB have mysteriously taken six months to be provided, I can expect more allegations as to independence to arise, if there were not enough already.

PROPOSED SENTENCING COUNCIL

In the 2006 Draft Law Commission Report '*Reform to the Sentencing and Parole Structure, Consultation Draft*' April 2006 has the following observations:

> **Parole Board conservatism**
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> 131 Parole Board members are aware of the public frustration – indeed, they cannot escape it in their daily work – and it is a factor driving them to interpret the Parole Act conservatively.
>
> 133 Taking such considerations into account entails a resentencing exercise, and involves the Parole Board in a function that should be the sole province of sentencing judges.
>
> 134 This issue is currently under consideration by the Court of Appeal.[xliv] Whatever the outcome of that case, it will pose an insoluble dilemma for the Parole Board. If the Court determines that inmates should be released

> by reference solely to their risk, it may mean that more are released closer to one-third, which would increase the disjunction between the sentence and actual time served and exacerbate public perceptions of a sentencing charade. If the Court determines that the Parole Board may engage in resentencing, that may have ongoing undesirable practical effects on sentence relativity and prison muster forecasting.

In the final NZ Law Commission report the Commission states:

> **Sufficiency of executive influence**
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> 209. There is also a risk that the creation of the Sentencing Council, and the guidelines that it promulgates, will not be as effective as anticipated in providing a governance mechanism.
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> 210. In the first place, the Council may develop guidelines which are not sufficiently sensitive to the policy concerns of the government. That is because the mechanisms for executive input are largely indirect; they are heavily reliant, upon the effectiveness of ongoing informal dialogue between the executive and the Council.

News reports reflecting government media releases stated that the essential elements of the Sentencing Council are that Judges will receive guidance as to the type and length of sentences for certain offences, and how to handle matters such as early guilty pleas. The council will be five judges, appointed by the judiciary, and five non-judicial members appointed by the Justice Minister. Whilst it will be 'independent' Parliament can veto any guideline.[xlv]

Can a body with judicial and other members appointed in such a fashion subject to Parliamentary veto be independent? *Fenn Walter and Others v Union of India* 2002[xlvi] (Supreme Court of India) states that, '*The appointment of sitting a Judge to a Tribunal is not desirable where the adjudicating members are composed of other members who are not Judges or qualified to be appointed as Judges, such as bureaucrats, revenue officials, etc*.' Whereas *Stran Greek Refineries and Stratis Andreadis v Greece*[xlvii] states that '*The principle of the rule of law and the notion of fair trial enshrined in Article 6 (art. 6) preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute*.' Bearing in mind the council will be half judges and half laypersons, what role should executive influence have, if any? *Leggatt* comments: [xlviii]

> 2.21 Departments often involve senior tribunal members and managers in the development of new policies and legislation which may be the subject of future appeals. Where the input of members and managers is sought as part of wider public consultation, their expertise and experience is valuable, and we would certainly not wish to diminish the extent to which it is sought. There is, however, a problem which frequently arises where the same department is responsible for developing the new initiative and for the administration of the tribunal. The policy officials can see themselves as approaching someone who belongs to the same organisation. Where

that happens, a culture develops in which tribunal members can be seen by departments and ministers as an integral part of the process of policy development and its subsequent delivery by the policy department. This can compromise their independence severely.

The NZ Law Commission continues:

Litigation risks

217 There are litigation risks attached to several aspects of these proposals, which steps have been taken to mitigate. First, issues may be raised about the constitutionality of the guidelines and/or the Council, in the light of adverse constitutional rulings in the United States, and the Council's novel organisational form. However, the guidelines proposed for New Zealand differ significantly from the highly prescriptive United States grid systems that have been discredited in some jurisdictions. As to the status of the Council, the Parliamentary negative resolution procedure is intended to address the issue, since any guidelines that proceed would do so with an implicit legislative mandate.

218, Secondly, it is proposed that the guidelines should govern sentences for offences committed prior to the commencement of these guidelines. Section 6 of the Sentencing Act 2002 and section 25(g) of the New Zealand Bill of Rights Act 1990, consistent with international obligations, prohibit retrospective penalty changes to the detriment of an offender. A provision is therefore proposed to explicitly exclude the guidelines from the scope of section 6; section 25 (g) of the Bill of Rights is likely to be construed in accordance with this clearly expressed legislative intent.

219. Thirdly, we recommend that judges should articulate the components of each sentence – that is, the two-thirds that must be served, plus the one-third parole component that may or may not be served, depending upon the Parole Board's assessment of the prisoner's risk. However, there is a subtle but important legal distinction between the judicially-imposed sentence and matters relating to the administration of it, which needs to be maintained. Parole falls into the latter category: provision for parole is provision for early release where that would assist risk management, as opposed to extra time imposed for preventive purposes. It would be inappropriate and dangerous for the impression to be given that this long-accepted formula has been abandoned, and the manner of articulation of the sentence has been grafted with this in mind.

220. Finally, if these changes proceed, Corrections would be required to administer three streams of sentenced prisoners: those to whom the Criminal Justice Act 1985 provisions continue to apply; those sentenced under the Sentencing and Parole Acts 2002; and those sentenced under guidelines. Mistakes in sentence administration carry a risk of habeas corpus applications and damages. This is a matter of degree rather than kind – it is a constant risk for Corrections, which may be exacerbated by the increased complexity.

The Law Commission has underestimated the risk; there are matters of

executive influence, separation of powers, as well as habeas applications to consider. As a NZ barrister who can safely say has brought more habeas applications than most, if not the most, I for one can foresee more litigation risk than the Commission.

B: Heavier Penalties—Article 7 ECHR and Article 15 ICPPR

Padfield[xlix] refers to the potential impact of *R (on the application of Uttley) v Secretary of State for the Home Department* ("*Uttley*") [l] where Arts 5, 6 and particularly Art 7 were in issue. This brings into sharp focus what the nature of parole is. Article 15 of the ICCPR is similar to European Article 7. The Supreme Court of New Zealand now the final appellate Court,[li] has considered this issue in *Morgan v The Superintendent, Rimutaka Prison* [2005] NZSC 26 SC 13/2005 and *Mist v The Queen* SC12 /2005 [2005] NZSC 77.To support the position ultimately adopted in *Morgan*, the Majority judgment relied on the two decisions of the Privy Council, and the House of Lords respectively, in *Flynn v Her Majesty's Advocate*[lii], (UKPC) and *Uttley.* Both cases concerned the issue in point, whether changes to the way in which early release obtained can constitute a penalty within the meaning of article 7(1) of the European Convention. Elias CJ dissenting indicates that a range of views appears in the judgments,[liii] an observation which is not made in the majority judgment.

Uttley had committed rape before 1983, when the maximum sentence for rape was life imprisonment, but he was not convicted and sentenced for the offence until 1995. He was sentenced after a legislative change and received 12 years imprisonment. The issue was whether more onerous conditions of release constituted an increase in penalty, contrary to article 7(1) of the European Convention.[liv] Their Lordships considered that article 7(1) would only be infringed if a sentence was imposed on a defendant which constituted a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that his offence was committed.[lv] Baroness Hale endorsed the principle adopted in *Coeme v Belgium*[lvi] stating that '*The court must therefore verify that at the time when an accused person performed the act which lead to his being prosecuted and convicted there was in force a legal provision which made that punishable, and that the punishment imposed did not exceed the limits fixed by that provision*.'[lvii]

Baroness Hale also considered that the issue concerned a sentence of imprisonment, which could have been of any duration up to life imprisonment.[lviii] In the Privy Council in the Scottish decision of *Flynn v Her Majesty's Advocate* Lords Rodger and Carswell, first formulated the effective maximum approach and who then repeated their reasoning in Uttley: "*The penalty "applicable" was that which a sentencer could have imposed at that time."* However, in her dissenting judgment in *Morgan*, the Chief Justice points to the fallacies in *Flynn*, by looking at the observations made by Lord Bingham, Lord Hope, and Baroness Hale. Lord Bingham considered that the changes to the mechanism by which prisoners sentenced to mandatory life imprisonment were considered for parole offended the spirit of article 7.[lix] The Chief Justice, also noted that Lord Hope had stressed the need to look to the substance of the burden imposed in stating that, *'…the*

introduction into the system of a new component that had the effect of requiring the adult mandatory life prisoner to serve a longer period in custody than he would be likely to have served under the pre-existing system would constitute a heavier penalty and would, for this reason, be [lx]incompatible with the Convention right."[lxi]

Elias CJ, in her clear rejection of the effective maximum approach also quotes paragraph 99 in *Flynn:*[lxii]

> It is as "completely unrealistic" to regard the penalty that could lawfully have been imposed in this case as seven years imprisonment as Lord Hope and Baroness Hale thought it was to regard the penalty imposed in Flynn as imprisonment for the rest of the prisoner's life. A sentence of seven years imprisonment could not lawfully have been imposed on Mr Morgan. It would not have been competent because such a sentence would have been overturned on appeal.[lxiii]

In my opinion Elias CJ's view of Flynn point to a clear indication that both decisions represent an interpretation of article 7 (and so of article 15 of the Covenant), which is wholly inconsistent with the ICCPR. Principally, the legal reasoning adopted betrays a serious error with regard to the interpretation of the purpose of article 7(1). The spirit of the article(s) is to clearly ensure that the offender is to be punished in the same way, as he would have been at the time of the offence, if this would result in a lesser penalty.[lxiv] If this were not the case, the full protection guarded under article 15 for individuals who have fallen victim to the mere accident of legislative changes would not be guaranteed. Throughout the text of the Covenant, and other international treaty documents, it is patently clear that emphasis is placed on the date of the commission of the offence as the determinative temporal factor. The long recognised criminal law principle of '*nullum poena sine lege'* proscribes the imposition of a heavier penalty than that which 'was applicable at the time when the criminal offence was committed'. In the leading Canadian case of *R v Lyons,*[lxv] Wilson J dissenting stated that, *'It is a principle of fundamental justice under section 7 of the Charter that the accused know the full extent of his jeopardy before he pleads guilty to a criminal offence for which a term of imprisonment may be imposed*.'

The primary rationale of this principle is fairness. In the words of Keith J in *Mist v The Queen*:'*…the state, through its institutions, should make determinations of criminal guilt and impose serious penalties only by reference to the law in force and applicable to the accused at the time of the crime*.'[lxvi] To apply the maximum sentence prescribed under the law at the date of the offence as the lesser penalty is to undermine the very principles of fairness, accessibility and foreseeability, which lie behind the article itself. It is to perpetuate, not alleviate, the injustice that is being produced by the legislative change. The issue is not what the law could have imposed at the time, but what would have been lawfully imposed at the time of the offence. This assessment would be undertaken with regard to the factors normally taken into account when a sentence is imposed i.e. seriousness of offending, culpability, aggravating and mitigating factors etc. Indeed, I contend that if every attempt is not lent to applying the same penalty

that would have been fixed under the regime at the date of the offending, the convicted person is not afforded his full rights article 15 of the Covenant. An outcome, which is inconsistent with the above, would be a superficial approach to what conceivably is, one of the foundation blocks of legality. Although it could be said that life imprisonment was "always available" (in the words of Baroness Hale) in the sense that it was on the statute book at the time of the offending, the sentence was clearly not applicable to *Uttley* as the sentencing Judge considered that 12 years was sufficient for the crime committed.[lxvii] A proper construction of the test for the Court therefore would be to adopt the opposite of Baroness Hale's proposition as suggested in paragraph 71, to formulate the following test: *'The Court must make a comparison between the sentence the offender would have received if sentenced shortly after he committed the offence and the sentence the court was now minded to impose.*'

Once this test is undertaken, the issue as to whether there is a heavier penalty or not will be easily resolved. It is suggested that authority relied on for the effective maximum approach including *Coeme v Belgium* is not persuasive. As Elias CJ states in *Morgan*, to endorse this approach, *'is to apply the type of reasoning deprecated in R v Home Secretary ex parte Pierson and rejected by the European Court of Human Rights in Stafford v United Kingdom and Weeks v United Kingdom.'*[lxviii] The observations as to substance and form made by Lord Steyn in *R v Secretary of State for the Home Department ex parte Pierson*[lxix], and in *Stafford* paragraphs 77-79 are relied upon.[lxx] Indeed, the decision of *Uttley* itself gives an indication that a flexible approach should be adopted vis-à-vis the scope of article 7 with regard to the definition of the 'heavier penalty'.[lxxi] Baroness Hale states that article 7 is not limited to sentences prescribed by the law, which created the offence. It could also apply to "additional penalties applied to that offence by other legislation".[lxxii] Her Ladyship also reports that the maximum duration of the sentence of imprisonment might not be the only factor: '*There might be changes in the essential quality or character of the sentence which made it unquestionably more severe.'*[lxxiii]

Changes made to parole eligibility dates through legislation strikes at the very core of the '*essential quality or character of the sentence'*. This would accord with the observations made by Lord Philips. This would also be consistent with His Lordship's comments regarding a Practice Note, which was issued by the Lord Chief Justice when release on licence was first introduced in 1991.[lxxiv] This Note had advised sentencing judges that if the changes introduced could lead to prisoners '*actually serving longer in custody than hitherto, it would be necessary for the sentencing judge to adjust the sentence to have regard to the actual period likely to be served.*'[lxxv] This clear acknowledgment made by the Lord Chief Justice as evidence that legislative changes regarding release entitlements *can* result in a protracted period spent in detention. This accordingly must signal that parole eligibility must be construed as a penalty. Likewise clear admission by the Chief Justice in paragraph 21 of *Morgan* that in New Zealand, the imposition of sentences are made without 'consideration of remission or parole'. Such a view is not conducive to a broad interpretation of Covenant terms, which is capable of ensuring that rights and 'practical and effective'.

New communications to the UN

Having been somewhat inspired by the Chief Justice's dissent in *Morgan* this analysis led to the further complaint to the HRC on behalf of Van Der Platt.[lxxvi]

Morgan (who represented himself) is now released. Van Der Plaat, relying on Morgan, claims that the New Zealand sentencing regime breaches Articles 15 and 26 (discrimination), and to the extent necessary he says that if this is correct, his detention is arbitrary, and in breach of Articles 9(1) and (4). The author is a 70-year-old man; almost blind who has served 6 years of a fourteen-year sentence for sexual offences against his daughter. Mr. Van der Plaat still maintains his innocence. His sentence appeal was based on grounds that his sentence was '*manifestly excessive and crushing*' with regard to his age. The Court of Appeal dismissed his appeal, which effectively exhausted his domestic remedies.[lxxvii] His conviction appeal was withdrawn on advice of his appellate counsel, Kevin Ryan QC, that it had no chance of success. He complains that since sentence, new domestic legislation had reduced sentences for persons in his position but he has not been given that benefit. It will obviously be several years[lxxviii] before the views of the Committee become known. The writer waits with interest those views, and new developments in the New Zealand statutory scheme in the interim.

Given *Geiringer's* comments above, and the wafer thin majority 7-6 in *Rameka* for not finding more breaches, it will be of no surprise that *Harris* (One of the original three *Rameka* authors) is lodging a second communication which addresses the main arguments again in light of *Mist* and asks the HRC to reconsider its views on preventive detention, and also raises the independence of the Parole Board issue above.

C:The Legality of Interim Recall Hearings and Associated Rights

Obviously recalls are much smaller in number in NZ than England in relative numerical terms, but the underlying philosophy of the recall is importance and raises issues of fundamental human rights law. The statistics available from the 2005 annual report of the NZPB show:[lxxix]

Life Imprisonment	16
Preventive Detention	2
Total	18

Recalls

	2002/03	**2003/04**	**2004/05**
Parole (Total)	284	293	237
Approved	231 (81.3%)	222 (75.7%)	195 (82.2%)

Home Detention (Total)	80	96	97
Approved	71 (88.7%)	76 (79.1%)	78 (80.4%)

One particular example will be focused on. The relevant statutory provision is s 62 Parole Act 2002:

> 62 Making interim recall order
>
> (1) On receiving a recall application, the chairperson or any panel convenor must make an interim recall order if he or she is satisfied on reasonable grounds that—
>
> (a) the offender poses an undue risk to the safety of the community or to any person or class of persons; or
>
> (b) the offender is likely to abscond before the determination of the application for recall; or
>
> (c) in the case of an offender on home detention, a suitable residence in the area where a home detention scheme is operating is no longer available.
>
> …

In *Manuel v Superintendent Hawkes Bay Prison*[lxxx] the NZ Court of Appeal rejected the approach adopted by the European Court in *Stafford v UK*.[lxxxi] The Court of Appeal[lxxxii] said:

> The European Court of Human Rights took the view that a mandatory life sentence for murder could not be regarded as imposing, as a punishment, imprisonment for life (leaving aside those comparatively rare cases where a "whole of life" tariff was fixed) and once the relevant tariff period had passed continued detention could only be justified on considerations of risk and dangerousness associated with the possibility of violent offending. So the risk of non-violent offending (which was the only risk posed by Stafford) did not warrant continued detention.

The Court recognized the applicability of *Stafford* to New Zealand conditions[lxxxiii] and the NZBORA but determined they were inapplicable to Habeas proceedings, and must be advanced on judicial review.

On the facts the Appellant had been sentenced to 4 months for fresh relatively minor offences, and served 2 months in accordance with the statutory scheme then released, He was re-detained on the next day, primarily on the basis that he was an immediate threat to the public, somewhat odd having just been released. The interim recall order was never produced, as it could not be found. So a question of jurisdiction to detain was in issue. The Court to Appeal observe the

case was:[lxxxiv]

> Overview
>
> [16] The case for the lawfulness of the appellant's detention is relatively simple:
>
> (1) The appellant was convicted of murder on 20 July 1984 and sentenced to life imprisonment.
>
> (2) He was released on parole on 18 January 1993.
>
> (3) On 29 January 1996 the chief executive of the Department of Corrections applied for his recall to prison. The chief executive of the Department of Corrections had power to do so, see s 107I(1).
>
> (4) The Parole Board had jurisdiction to direct his recall if satisfied that any of the grounds relied on by the chief executive had been established, see s 107L(2).
>
> (5) The Parole Board, being satisfied that all grounds relied on by the chief executive had been made out, ordered the appellant's recall.
>
> **[17]** The broad complaints of the appellant as to the lawfulness of his detention involve the following heads of argument:
>
> 1) The interim order should not have been applied for ex parte.
>
> (2) No interim recall order was made by the chairperson of the Parole Board.
>
> (3) Section 23 of the New Zealand Bill of Rights Act 1990[lxxxv] was not complied with when the appellant was taken into custody on the warrant issued by the chairperson.
>
> (4) The hearing date stipulated in the original application for the appellant's recall was incorrect (given the statutory framework) and, after a fresh and conforming hearing date was arranged, the appellant's "consent" to an adjournment (see para [8] above) was not legitimate.
>
> (5) The decision to recall the appellant to prison was inappropriate given international human rights jurisprudence, the New Zealand Bill of Rights Act 1990 and the true interpretation of the relevant provisions of the Criminal Justice Act 1985.
>
> (6) The chairperson of the Parole Board (who presided over the hearing on 19 March 1996) was biased given his role in the interim recall decision.

The Court of Appeal considered on the facts[lxxxvi] that there was a difference with *Stafford* in stating that *'In Stafford it was agreed that there was no ongoing*

risk of violence. Yet on the papers which we have seen, it appears to us that it was the risk of violence which the appellant was perceived as presenting which led to his recall.' But it was not a **serious**[lxxxvii] risk of violence and he had already served his sentence of 4 months on the offences, except for a Male Assaults a Female charge which was pending which meets the statutory test of **serious** violence, but on which he was subsequently not convicted on. *Manuel v NZ*[lxxxviii] has been taken to the HRC. As Manuel's counsel I have raised a raft of issues of concern to human rights lawyers. It is not simply just a challenge to the recall jurisdiction, but also on the adequacy of habeas as a remedy in NZ, and many other points. The views of the Committee are hopefully expected before the end of 2006.

A prisoner has a right of hearing and counsel, for a final recall order, however no such right exists in respect of an interim order made on the papers by a Convener, or the Chairman of the Board. The proposition that a prisoner can be subject to an interim ex parte recall by the Board, but denied a hearing on that for at least 14 days[lxxxix], engages rights against arbitrary detention.[xc]

Nicola Padfield's article[xci] refers to the decision to recall in England being taken by an executive casework manager level, and that the recall team issues a revocation order. This is even more alarming than what occurs in New Zealand. If this is not plainly executive recall, then what is? In the words of Bingham LCJ (as he then was) referring to the substantive imprisonment (not just the initial stage of recall), in *Stafford*[xcii]in the Court of Appeal**:** '*The imposition of what is in effect a substantial term of imprisonment by the exercise of executive discretion, without trial, lies uneasily with ordinary concepts of the rule of law. I hope that the Secretary of State may, even now, think it right to give further consideration to the case.'*

The Communication to the UN Human Rights Committee in *Manuel* includes the following[xciii]:

> 1. An interim order…
>
> 2. This order is so fundamentally wrong that it is completely alien to the concept of the rule of law. It is an arbitrary detention caused by arrest and imprisonment by an administrative tribunal *on the papers*, or possibly *ex parte*.
>
> 3. The interim order causes a detention without notification of your right to a lawyer, or to apply for habeas corpus. The detention is for a **minimum** of 14 days, and a maximum of one month or 8 days longer without consent, and unlimited time with consent.
>
> 4. Additionally, there is an effective denial of the right to be brought before a court to challenge ones imprisonment. No Board[xciv] hearing can be **before** 14 days. Even an alleged murderer receives an immediate bail hearing before a Court.
>
> 5. Fortunately no other administrative tribunal (but see *Wade*[xcv]) has such a draconian power to imprison without trial and deny rights.

> 6. Counsel is reminded of the very causes of the English civil law and the Dispute between the executive and Parliament in the time of Charles I. It is somewhat strange that the very arbitrary rights the English Parliament went to war to protect are now encompassed in legislation.
>
> 7. Replacing Parole Board for Minister the words of Lord Aitkin are adopted:[xcvi]
>
> > "I protest, even if I do it alone, against a strained construction put upon words, with the effect of giving an uncontrolled power of imprisonment to the Minister."

One could perhaps add, that the types of detainment currently allowable under terrorist legislation without immediate right to be brought before a court have no place here in Parole Board legislation, or jurisprudence. Whilst it will be undoubtedly truthfully be said, **but Manuel is subject to recall for life,** any such recall must be lawful. Immediate challenge to that must be possible as with any detention, as the recall may of course be unlawful.[xcvii]

Habeas is unavailable[xcviii] according to both *Manuel v Superintendent Hawkes Bay Prison*[xcix], and *Bennett v. Superintendent Rimutaka Prison*[c] at least in domestic law terms. It remains to be seen whether an international habeas right is available.

Conclusion

The short-term appointments for NZPB members, and the Board's wider role need serious reconsideration. The allied topic of Sentencing Reform is in a state of flux in NZ. Public pressures, alas, have intruded too far into the judicial process. If the Parole Board, as the Law Commission espoused, is essentially a *judicial body and certainly each panel is convened by a judge*, then it should be free from political appointments and pressures, executive influence and actually be independent and impartial. Members cannot be 'trained' by the Department of Corrections despite a legislative permit to provide administration and training services.[ci] We have thankfully not yet reached the position where the police train Judges.

It remains to be seen what the HRC makes of recall applications, and the applicability of penalty provisions as canvassed in the *Uttley* and *Morgan* arguments. Equally whether our Parole Board actually is independent or impartial, remains to be confirmed or otherwise by the NZ Courts. The proposed Sentencing Council with its planned executive influence has shades of *R v Secretary of State for Home Department ex parte Andersen*,[cii] and for a very interesting debate on separation of powers. In *State v Mamalbolo*,[ciii] 11 Judges of the Constitutional Court of South Africa said:

> Under the doctrine of separation of powers it [the judiciary] stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest

independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority.

What hope then for the Parole Board, or a Sentencing Council?

Tony Ellis
Barrister
Wellington NZ
28 August 2006

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[i] Barrister, Wellington, NZ and President NZ Council for Civil Liberties.

[ii] European Convention on Human Rights

[iii] International Covenant on Civil and Political Rights —"ICCPR" or "Covenant".

[iv] Divided from the Sentencing and Parole Reform Bill (Bill 88-2) third reading

[v] s 97, Criminal Justice Act 1985.

[vi] ibid s100

[vii] s112, Parole Act 2002

[viii] Also a Tony Ellis, but no relation to the writer

[ix] 22 were last noted on the Board's website as at August 2006 www.paroleboard.govt.nz/nzpb/aboutus/whoswho.html

[x] s111 (1) Parole Board Act 2000 appointed by the Governor-General on the recommendation of the Attorney-General (for a term of 3 years or less) s120

[xi] *Miller & Carroll v New Zealand Parole Board and Attorney-General* Civ No 2004-485-1460

[xii] In *Van Der Platt v New Zealand,* Comm. No /2006. (Awaiting a number allocation). New Zealand has ratified both the International Covenant on Civil and Political Rights, and the Optional Protocol allowing individual complaints. Since ratification the only successful case has been *Rameka, Harris, and Tarawa v New Zealand,* Comm No 1090/2002, CCPR/C/79/D/1090/2002**,** Views of 15 December 2003 (Human Rights Committee**),** 7 HNRZ 663 A preventive detention case (IPP prisoner in UK terms) The writer of this article was counsel for the 'authors' in that case, as the complainants are described in UN terminology.

[xiii] NZLC R94 www.lawcom.govt.nz.

[xiv] The capital city of New Zeland.

[xv] New Zealand Law Talk, www.nzls.org.nz/lawtalk/672

[xvi] ibid.

[xvii] www.safe-nz.org.nz

[xviii] Attitudes to Crime and Punishment: A New Zealand Study. Ministry of Justice, Judy Paulin, Wendy Searle, & Trish Knaggs. December 2003.

[xix] Kuttschreuter, M., and O. Wiegman (1998). "*Crime Prevention and the Attitude Toward the Criminal Justice System: The Effects of a Multimedia Campaign*." Journal of Criminal Justice 26(6): 441–452.

[xx] Also an Ex Prime Minister, and Law Professor.

[xxi] NZLC R94

[xxii] Compiled from the "World Prison Population List", Sixth Edition, Roy Walmsley, Kings College London, International Centre for Prison Studies

23 "*Building Safer Communities through Effective Interventions in Criminal Justice*" Seminar at the New Zealand Centre for Public Law, Minister of Justice, 16 August 2006, Victoria University of Wellington Law School, Wellington.

[xxiv] Ibid.

[xxv] Rameka v New Zealand No.1090/2002 UNHRC 7 HRNZ 663.

[xxvi] Article 9(4) (is similar to Article 5(4) of the ECHR) it provides:

> *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

[xxvii] Para 6.4.

[xxviii] Claudia Geiringer, *Case Note: Rameka v New Zealand*, New Zealand Yearbook of International Law [Vol 2, 2005] pp185-203, 193.

[xxix] Ibid 194

[xxx] *Blackstock v UK* , ECHR Application No 59512/00, 21 June 2005. *Spence v UK* Application no. 1190/04, 30 November 2004.

[xxxi] The Government's Chief Psychiatric Adviser, and Director of Mental Health in the Ministry of Health.

[xxxii] www.paroleboard.govt.nz/nzpb/media/media/ Media release was 21 July 2004.

[xxxiii] Another interesting reason is the Parole Board policy discouraging legal representation set out at Page 70 of the Parole Board Guide under the heading Legal Representation;

> *Experience has shown that unless there is some special need for counsel, her/his involvement does not operate to the advantage of the offender. It commonly puts the Board at one remove from the offender, reduces the Board's ability to achieve a close and frank relationship with offenders, and makes them less inclined to exercise their own initiative or work out what may best be done to meet their particular needs based upon their knowledge.*

This requirement for leave to appear is a breach of the concept of inequality of arms as the Department has no such restriction. It does not bode well for the proposition that the Board is a Court. What court requires counsel to seek leave to appear before it?

[xxxiv] Strictly speaking the majority party in a coalition, NZ not having had a single party with sufficient MP's to form a majority government since the MMP (mixed member proportional) system was introduced in 1996 (half constituency MP's, and half list MP's with each voters having two votes).

[xxxv] www.dpmc.govt.nz/cabinet/

[xxxvi] Clause XVI, 1983 SR 1983/225.

[xxxvii] s130 Criminal Justice Act 1985.

[xxxviii] s120 Parole Act 2002.

[xxxix] ECHR Application No. 7819/77; 7878/77 28 June 1984.

[xl] ECHR, Application No. 58141/00 3 May 2005.

[xli] An order that the prisoner not be released whilst a 'risk' reviewed every six months, but for most finite sentenced prisoners it applies to meaning the final third of the sentence need to be fully served.

[xlii] For example a General Manager in the Department will be the applicant for recall orders, or s107 orders.

[xliii] *Tribunals for Users One System, One Service*, Sir Andrew Leggatt, March 2001, www.tribunals-review.org.uk/leggatthtm/leg-00.htm

[xliv] We [Law Commission] understand that the case was set down for hearing on 28 March 2006. As far as we are aware, the judgment has not yet been released.

[xlv] Dominion Post, Wellington 16 August 2005.

[xlvi] [2002] 3 LRI 210.

[xlvii] (Application no. 13427/87) 9 December 1994. Para 49.

[xlviii] *Tribunals for Users One System, One Service*, Sir Andrew Leggatt, March 2001.

[xlix] *The Parole Board in Transition* [2006] Crim L.R. p18.

[l] [2004] UKHL 38; [2004] 1 W.L.R. 2278; [2005] 1 Cr.App.R. 15.

[li] Replacing the Judicial Committee of the Privy Council on 1 January 2004.

[lii] [2004] SCCR 281.

[liii] *Morgan v The Superintendent, Rimutaka Prison*, [2005] NZSC 26 Para 18.

[liv] As indicated by Lord Philips, if Mr Uttley had been sentenced to 12 years imprisonment under the old regime he would, subject to good behaviour, have been released on remission after serving two-thirds of his sentence, which would then have expired. Under the new regime he was released at the same time, but he was subject to a number of restrictions on his freedom.

[lv] Lord Carswell stated at paragraph 65:

> '*The maximum sentence for rape, the most serious of the offences committed by the respondent, was imprisonment for life both before and after 1983 and so remains. A court sentencing the respondent before 1983 could if it thought fit have imposed imprisonment for life or for a term very much longer than 12 years. It is in my opinion impossible to regard a sentence of 12 years, even with the new element of a licence, as a heavier penalty than that which could have been imposed at the time when the offence was committed.'*

This view was supported by their Lordships. Lord Rodger observed that for the purposes of article 7 (1), the proper comparison was between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983. Therefore, the cumulative penalty of 12 years which the court imposed was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed.

[lvi] Reports of Judgments and Decisions 2000-VII.

[lvii] P 75 at Para 14.5

[lviii] *Flynn* Para 109.

[lix] At Para's 18 and 19.

[lx] His "grave doubts" were only overcome by his view that the High Court would be entitled to take into account the prisoner's expectations under the old system in fixing the punishment tariff before which eligibility for parole could not be considered.

[lxi] At Para 46.

[lxii] 2004 SCCR 281, UKPC, at paragraph 99.

[lxiii] At Para 25.

[lxiv] Lord Rodger in Uttley considered that the purpose was not to ensure that the offender was punished in exactly the same way, as he would have been at the time of the offence but to ensure that he was not punished more heavily than the relevant law passed by the legislature would have permitted at that time.

[lxv] [1987] 2 SCR 309.

[lxvi] At Para 29

67 Turning to the words of Lord Carswell, the missing step in his argument is that the court who did sentence Mr Uttley could also have been minded to impose a sentence of life imprisonment, but did not. It is clearly admitted by his Lordship that the maximum sentence for rape was imprisonment for life before, after 1983, and at the time of the sentencing. It is conceded by Your Author that as pointed out by his Lordship, the court sentencing Mr Uttley shortly after the commission of the offence could have imposed imprisonment for life or for a term longer than 12 years

[lxviii] At Para 25.

[lxix] [1998] A.C.539, at Para 585.

[lxx] '*In public law the emphasis should be on substance rather than form. The case should not be decided on a semantic quibble about whether the Home Secretary's function is strictly "a sentencing exercise". The undeniable fact is that in fixing a tariff in the individual case the Home Secretary is making a decision about the punishment of the convicted man. ….*'

[lxxi] '77*… then in the case of Anderson and Taylor, which concerned a challenge under Article 6 (1) to the role of the Secretary of State in fixing tariffs for two mandatory life prisoners, the Court of Appeal was unanimous in finding that this was a sentencing exercise which should attract the guarantees of that Article, following on from clear statements made by the House of Lords in the cases of Ex Parte T and V and Ex parte Pierson.*

'79 . *The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise.*'

[lxxii] At Para 46.

[lxxiii] Her Ladyship gives as examples a sentence of hard labour, the automatic conversion of a sentence of imprisonment into a sentence of transportation and the replacement for juvenile offenders of committal to the care of a local authority with determinate prison detention.

[lxxiv] At Paragraph 57: '*If statutory changes were made to the release regime of those serving mandatory life sentences those changes might affect the severity of the sentence that the law required. The remission regime is an integral feature of the sentence of imprisonment. When considering how heavy a penalty has been imposed by the sentence it is necessary to consider the overall effect of the sentence. '*

[lxxv] At Para 15.

[lxxvi] *Van Der Platt v New Zealand,* Comm. No /2006 (No awaited)

lxxvii As at that time the Privy Council was the Final Appellate Court. Less than 15 criminal appeals in 150 years had been granted Special Leave to Appeal.

lxxviii The HRC typically take two to three years from lodgement to decision.

lxxix www.nzpb/pdf/nzpb-annual-report-2005.pdf

lxxx 2005 1 NZLR 161.

lxxxi 35 EHRR 1121.

lxxxii Ibid Para 74.

lxxxiii Ibid Para 75.

lxxxiv Ibid Para16/17.

lxxxv (Footnote added) for present purposes—The right to a lawyer, and the right to apply for habeas corpus.

lxxxvi 2005 1 NZLR 161, Para 77.

lxxxvii s 2 Criminal Justice Act, (where a period of imprisonment of 2 years or more applies).

lxxxviii Comm No. 1385/2005.

lxxxix Parole Act 65 the final recall order is determined … at least 14 days after, but not more than 1 month after, the date of the interim order.

xc s22 New Zealand Bill or Rights Act 1990 ("NZBORA"), Article 9(4) ICCPR, cf Article 5(4) European Convention.

xci The Parole Board in Transition [2006] Crim L.R.3, pp8/9

xcii Cited by the European Court at Para 24 of *Stafford v UK* **[2002]** 35 EHRR 32.

xciii Renumbered paragraphs and footnotes are used for ease of presentation.

xciv The NZBORA and the ICCPR are relevant, for Covenant purposes the Board is arguable not a Court, or more accurately does not exercise judicial power "before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release" see Article 9(3).

xcv Wade and Forsyth, *Administrative Law* 8th ed, OUP, 2000, p529.

xcvi *Liversidge v Anderson* (1941) 3 ALL ER 338, 361

xcvii s 22,23(1)(c) NZBORA, Habeas Corpus Act 2001 s14, (and the common law), Article 9(4) ICCPR, Article 5(4) European Convention, Article XXV of the American Declaration, Article 70 of the American Convention. Article 7(1)(a) African Charter.

xcviii For an alternative view see A.J. Ellis, *Psychological Torture by The Misuse of Long Term Solitary Confinement in New Zealand Prisons and The denial of Habeas Corpus: an International and Comparative Perspective*, M Phil, Essex University. 2005.

xcix 2005 1 NZLR 161

c [2002] 1 NZLR 616 (CA) (5 Judges sat).

ci Parole Act 2002 s110 **Department of Corrections to provide administrative and training support to Board**

(1) The chief executive must ensure that the Board and the chairperson are provided with the administrative and training support necessary to enable them to perform their functions efficiently and effectively

[cii] [2001] 4 All ER 1089.

[ciii] CCT 44/00, 11 April 2001.