IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 40/2020
[2022] NZSC 143

BETWEEN	WILLIAM ALLAN BERKLAND Appellant
AND	THE KING Respondent

SC 64/2020

BETWEEN	BROWNIE JOSEPH HARDING Appellant
AND	THE KING Respondent

Hearing:	23 and 24 March 2021
Court:	Winkelmann CJ, William Young, Glazebrook, Ellen France and Williams JJ
Counsel:	L C Ord and E T Blincoe for Appellant SC 40/2020 R N Park for Appellant SC 64/2020 S K Barr and A J Ewing for Respondent in SC 40/2020 and SC 64/2020 C P Merrick, K Snelgar and J R Spelman for Te Hunga Rōia Māori o Aotearoa | The Māori Law Society as Intervener
Judgment:	7 December 2022

JUDGMENT OF THE COURT

A **Mr Berkland's appeal in SC 40/2020 is allowed. His sentence of 12 years and nine months' imprisonment, together with a 50 per cent MPI, is quashed, and a sentence of eight years and eight months' imprisonment is substituted.**

B **Mr Harding's appeal in SC 64/2020 is allowed. His sentence of 28 and a half years is quashed, and a new sentence of 21 years is substituted. There is no adjustment to the MPI.**

REASONS

WINKELMANN CJ, WILLIAM YOUNG, GLAZEBROOK AND WILLIAMS JJ
(Given by Williams J)

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A INTRODUCTION

[1] In *Zhang v R* the Court of Appeal recalibrated New Zealand's approach to sentencing for methamphetamine-related offending.[1] It broadened sentencing discretion in two ways relevant to this appeal. First, it removed the purely category-based distinction in sentencing between manufacture, importation and supply of methamphetamine. Sentencing is to be focused instead on the particular role of the offender in the offending. This was done by introducing new role categories ("leading", "significant" and "lesser") to capture the role-related culpability inherent in the offending.

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1 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

Second, and subject to this Court's decision in *R v Jarden*,[2] the Court signalled that personal circumstances may be relevant across the entire spectrum of methamphetamine-related sentencing.

[2] These two appeals by William Berkland and Brownie Harding raise important issues for the implementation of that new framework and for sentencing more generally.

The appeals in brief

The Berkland appeal

[3] Following the termination of "Operation Walnut" in April 2017, Mr Berkland (a patched member of the Porirua chapter of the Mongrel Mob) pleaded guilty to charges relating to his role in a significant methamphetamine supply operation together with ancillary charges relating to possession of weapons and his own retail supply of other drugs. The methamphetamine supply operation was led by Mr Berkland's principal, Steven Blance (also a patched member of the Porirua Mongrel Mob). It was established that during the investigation period, they purchased at least 15 kilograms of methamphetamine for on-supply and supplied an estimated average of approximately one kilogram of methamphetamine per week to drug retailers in the Wellington region. Total profit for this slice of the operation was estimated at approximately $1.6 million .

[4] In the High Court, Collins J described Mr Blance as the "mastermind" [3] of the operation and Mr Berkland as his "right-hand man".[4] The starting point for Mr Blance was 18 years.[5] The starting point for Mr Berkland was 16 years and six months, to which was added a one year uplift for his ancillary firearms and supply offending. His end sentence of 13 years and three months reflected discounts for an early guilty plea and a six month allowance for personal background factors such as his methamphetamine addiction.[6] A minimum period of imprisonment (MPI) of six years and six months was imposed.

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2 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612.
3 *R v Blance* [2018] NZHC 1518 at [17].
4 *R v Berkland* [2018] NZHC 1520 (Collins J) [Berkland sentencing notes] at [6].
5 To Mr Blance's starting point was added a one year uplift for associated firearms and dishonesty charges. His end sentence was 14 years and six months, the reduction reflecting an early guilty plea and a six month reduction for personal factors.
6 Berkland sentencing notes, above n 4, at [35]–[36].

[5] When it decided Mr Berkland's appeal against sentence, the Court of Appeal applied the new role categories introduced in *Zhang*[7] (which was decided after Mr Berkland was sentenced).[8] The Court described Mr Blance's role in the methamphetamine operation as "leading" and that of Mr Berkland as at the upper end of "significant". This role combined with the quantity of methamphetamine involved indicated that the High Court's starting point of 16 and a half years' imprisonment was within range. Moreover, the Court accepted the limited differentiation between starting points adopted by the sentencing Judge for Messrs Blance (who did not appeal) and Berkland may have been on the low side but said it did not warrant reduction of Mr Berkland's sentence given the high threshold for disparity arguments and view that Mr Blance's sentence was low under *Zhang*.

[6] Finally, the Court rejected the argument that a greater discount should have been given for Mr Berkland's personal factors. They were not an "operative cause" of his offending in light of its scale and commerciality (including retailing multiple drugs), and the fact that his derived income was above subsistence level.[9] Nevertheless, the Court accepted that due to an administrative oversight, certain further background information filed in the High Court by Mr Berkland had not been brought to the attention of the sentencing Judge. This information warranted a further modest discount. The Court of Appeal allowed the appeal in that limited respect only, and reduced the sentence by a further six months to 12 years and nine months on account of the additional factors raised in that material.[10]

[7] This Court granted general leave to appeal, but noted the following in our leave judgment:[11]

> [1] While the approved question is general, the Court is particularly interested in hearing from the parties in relation to the following issues:
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> (a) whether, given the more limited role attributed to Mr Berkland by the Court of Appeal (compared to that of his co-offender), sufficient weight was placed on that factor in setting the starting point;

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7 *Zhang*, above n 1, at [126].
8 *Berkland v R* [2020] NZCA 150 (French, Dobson and Moore JJ) [Berkland CA judgment].
9 At [77].
10 The MPI of slightly less than 50 per cent was also reduced proportionately.
11 *Berkland v R* [2020] NZSC 125 (footnote omitted).

(b) whether the Court of Appeal applied the correct approach to personal mitigating circumstances in relation to Mr Berkland, and in particular in requiring a causal link between his addiction or history of deprivation and the offending; and

(c) whether the Court of Appeal was correct to uphold the imposition of a minimum period of imprisonment.

[2] It will be clear from the foregoing that it is not intended that this appeal should proceed as a wholesale re-litigation of the Court of Appeal's guideline judgment in *Zhang v R*.

[8] Mr Berkland broadly advances three arguments. First, he says that for various reasons the Court of Appeal overstated the significance of his role, particularly in light of the differentiation between him and Mr Blance. Properly characterised, he claims he was at the lesser end of significant and a starting point of between 13 and 14 and a half years should have been adopted. Second, he argues the Court of Appeal erred in principle by allowing only token discounts for personal factors due to the commercial scale of the operation and the need to show a causative link between such factors and the offending. Instead, he says a discount should be given where personal factors *contribute* to the offending. Mr Berkland's final argument is that in light of his personal circumstances, an MPI could not be justified.

The Harding appeal

[9] Mr Harding pleaded guilty to 11 charges relating to the manufacture and distribution of methamphetamine following the termination of "Operation Easter".[12] The six separate manufactures in respect of which the police investigation obtained evidence produced at least 6.5 kilograms of the drug assessed at a very high level of purity. The product was transported to Auckland for on-distribution via Mr Harding's gang connections.

[10] Mr Harding was described by Moore J in the High Court as the "undisputed and unchallenged kingpin of this operation which operated on what can fairly be described as a highly organised industrial enterprise".[13] The Judge first considered the application of s 8(c) of the Sentencing Act 2002 which requires imposing the maximum penalty

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12 The 11 charges include six of manufacturing methamphetamine, two of conspiring to supply methamphetamine, possession for supply, supplying pseudoephedrine and participating in an organised criminal group.

13 *R v Harding* [2017] NZHC 675 (Moore J) [Harding sentencing notes] at [38].

prescribed for the offence "if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate". Although satisfied that Mr Harding's offending was within the most serious of cases of methamphetamine manufacturing, Moore J decided "by a fine margin" that the guilty pleas and lack of previous drug-related offending made a sentence of life imprisonment inappropriate.[14] Instead, a starting point of 30 years' imprisonment was adopted with a discount for late guilty pleas of 18 months, leaving a final sentence of 28 and a half years' imprisonment.[15] The maximum MPI of 10 years was imposed as the Judge was satisfied a higher MPI would have been justified but for the 10 year maximum provided in s 84(4).

[11] At the time Mr Harding was sentenced, the relevant sentencing guidelines were those provided in *R v Fatu*.[16] It was not suggested that, under those guidelines, the starting point adopted was unavailable. Mr Harding, however, was entitled to have the appropriateness of his sentence reviewed in light of *Zhang*. He pursued an appeal on that basis.

[12] The Court of Appeal upheld this sentence on appeal. The Court described the operation as "the most substantial methamphetamine manufacturing and distribution network ever prosecuted in New Zealand",[17] and placed Mr Harding at the "apex" of it.[18] *Zhang*, the Court found, did not suggest that leaders in commercial drug dealing should receive more lenient sentences than they would have under *Fatu.*[19] The Court also agreed with Moore J that there should be no discount for personal circumstances as there was not "the necessary link between any mental health issues, or Mr Harding's abuse of alcohol and gambling, and the offending".[20]

[13] It should, however, be noted that the Court of Appeal did express concern that a sentence of 30 years may not materially contribute any more to the Sentencing Act's goals

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14 At [6] and [75].
15 This 30 year starting point comprised 25 years for the manufacturing charges with an uplift of 5 years for the supply-related charges.
16 *R v Fatu* [2006] 2 NZLR 72 (CA).
17 *Harding v R* [2020] NZCA 217 (Goddard, Ellis and Brewer JJ) [Harding CA judgment] at [1].
18 At [42].
19 At [54].
20 At [57].

of accountability, denunciation or deterrence than would a sentence of (say) 20 years. If that were the case, such a lengthy sentence might only be justifiable as a means of providing community protection through incapacitation.[21] Further, Goddard J considered that a sentence of 28 and a half years raised a question about proportionality given the lower average life expectancy of Māori men in their early 40s.[22] It might be said that such sentences could be tantamount to a life sentence. However, since neither argument was raised by the appellant, the Court of Appeal did not address these matters further.

[14] Mr Harding applied for leave to appeal to this Court against both conviction and sentence. We declined leave to appeal against conviction but granted the appeal against sentence.[23] The approved question was whether the Court of Appeal was correct to dismiss the appeal against sentence.

[15] Mr Harding argues the sentence is excessive when compared to sentences for importation of similar quantities, and in light of personal background and cultural factors which, it was argued, the Court of Appeal failed to take into account.

Issues

[16] Taken together, resolution of these appeals requires us to consider six broad issues: some are appeal specific, others are relevant to both appeals. We set those out here and summarise our conclusions:

(a) Was Mr Harding's conduct in manufacturing methamphetamine more culpable than that which might be ordinarily associated with importation or supply of the same quantity, and if so, how should that increased culpability be assessed?

We conclude that, irrespective of the offence category, culpability must be assessed on the facts of the particular case, commencing with drug quantum and the offender's role in the offending. We address separately below, the relevance to culpability of offender background. In Mr

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21 At [60].
22 At [61].
23 *Harding v R* [2020] NZSC 127.

Harding's case, although the complexity (by which we mean the planning, premeditation and human scale) of his manufacturing operation was greater than that which might be expected in importation or supply of the same quantity, the uplift upheld in the Court of Appeal reflected an incorrect assessment of his culpability. It was, as a result, too great.

We consider an overall starting point of 22 years for all offending is appropriate.

(b) In the Berkland appeal, did the relevant role criteria, as stipulated in *Zhang* and applied by the Court of Appeal, ensure that all facts relevant to culpability were appropriately considered?

The role description in *Zhang* warrants reformulation to make it clear that an offender such as Mr Berkland who did not have significant autonomy, decision-making authority or management of others should not be placed at the upper end of the significant role. His starting point must be reduced accordingly.

We consider an overall starting point of 14 and a half years for all offending is appropriate.

(c) In both appeals, how important should background factors have been; and what degree of connection must be established between background and the offending?

The Sentencing Act's purposes and principles mandate individualised justice, making the offender's background an important element in all sentencing alongside consideration of the harm caused to victims and the community. We conclude that background factors such as addiction, deprivation and historic dispossession can mitigate sentence where those factors have contributed causatively; that is, if they help to explain in some rational way why the offender has come to offend. This standard is not unduly rigorous. That said, there will be cases in which the causative

nexus is more direct. In other words, if it can be established that a background factor was the operative or proximate cause of the offending then the potency of that connection will be greater. But there may be other considerations that limit the effect of background. In particular, the more serious and carefully orchestrated the offending, the more the courts are likely to emphasise the choice made by the offender to offend. The causative contribution of background factors will be reduced and other sentencing purposes will be more prominent, particularly protecting the community from the harm associated with drug dealing.

Further, we emphasise that ss 25–27 of the Sentencing Act are key infrastructure to assist the court in elucidating relevant aspects of offender background. We provide further guidance as to the implementation of s 27.

(d) How do we apply our conclusions in relation to the place of background factors to these appeals?

(i) In relation to Mr Berkland, we consider that the available information established that various background factors contributed causatively to his offending and should have materially affected his sentence in accordance with the relevant purposes and principles of sentencing.

We consider discounts of 10 per cent for background and addiction and 10 per cent for rehabilitation are appropriate.

(ii) In relation to Mr Harding, we do not consider the background information to be as compelling either on its own terms or when placed alongside the seriousness of his offending. We do not discount the possible causative contribution of Mr Harding's background factors, particularly poor educational outcomes. But when these factors are seen in the context of his leadership of serious and carefully orchestrated offending and his lengthy history

of different but still serious offending, it would not be appropriate to treat that background as justifying a discount.

(e) In the Berkland appeal, should his background have played any part in the decision to impose an MPI?

In light of the reduction in Mr Berkland's sentence and the fact that an MPI of 50 per cent of that sentence would have elapsed at the end of 2021 or early this year, imposing an MPI now would serve no relevant purpose. In those circumstances we do not impose an MPI in Mr Berkland's case. For completeness we note that Mr Harding's MPI remains at the 10 year maximum. Since his final sentence is still more than 20 years, an MPI of 50 per cent would exceed that term. His counsel did not suggest an MPI of less than 50 per cent could be justified.

[17] We conclude therefore that the sentences in each appeal were in error in different respects and would allow the appeals accordingly.

[18] Before turning to discuss our reasons, it is necessary to briefly sketch out the relevant aspects of the sentencing framework generally and drug offending in particular, including the Court of Appeal's guideline judgment in *Zhang*.

Sentencing purposes, principles and guidelines

[19] Section 7 of the Sentencing Act contains a closed list of permissible sentencing purposes. The Act itself does not dictate any particular priority.[24] Nor is the sentencing judge directed to pursue all of them. In fact, as every sentencing judge knows, these purposes can pull in different directions.

[20] Section 8 then provides a list of mandatory relevant principles of sentencing for the court, including specific directives in relation to the application of maximum penalties and, conversely, to impose the "least restrictive" outcome. To this is added the inclusive

[24] Sentencing Act 2002, s 7(2).

list of aggravating and mitigating factors contained in s 9. They too are mandatory considerations if relevant to the case.

[21] These principles and factors in ss 8 and 9 can also pull in different directions. Again, the Act itself does not prioritise them or attribute to them any particular weight. Rather, their applicability, priority and weight will be a matter for the sentencing judge to evaluate based on a broad assessment of the seriousness of the harm, the culpability of the offender, the interests of the victim and the offender's personal circumstances or background.[25]

[22] As this Court said in *Hessell v R*, ss 7, 8 and 9 reflect the complexity of the sentencing task and the infinite variety of factual circumstances that must be considered and weighed.[26] This is an intensely individualised factual evaluation.[27] That does not mean consistency in sentencing is de-powered; rather as *Hessell* notes, it reflects that "Parliament was certainly concerned over the need for consistency in sentences, but was equally concerned that the sentence be appropriate in the particular case".[28] Consistency and a full evaluation of the circumstances must sit together "to achieve justice in the individual case".[29] Section 8(e) makes that point in the following careful terms:

> In sentencing ... the court ... must take into account the general desirability of consistency with appropriate sentencing levels ... in respect of similar offenders committing similar offences in similar circumstances ...

[23] Purposes, principles and factors are prescribed but sentencing methodology has been left to the judges.[30] In drug offending, as in all other offending, the courts adopt the well-known two-stage methodology, first introduced by the Court of Appeal in *R v Taueki*.[31] The sentencing judge must first set a starting point by reference to the facts of the offending and the offender's role in it, and then secondly consider the wider circumstances of the offender in order to determine whether the starting point should be

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25 *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [4].
26 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [42].
27 At [38]. This point was also recently affirmed in *Zhang*, above n 1, at [120].
28 At [38].
29 At [38]
30 *Moses*, above n 25, at [4].
31 *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

adjusted. As recently settled in *Moses v R*, account is taken of any guilty plea at that second stage.[32]

[24] We agree with the observation in *Moses* that "[g]uideline judgments build on the Act, seeking to further its purposes by promoting transparency of analysis, which facilitates comparison and appellate review, and principled consistency of outcome".[33] Where there is a guideline judgment it should be applied by the sentencing judge. But as reiterated by this Court in *Hessell*, guideline judgments are just that.[34] They assist sentencing judges in the difficult evaluative task they perform. They look over the sentencing judge's shoulder to ensure there is a "proper judicial evaluation of individual cases".[35] Guideline judgments do not replace sentencing discretion with a "mechanistic" box-ticking exercise.[36]

Drug offending

Misuse of Drugs Act 1975

[25] The Misuse of Drugs Act 1975 (MODA) controls the importation, manufacture, supply and sale of controlled drugs.[37] Methamphetamine is a Class A controlled drug because, in terms of s 3A(a), its misuse poses "a very high risk of harm" to "individuals, or to society".[38]

[26] Parliament's concern about methamphetamine's potential for harm drives the criminalisation of unauthorised "dealing" in it.[39] Dealing includes importation, manufacture and supply.[40] The maximum sentence for methamphetamine dealing is life imprisonment.[41] Imprisonment will be the presumptive sentence for methamphetamine dealing unless there are circumstances of the offence or offender justifying a different

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32 *Moses*, above n 25, changing the approach from that set out in *Hessell*, above n 26, where the guilty pleas were taken into account at a third stage.
33 *Moses*, above n 25, at [4].
34 *Hessell*, above n 26, at [41]–[43]. See also *Zhang*, above n 1, at [120].
35 *Hessell*, above n 26, at [41].
36 *Zhang*, above n 1, at [48].
37 Misuse of Drugs Act 1975 [MODA], s 6(1).
38 MODA, sch 1.
39 Section 6.
40 Section 6(1)(a)–(c).
41 Section 6(2)(a).

result.[42] Although the Act contains a rebuttable presumption that possession of at least 5 grams of methamphetamine will constitute possession for supply,[43] the dealing offences do not prescribe a minimum quantity.[44] In other words, dealing in methamphetamine in any amount will trigger a presumed custodial response, while exposing the offender, at least in theory, to life imprisonment.

[27] For sentencing judges this means two things: first, the range of available sentences, including the range of custodial sentences, is extremely wide; and second, this makes the evaluative task both more important and more difficult. Guideline judgments obviously play an important role in ameliorating that burden. But as noted above, guideline judgments must not be applied in a mechanistic manner. There must be proper judicial evaluation of the individual case.[45]

Zhang

[28] In 2019, following a comprehensive inquiry, the Court of Appeal issued new methamphetamine sentencing guidelines in *R v Zhang.*[46] These guidelines replaced those issued by the Court of Appeal 14 years earlier in *R v Fatu.*[47] The Court in *Zhang* made various adjustments to the methamphetamine sentencing practice that had developed under *Fatu*, in light of current evidence of changing trends in methamphetamine dealing and consumption in New Zealand.

[29] The changes in the New Zealand methamphetamine trade were significant. There had been a massive increase in aggregate quantities seized: from a total of 13 kilograms

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42 Section 6(4).
43 Schedule 5.
44 Section 6(1).
45 *Hessell*, above n 26, at [41]–[43].
46 *Zhang*, above n 1. The Court selected six appeals for hearing, which between them were considered to raise a spectrum of issues the Court felt needed to be addressed. Submissions were sought from the Criminal Bar Association of New Zealand, the New Zealand Law Society | Te Kāhui Ture o Aotearoa, the New Zealand Bar Association | Ngā Ahorangi Motuhake o te Ture, the Auckland District Law Society, the Public Defence Service | Ratonga Wawao ā-Ture Tūmatanui, the Human Rights Commission | Te Kāhui Tika Tangata, the New Zealand Police | Ngā Pirihimana o Aotearoa, the New Zealand Drug Foundation | Te Tūāpapa Tarukino o Aotearoa, Te Ohu Rata o Aotearoa | Māori Medical Practitioners Association and Te Hunga Rōia Māori o Aotearoa | Māori Law Society. All those invited filed submissions and other material. Only the New Zealand Drug Foundation, Te Ohu Rata and the New Zealand Police chose not to make separate oral submissions. Extensive evidence of a systemic nature was also filed by the interveners.
47 *Fatu*, above n 16.

in 2012 to 923 kilograms by 2016.[48] Methamphetamine-related convictions had almost doubled between 2009 and 2018 while, by contrast, drug convictions overall had halved over the same period.[49] Part of that trend may be attributable to a shift in policing policy (particularly with regard to Class C drug offending and mere possession generally), but the Court was in little doubt that methamphetamine use in the country had increased markedly since *Fatu* despite the prevalent emphasis on deterrence above other more individualised sentencing purposes.

[30] "After extensive consideration and debate upon the matter,"[50] the Court decided to retain the *Fatu* quantum-based framework as a "reasonable proxy both for the social harm done by the drug and the illicit gains made from making, importing and selling it".[51] But in an acknowledgement of the larger quantities now entering the market almost entirely through importation, the Court decided to split band four of *Fatu* in two: band four would cover quantum between 500 grams and two kilograms; and a new band five would relate to any quantum above two kilograms. The following comparative table demonstrates the change:

	Former: *Fatu*	**New: *Zhang***
Band one: < 5 grams	2–4.5 years	**Community to 4 years**
Band two: < 250 grams	3–11 years	**2–9 years**
Band three: < 500 grams	8–15 years	**6–12 years**
Band four:	> 500 grams 10 years to life	< **2 kilograms** **8–16 years**
(New) Band five:	N/A	> **2 kilograms** **10 years to life**

[31] As can be seen the new guideline produced material reductions in starting point ranges in bands one to three. Overall the Court signalled a desire to step back from the relative rigidity of the *Fatu* framework.

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48 *Zhang*, above n 1, at [81].
49 At [84].
50 At [118].
51 At [103].

[32] First, the bands would no longer differentiate, as *Fatu* had, between supply, importation and manufacturing.[52] The Court reasoned that since the maximum penalty for each offence and the harm caused is identical, each offence category should also be treated as equally serious in principle. Further, the emphasis in *Fatu* on safety issues were seen as less pressing for two reasons: importation is now the predominant means by which the drug entered the New Zealand market, and contamination issues related to manufacturing had been found to be somewhat overstated.[53]

[33] Second, sentencing judges were encouraged to consider "more flexible sentencing solutions", particularly in band one offending.[54] The Court signalled that non quantum-based individual culpability factors such as role and personal background could well justify community-based sentences.[55]

[34] Third, in fixing culpability *Zhang* placed a great deal more emphasis on the role of the offender in the offending.[56] It was, the Court noted, "an important consideration" alongside quantum in assessing overall culpability.[57] A formalised approach to role was therefore required. Following the lead of the United Kingdom Sentencing Council,[58] the Court subdivided each of the five bands into role-based categories: "lesser" belonging to the bottom of the band, "significant" in the mid-range and "leading" at the upper end.[59] The Court also entertained the possibility that role could take a starting point outside the band dictated by quantum alone. The Court set out the relevant role indicia in these terms:[60]

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52 The Court in *Fatu* considered that manufacture, importation and supply were not equally culpable: manufacturers were likely to be more culpable than importers and importers more culpable than suppliers. An additional 10 to 20 per cent loading was imposed for importation (as compared to supply); and 10 to 20 per cent again for manufacturing (as compared to importation) as explained in *Zhang*, above n 1, at [26]. The sentencing bands for *Fatu* in the above table incorporate the full range of possible starting points for all three offences in each band.

53 *Zhang*, above n 1, at [30].

54 At [123].

55 At [123].

56 The Court in *Zhang* made the point that in *Fatu* role was primarily relevant to placement within a band rather than to movement between bands or to take a person out of a band: see *Zhang*, above n 1, at [26] and [118], and contrast with *Fatu*, above n 47, at [31], [32] and [36].

57 *Zhang*, above n 1, at [118].

58 Sentencing Council *Drug Offences: Definitive Guideline* (2012). Note that these guidelines have since been updated in April 2021: Sentencing Council "Sentencing Guidelines for use in Crown Court" <www.sentencingcouncil.org.uk>.

59 *Zhang*, above n 1, at [126].

60 At [126].

Role		
Lesser	**Significant**	**Leading**
1. Performs a limited function under direction; 2. engaged by pressure, coercion, intimidation; 3. involvement through naivety or exploitation; 4. motivated solely or primarily by own addiction; 5. little or no actual or expected financial gain; 6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved; 7. no influence on those above in a chain; 8. little, if any, awareness or understanding of the scale of operation; and/or 9. if own operation, solely or primarily for own or joint use on non-commercial basis.	1. Operational or management function in own operation or within a chain; 2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward; 3. motivated solely or primarily by financial or other advantage, whether or not operating alone; 4. actual or expected commercial profit; and/or 5. some awareness and understanding of scale of operation.	1. Directing or organising buying and selling on a commercial scale; 2. substantial links to, and influence on, others in a chain; 3. close links to original source; 4. expectation of substantial financial gain; 5. uses business as cover; and/or 6. abuses a position of trust or responsibility.

[35] At stage two of the *Moses* sentencing process, the Court stepped back from the prevailing orthodoxy which held that personal background should count for little in commercial scale drug offending. Personal factors may, the Court considered:[61]

(a) impair an offender's rational choice to offend;

(b) reduce the efficacy of either general or specific deterrence; and/or

(c) render a sentence of imprisonment more severe than would be the case for other offenders.

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61 At [138].

[36] Three particular personal factors discussed by the Court in *Zhang* bear mentioning because they are relevant to the issues in this appeal. First, the Court held that addiction will be a mitigating factor where it is "causative of the offending" but would otherwise be "of little mitigatory relevance".[62] Further, the Court suggested that "commercial dealing is likely to be inconsistent with the impairment of the ability to exercise rational choice," but that possibility could not be entirely excluded.[63] Discounts of up to 30 per cent were contemplated for addiction-related factors.[64]

[37] Second, mental health issues also justified discounts where causative in accordance with settled authority.[65] The Court acknowledged that very often mental health issues will go hand in hand with addiction.

[38] Third, the Court acknowledged that social, cultural and economic deprivation, whether in terms of the continuing effects of the historical displacement of Māori, or where found in the particular background of offenders more generally, will be relevant where it "contribute[s] causatively to offending".[66]

[39] The Court then briefly addressed the question of MPIs. The Court emphasised that MPIs must not be imposed mechanistically. Nor should their term be approached in that way.[67] The s 86 discretion "must not be fettered" by presumptions or rules of thumb.[68] But, the Court held, deterrence, denunciation and accountability must remain the dominant purposes engaged in accordance with s 86 and so lengthy MPIs should be reserved for cases involving significant commercial dealing.[69]

[40] The Court summed up the effect of its judgment in this way:[70]

> Those who willingly participate in commercial-level dealing in methamphetamine will gain little succour from this judgment. Its benefits lie

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62 At [147].
63 At [147].
64 At [149].
65 At [152]–[153]. See also *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411; and *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629.
66 *Zhang*, above n 1, at [159] and [162].
67 At [169] and [172].
68 At [174] .
69 At [171].
70 At [11].

> more for those who take a lesser role in methamphetamine offending, and particularly those who do so as a result of vulnerability.

[41] With respect for that Court's supervisory role over first instance sentencing practice, we are broadly in agreement with *Zhang's* recalibration of methamphetamine sentencing. We return to some of the detail of the findings in *Zhang* where relevant to the issues raised in this appeal. As will be seen, we consider there is a need for further clarification in some areas. These include: offender role; the required nexus between personal background factors and offending; and the tools for obtaining and evaluating background information.

B THE RELEVANCE OF OFFENCE CATEGORY TO STARTING POINT IN THE HARDING APPEAL

Submissions

[42] Mr Harding argued that his overall starting point of 30 years (25 years for manufacturing and a five year uplift for supply) was too high. He emphasised that the Court in *Zhang* relied on quantum as the first component in any sentence, removing the offence-based differences that had applied since *Fatu.* Ms Park essentially argued that even if Mr Harding's role was at the upper end of leading (a point she challenged) the Court adopted a starting point far in excess of those for similar quantities in importation and supply cases. This was therefore inconsistent with *Zhang.*

[43] The Crown acknowledged that *Zhang* had removed sentence differentials based only on the offence category but submitted that differences between offence category could still be a relevant factor in determining the starting point. Mr Barr submitted that the quantity involved in Mr Harding's case was still well above the band five floor. He argued that manufacturing on this scale was more complicated and labour intensive, and it required more planning than did importation. Mr Harding was the "kingpin" and "mastermind" of a complex industrial scale operation. It was submitted therefore that that part of Mr Harding's culpability not captured in quantum alone was more than made up for in the high level of responsibility he carried and the fact that the enterprise involved both manufacture and supply.

Analysis

[44] As noted, Mr Harding's manufacturing operation was the largest ever detected in New Zealand at that time. When he was sentenced, manufacturing methamphetamine was treated separately under the *Fatu* guidelines. It was considered to be more culpable than both importing and supplying. So under *Fatu* producing 6.5 kilograms of methamphetamine was therefore "within the most serious of cases" of *manufacturing* methamphetamine.[71] Moore J's conclusion that s 8(c) of the Sentencing Act was engaged was therefore correct on the authorities as they stood at the time.

[45] But the sentence imposed must be reconsidered in light of *Zhang* under which manufacturing, importing and supplying are no longer differentiated in principle. Rather, according to *Zhang*, starting point composition begins with quantum (since the MODA offences respond to the social harm of drug dealing) followed by a consideration of the offender's role in that offending. Any variation between manufacturing, importation and supply will reflect variations in role and associated culpability, not the offence category.

[46] Properly construed, s 8(c) is consistent with that approach. In the context of commercial drug "dealing" s 8(c) can most sensibly be read as applying to the "dealing" offences under s 6 of the MODA as a single category. This brings starting points for importation and supply into the s 8(c) assessment in manufacturing cases.

[47] Since importation and supply cases involving larger quantities of methamphetamine have not led to the imposition of life sentences, s 8(c) (and s 8(d) for that matter) are not likely to be engaged by offending that involved the manufacture of 6.5 kilograms of methamphetamine.

[48] Supply cases with offenders leading sophisticated networks distributing similar quantities to that in Mr Harding's case have tended to attract starting points of 18 years.[72] Leaders in importation offending cases involving similar quantities have also attracted

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71 Harding sentencing notes, above n 13, at [65].

72 *R v Thompson* [2018] NZDC 11394, with the starting point being considered "within range" in *Zhang*, above n 1, at [272]; and *R v Campbell* [2019] NZDC 26383, with this starting point not challenged on appeal: *Campbell v R* [2020] NZCA 631 [*Campbell* CA] at [10].

starting points around the 18 year mark. *R v Martel* is a pre-*Zhang* example,[73] while post *Zhang*, a "moderately leading" importer of 20 kilograms of methamphetamine in multiple importation events had a 19 year starting point reduced to 17 years on appeal.[74] So, if s 8(c) was not engaged, Mr Harding's starting point of 25 years for manufacturing 6.5 kilograms was very high.

[49] In assessing Mr Harding's comparative culpability, we acknowledge that he led a very large manufacturing operation by New Zealand standards.[75] His offending involved a high level of planning and premeditation.[76] He employed 11 others who worked as principal cooks, assistant to the cooks, packers, couriers, equipment suppliers and general drivers and gofers operating in shifts. And he was a hands on boss. He controlled every aspect of the operation. Clearly then, these facts justify an uplift on the (generally) 18 year starting points adopted in the supply and importation cases to which we have referred. This is not because of the particular offence category in Mr Harding's case, but because the facts disclose a higher level of planning and premeditation than the facts in those importation and distribution cases. But a seven year uplift is excessive.

[50] We would for example contrast his starting point with that of Mr Yip whose appeal was dealt with in *Zhang*.[77] He played a leading role in the importation of around 60 kilograms of methamphetamine. A starting point of 25 years was reduced on appeal to 23 years because, although he was a leader, he did not appear to have significant decision-making power and his reward was modest in terms of the significance of his role.[78]

[51] The Courts below do not seem to have grappled with the actual quantity involved in this offending. Six and a half kilograms is not an exceptionally large quantity when compared to trends in importation quantity. It must be remembered that the driver of the

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73 *R v Martel* [2017] NZHC 1878 where the starting point for methamphetamine charges for Mr Martel was 18 years, with an uplift of two years for other drug charges. The sentence, and in particular the starting point, was upheld in the Court of Appeal: *Martel v R* [2018] NZCA 305 at [10].

74 *Fangupo v R* [2020] NZCA 484 at [42] and [50]. The Court of Appeal overturned the19 year starting point in *R v Fangupo* [2019] NZHC 2896.

75 It was argued by Mr Harding that this was not supported by the evidence. But we reject that submission; it is plain that he was the leader of the operation.

76 Sentencing Act, s 9(1)(i). See also *R v Mako* [2000] 2 NZLR 170 (CA) at [36] which notes that "[t]he degree of planning and preparation will reflect criminality".

77 *Zhang*, above n 1, at [282]–[310].

78 At [299]–[300].

MODA offence provisions is the risk of harm to drug users, their families and communities. That is why quantum comparisons are the point of entry for the *Moses* stage one assessment.

[52] A starting point of 21 years for the manufacturing charges sufficiently recognises the greater culpability of Mr Harding's leadership of the operation.

[53] As the sentencing Judge acknowledged, Mr Harding's supply-related offending was closely connected to the manufacturing operation, and in truth it reflected Mr Harding's controlling role in the overall enterprise.[79] An uplift for the supply-related charges is plainly justified for this but there must be no double counting. In our view an uplift of one year to an overall starting point of 22 years is appropriate. It is on any view a very stern starting point. We acknowledge, in that respect, the question posed by the Court below in relation to the marginal deterrent effect of very long finite sentences.[80] Like that Court, we are doubtful that a 30 year sentence serves the sentencing goals of accountability, denunciation and deterrence any better than a sentence of 22 years.

[54] We will address factors in relation to Mr Harding's personal background later in this judgment.

C THE EFFECT OF ROLE ON STARTING POINTS IN THE BERKLAND APPEAL

[55] *Zhang* "reinforc[ed] and enhanc[ed]" the place of role in the culpability assessment.[81] It provided much needed guidance on the potential impact on culpability of different role profiles. But a particular focus of the Court in *Zhang* was on encouraging a less constrained approach to sentencing for "lesser" roles.

[56] In Mr Berkland's appeal the focus is on the "significant" category. He submits there should be greater differentiation between significant and leading roles than the Court of Appeal had allowed for in his case. That issue will always be intertwined with factual assessments in the particular case. It is no surprise therefore that in this appeal

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79 Harding sentencing notes, above n 13, at [28].
80 Harding CA judgment, above n 17, at [60].
81 *Zhang*, above n 1, at [127].

Mr Berkland also mounted an attack on the role-related findings of fact in the Courts below. We address both the factual and the in-principle issues arising under this heading.

The Court of Appeal

[57] It will be recalled that the sentencing Judge set Mr Blance's starting point at 18 years and Mr Berkland's at 16 and half years, before uplifting both starting points to reflect additional offending. In setting the starting point, the Court of Appeal considered the following circumstances meant that Mr Berkland's role could be considered "towards the upper end of significant":

> [51] He performed operations and management functions. He was responsible for the counting, safe keeping and concealment of the money. He was the go-to person after Mr Blance. He was the person who came with the money to purchase the major supplies and by his own admission had conducted major deals on his own. Contrary to a submission made by Ms Ord, we do not dismiss that admission as puffery and idle boasting. The trust Mr Blance placed in Mr Berkland was such that it is perfectly conceivable Mr Blance would have been willing to sanction Mr Berkland doing that. That is not to say, that either man would have regarded the money as solely belonging to Mr Berkland.
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> [52] Mr Berkland also seems to have been the main custodian of what can fairly be described as an arsenal of firearms. It is noteworthy too that he had over half a million dollars' worth of methamphetamine in his van.
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> [53] Mr Berkland was motivated primarily by financial advantage. He expected to profit and did profit. Whether there was or was not a nest egg does not matter for present purposes. What matters is that Mr Berkland genuinely thought there was. …
>
> [54] In any event, in addition to the promised reward of a $100,000 nest egg, there were weekly payments by way of methamphetamine (worth over $4,000 to Mr Berkland) and cash of between $1,000 to $2,000.
>
> [55] Mr Berkland was conversant with the detail of the operation and its scale. The intercepted communications between him and Mr Blance as well as his statements to the undercover police show an intimate knowledge. He talked to the officers about such matters as the operation's preference for purchasing rock methamphetamine, its sales tactics, and money laundering ideas. He conferred with Mr Blance about deals and stocks. He knew Mr Blance's availability, the state of the stocks, and when 'reloading' was going to happen. Mr Berkland may not have been a frequent visitor to Coates Street but the two men must have been in frequent communication.

[58] The Court of Appeal considered these facts satisfied four of the five relevant *Zhang* "significant" indicators and therefore located Mr Berkland's role at the upper end

of significant:[82] he had operational and management functions; he was motivated primarily by financial advantage; he received or expected profit; and he had some awareness of the scale of the overall operation. The starting point of 16 and a half years before an uplift for additional charges was therefore justified. Further, even if the differential between Messrs Berkland and Blance should have been greater, Mr Blance's starting point was probably too low on a *Zhang* analysis. It could not therefore be established that the sentence, on its own terms, was excessive. In any event, the Court took the view that the 18 month difference was not so insignificant a reasonable minded observer would conclude something had gone wrong with the administration of justice.[83]

Submissions

[59] Mr Berkland argued that the Court of Appeal had overstated his role in Mr Blance's operation. Partly this was because the sentencing Judge had erroneously expanded Mr Berkland's role. The sentencing Judge said that Mr Berkland "ran the supply network and [was] in charge of counting and concealing large amounts of cash earned from the methamphetamine sales",[84] when the Summary of Facts actually recorded that Mr Berkland would "run the supply network from the Coates Street address *in Blance's absence*".[85] Further the Judge considered there were more than 100 supplies "by [Mr Berkland] in [his] capacity as part of the organisation".[86] In fact the Summary of Facts recorded that *Mr Blance* was involved in over 100 separate supplies. Further, the sentencing Judge considered Mr Berkland was "personally said to have supplied undercover officers on 11 occasions".[87] In fact, the Summary of Facts recorded that Mr Berkland had interacted with and sold methamphetamine to undercover officers on 11 separate occasions. Only three of the 11 occasions involved actual supply.

[60] Mr Berkland argued that the Court of Appeal, having been appraised of these errors, then ignored them, treating them as immaterial to the final sentence. They were, it was submitted, plainly material. Mr Berkland argued that his role was properly located

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82 At [56].
83 At [67]. This was, the Court noted, the longstanding test for whether disparity between sentences for co-offenders had caused justice to miscarry for one or another of them.
84 Berkland sentencing notes, above n 4, at [6].
85 Emphasis added.
86 Berkland sentencing notes, above n 4, at [17(2)].
87 At [17(2)].

at the lower end of significant rather than the upper end,[88] and that a starting point of between 13 and 14 and a half years' imprisonment was appropriate.

[61] For the Crown, Mr Barr argued that whatever factual errors were made at sentencing, Mr Berkland had accepted the Court of Appeal's summation of the facts. As that Court found, those facts still placed Mr Berkland's role at the upper end of significant. In response to Mr Berkland's argument that there ought to have been greater differentiation between his and Mr Blance's starting points, the Crown made three points. First, the Court of Appeal in *Zhang* had intentionally rejected the United Kingdom Sentencing Council's more prescriptive approach to role differentiation in favour of a more "open textured" approach in the New Zealand context. Secondly, direct comparisons are inappropriate where Mr Berkland's combined starting point of 17 and a half years appears to have reflected a wider range of drug offending than Mr Blance's overall starting point. For instance, Mr Berkland's offending included his own retail supply business, not all of which was methamphetamine-based. Thirdly, and in any event, the Court of Appeal's observations that Mr Blance's starting point was too low on a *Zhang* analysis was justified in light of the massive scale of the operation.

Role as an important component in starting points for commercial dealing

[62] This aspect of the appeal addresses the difficult issue of the place of role in determining appropriate starting points in commercial drug offending.

[63] In any offending, the role of the offender (what they actually did) is a fundamental component of the gravity and culpability assessment.[89] Neither the MODA nor the Sentencing Act suggest drug offending should be treated differently. As we have said, sentencing is an intensely factual inquiry and relevant facts must be proved or disproved to the standards set out in s 24 of the Sentencing Act. Though difficult, the exercise cannot be avoided, as the Court in *Zhang* emphasised.[90]

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88 Mr Berkland submits that he met four of the indicia of the lesser role. In terms of the significant role indicia, he accepts he had an operational function but not a management one; he was motivated partly but not solely or primarily by financial advantage; there was a degree of actual or expected commercial profit; and he was aware of the scale of the operation.

89 Sentencing Act, s 8(a). As the Court of Appeal noted in *Zhang*, above n 1 at [110]: "It is patent that role has a fundamental impact on culpability".

90 *Zhang*, above n 1, at [127]

[64] This means the potency of role will vary. It can, as *Zhang* clarified, drive movements both within and between the quantum driven bands. In other words, there is no reason in principle why role cannot be even more impactful than quantum, if justified in the circumstances. This may well be the case, for example, if the circumstances demonstrate that, irrespective of quantum, the offender's role in relation to it falls within the lower end of "lesser".[91] All will depend on the facts and the sentencing judge's evaluation of them. Once again, the purpose of *Zhang* is to assist that evaluation, not displace it.

[65] *Zhang's* three role categories provide a useful lens through which to view the facts, but, as that Court cautioned, they are a tool to aid evaluation, not a straitjacket.[92] All facts going to role will be relevant, not just the ones approximating the hypothetical facts in one or other of the categories. And they are not three siloes. Category borders are likely to be porous. Nonetheless, it is useful to consider the core characteristics of, and differences between, the leading and significant roles, even if in reality they form a single continuum. This is at the heart of this aspect of the appeal. Having considered these characteristics, we have come to the view that the "significant" role classification criteria in *Zhang* warrants some reformulation in two matters of detail.

[66] Leaders are described in the *Zhang* role profile as directing or organising buying and selling on a commercial scale. We accept this description as one that applies generally. The essential characteristic of leaders is that they lead. They are the initiators, designers, controllers and (usually the) profit-takers at each of the several stages in the commercial dealing chain from manufacture or importation to supply. They expect and obtain substantial financial gain.

[67] By contrast, the essential characteristic of significant players is that they are important enablers in the chain who take their orders from leaders. They are described in *Zhang* as performing an "operational or management" function. This is the first aspect of the significant role profile in *Zhang* we see as warranting some reformulation. The disjunction "or" may be taken to imply that these functions are interchangeable in

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91 This too was accepted in *Zhang*, above n 1, albeit in exceptional circumstances: at [123].
92 At [120].

culpability terms but that is not necessarily so. Managers (under the direction of leaders) are likely to be more culpable than those whose tasks are merely operational.

[68] Those at the upper end of the significant range can be expected to manage aspects of the overall operation with at least some knowledge of how the pieces fit together. They will direct and engage others in the course of managing a significant aspect of the operation. Purely operational functions will not usually place the offender at the upper end of significant unless they exercise a high degree of autonomy in the performance of functions that are significant to the operation or there is some distinctive element of the operational role justifying its placement at the upper end. In either capacity, those at the upper end will take payments, often comparatively large payments, from the leaders in return.

[69] Those falling within the middle and lower end of the significant range are unlikely to be exercising managerial functions or have real autonomy in the performance of their functions.

[70] The second issue is with item four on the criteria that references "actual or expected commercial profit". It is of uncertain application. As we have noted, profit-taking is a strong indication that the taker is in a leadership role.[93] Significant players, on the other hand, are typically paid. For the significant role profile it is financial gain rather than commercial profit which is a more appropriate descriptor. Adjusting the profile accordingly also brings more coherence with the equivalent items under the lesser and leading roles. Those at the upper end of significant can be expected to have been paid in a way which is broadly commensurate with the risks that are run and the overall profitability of the operation. By contrast, a person in the middle to lower range is typically required to carry a greater share of the risks than the reward justifies.

[71] We consider it appropriate to adjust the significant role profile to address these issues:

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[93] We of course do not discount the possibility that significant players may take a profit share, but in our view this is unlikely.

Changes to significant role profile from *Zhang*	
***Zhang's* significant role profile**	**Updated significant role profile**
1. Operational or management function in own operation or within a chain; 2. involves and/or directs others in the operation whether by pressure, influence, intimidation or reward; 3. motivated solely or primarily by financial or other advantage, whether or not operating alone; 4. actual or expected commercial profit; and/or 5. some awareness and understanding of scale of operation.	1. Management function in operation or chain where, under direction from a leader, this entails directing others in the operation whether by pressure, influence, intimidation or reward; 2. operational function whether operating alone or with others; 3. motivated solely or primarily by financial or other advantage; 4. actual or expected financial or other advantage, especially where commensurate with role and risk assumed; and/or 5. some awareness and understanding of the scale of the operation.

Updated Role Profile Table		
Lesser	**Significant**	**Leading**
1. Performs a limited function under direction; 2. engaged by pressure, coercion, intimidation; 3. involvement through naivety or exploitation; 4. motivated solely or primarily by own addiction; 5. little or no actual or expected financial gain; 6. paid in drugs to feed own addiction or cash significantly disproportionate to quantity of drugs or risks involved; 7. no influence on those above in a chain; 8. little, if any, awareness or understanding of the scale of operation; and/or 9. if own operation, solely or primarily for own or joint use on non-commercial basis.	1. Management function in operation or chain where, under direction from a leader, this entails directing others in the operation whether by pressure, influence, intimidation or reward; 2. operational function, whether operating alone or with others; 3. motivated solely or primarily by financial or other advantage; 4. actual or expected financial or other advantage, especially where commensurate with role and risk assumed; and/or 5. some awareness and understanding of the scale of the operation.	1. Directing or organising buying and selling on a commercial scale; 2. substantial links to, and influence on, others in a chain; 3. close links to original source; 4. expectation of substantial financial gain; 5. uses business as cover; and/or 6. abuses a position of trust or responsibility.

Effect of this part of the judgment

[72] These amendments to the significant role profile in *Zhang* must be read in conjunction with *Zhang* as the guideline for sentencing in methamphetamine dealing. This aspect of the judgment therefore applies in the following circumstances:

(a) to all sentencings that take place after the issue of this judgment regardless of when the offending took place;

(b) to all sentencing appeals currently on foot, including any applications for leave to appeal; and

(c) to all sentences and appeals against sentence dealt with under *Zhang* but only where the application of the amended significant role profile in *Zhang* would result in a more favourable outcome to the appellant.

Application

[73] In this case, Mr Berkland was the right-hand man to the profit-taker and leader of an operation that was one of the most significant detected in the Wellington area at the time. Mr Berkland had important operational functions including completing purchases and some sales as well as storing drugs, cash and weapons. He was privy to some of Mr Blance's strategic decision-making and had an awareness of the overall scale of the business. He was motivated by financial gain. Whether addiction was also a material motivation is debated and is a point to which we will return. But he certainly expected and received reward in cash and drugs for his work.

[74] There was, however, a clear demarcation between Mr Blance's and Mr Berkland's roles. He did not stand in for Mr Blance except when the latter was unwell — and even then, Mr Berkland had no executive discretion. As he made clear in unguarded comments to the undercover officer, he did as he was told and no more and he was, effectively, paid a wage in return (both in cash and drugs). In contrast to those of Messrs Blance and Smith (the Auckland courier driver and "broker" for the operation), Mr Berkland's

circumstances did not disclose any of the wealth accumulation typically associated with commercial dealing on this scale.[94]

[75] Furthermore, the Crown did not challenge the contention that all significant quantities of cash and methamphetamine located at the addresses associated with Mr Berkland belonged to Mr Blance. So, in return for what, on the scale of the operation, was a very modest reward, Mr Berkland was Mr Blance's risk-taking custodian.

[76] To sum up, while Mr Berkland was undoubtedly Mr Blance's right-hand man, he was not a mere step below the leader in culpability, so he should not have been located at the upper end of significant. He was a highly trusted "gofer" who performed important functions for his boss under close supervision, and who bore disproportionate risk when compared to the reward. Given the absence of any genuine operational autonomy or managerial functions and the limited nature of the financial gains made by Mr Berkland when compared to the overall profitability of the operation, we cannot see his role as classified appropriately at the upper end of significant.

[77] Of course quantum is an important, in fact, the most important aggravating factor for Mr Berkland, as it is for Mr Blance. It is why the entry point for their sentences is so high. But role is also fundamental and must not be unnecessarily fettered as a sentencing factor. In other words, quantum and general deterrence must not obscure the importance of role as an indicator of comparative culpability. The indeterminacy of the role classification criteria in *Zhang* and their application to Mr Berkland by the Court of Appeal resulted in the significance of his role being exaggerated. We see him as a typical significant player properly located in the mid-range of *Zhang's* significant category.

[78] Our approach to starting point in this case means there is no point in discussing the issue of whether the Court of Appeal misapplied the *Zhang* criteria or imposed a

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[94] Mr Berkland was apprehended with $10,000 of his own cash concealed at his mother's home. He told the undercover detective that he was saving up for a motorcycle. He also hoped he would get $100,000 in the future from Mr Blance if he behaved himself (a "nest egg"). But that nest egg had not materialised and there was no other money definitively attributed to Mr Berkland in his own right. Forfeiture orders have now confirmed that the extent of his individual assets were a 2002 Ford Falcon and proceeds of around $3000 from the sale of two cars and a half share in a 1977 Triumph motorcycle. See by contrast: *Commissioner, New Zealand Police v Blance* [2022] NZHC 1454. The application in relation to Mr Smith's alleged assets is still pending.

sentence that was insufficiently differentiated from Mr Blance's. Those arguments are now only of theoretical relevance.

Conclusion

[79] As will be apparent, we are of the view that the upper end of the significant role will usually be reserved for those who, although not leaders, nonetheless perform managerial or operational functions with real autonomy and an awareness of both the overall operation and the significance of their role within it. They will receive or expect rewards commensurate with the operation's profitability and the risks they are required to run. Mr Berkland does not fit this profile.

[80] Since Mr Berkland's case properly falls within the mid-range of significant, a starting point of 16 and a half years on the methamphetamine charges is plainly too high. We would adopt a starting point of 13 and a half years in relation to that charge with an uplift of one year for the firearms and lesser supply charges — an overall starting point on all charges of 14 and a half years.

D THE EFFECT OF OFFENDER BACKGROUND IN SENTENCING FOR COMMERCIAL DEALING

[81] Messrs Berkland and Harding both raise issues in relation to their respective backgrounds. The intervener — Te Hunga Rōia Māori o Aotearoa — also made submissions on this aspect of the appeals. The primary issue is what is the required nexus between background and the offending, and in what circumstances will that nexus mitigate sentence? Where the offending is serious an inevitable downstream issue is how that should affect the mitigatory potency of background.

Submissions

[82] Ms Blincoe, who argued this aspect of the appeal, submitted that the appropriate nexus is one based on contribution rather than causation. Causation terminology draws judges into requiring a simple and direct relationship between addiction and deprivation on the one hand and the offending on the other, when the complexity of context and contributing factors makes that approach unrealistic. Further, it was argued that since

Zhang, the Court of Appeal has adopted five different approaches in applying the causation standard in Zhang.[95]

[83] In contrast, requiring contribution is said to be consistent with the Sentencing Act and removes some of the difficulties that have arisen in the interpretation and application of a causation standard. It is said to be a broader and less restrictive test, consistent with that applied by the Supreme Court of Canada in *R v Ipeelee* which simply required that background factors be "tied in some way" to the offending and offender so as to "bear on his or her culpability".[96]

[84] Relatedly, Ms Blincoe argued that background factors such as addiction and deprivation do not contribute only to offending at the lowest levels of seriousness. Offender background should be a potent factor in any sentencing for commercial drug dealing and that to the extent earlier authorities suggested personal background should be subordinated, that approach ought to be rejected by this Court. To the extent that *Zhang* suggested commercial scale dealing is unlikely to be caused by addiction (in the sense of impairing rational choice), that should also be rejected by this Court.

[85] Ms Blincoe argued that, in any event, the pre-*Zhang* focus on deterrence would continue to suppress proportionate differentiation between the top two role categories until the decision of this court in *Jarden* was overruled.[97] Since marginal increases in prison terms were known to have no deterrent effect, it was time to overturn *Jarden* and to focus instead on accountability, denunciation and community protection as sentencing purposes at stage one of the *Moses* assessment.

[86] The Crown acknowledged that histories of addiction and/or deprivation can reduce offender culpability for the purposes of s 8(a) of the Sentencing Act. Mr Barr accepted that deprivation is a complex phenomenon and can include poverty as well as other systemic issues. Further, he acknowledged that *Zhang* should not be taken to require

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95 Ms Blincoe relies, for example, on the approaches to background factors in cases of commercial scale drug offending in the following cases: *Whiteford v R* [2020] NZCA 130; *Roulston v R* [2020] NZCA 255; *Royal v R* [2020] NZCA 129; *Joyce v R* [2020] NZCA 124; and *Clark v R* [2020] NZCA 641.

96 *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433 at [83] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ.

97 *Jarden*, above n 2.

a direct causative link "to a tortious standard" between the relevant history and the offender's decision to offend. Rather, Mr Barr submitted that where an offender's history can provide a basis to infer that their decision-making was constrained or impaired at the time of the offending, then it is appropriate to conclude that culpability is reduced accordingly. This approach, the Crown submitted, is consistent with the suggestion in *Zhang* that commercial scale dealing is generally not the product of "the impairment of the ability to exercise rational choice" in a manner that reduces culpability.[98]

[87] Mr Snelgar, for Te Hunga Rōia Māori o Aotearoa, submitted that any requirement to prove direct causation would be overly narrow, and, in any event, out of step with the courts' approach to discounts for youth, for example.[99] It was further submitted that the potential knock-on effect of a more restrictive causation test may be to narrow the matters covered by s 27 information. This could, it was submitted, possibly lead to such reports only covering background matters for which a direct causal relationship to the offending can be demonstrated, leaving other useful contextual information to one side. Such wider information might, it was submitted, include information relevant to the needs of rehabilitation and reintegration.

[88] We turn now to address these issues. We begin with the role of offender background in sentencing generally, in the context of which we discuss the decision of this Court in *Jarden*. We then address the required degree of connection between background factors and offending for the purpose of sentencing discounts. We provide a framework for assessing the relevance and weight of those factors that is consistent with the Sentencing Act's requirements.

The importance of offender background

[89] As we have said, the statutory purposes, principles and factors for sentencing require judges to dispense individualised justice in the sense that sentencing decisions must reflect a careful evaluation of the circumstances of the offending and of the offender. They encourage an approach to sentencing in which offenders acknowledge and atone for

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98 *Zhang*, above n 1, at [147]. This proposition related specifically to addiction but similar language of impaired choice and causation is emphasised in the context of the Court's approach to social, cultural and economic deprivation: at [159].

99 See *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 where a causal nexus between immature neurological and personality development and offending is simply assumed.

the harm they have done and, through rehabilitation, are enabled to choose a crime-free future. To meet these objectives, judges need a sufficient understanding of the offender. That is why the purposes, principles and factors of sentencing make offender background an important component in sentence construction.[100]

[90] Sentencing consistency, an important principle of sentencing, is often seen as being in natural tension with the requirements of individualised justice. But that is to misunderstand what consistency means. Section 8(e) says consistency requires that "*similar offenders* committing similar offences in similar circumstances" should receive similar treatment.[101] When the court takes full account of an offender's background, the risk that the offender will be treated the same way as materially dissimilar offenders is reduced. In other words, proper consideration of background mitigates the risk of sentencing inconsistency.

[91] Relatedly, assessing culpability is not just a matter of establishing what the offender did. It must be assessed by reference to the offender too because punishment is premised on offender agency.[102] An offender's background may affect the extent of that agency. The obvious examples are offender age and mental wellbeing or capacity, but deprivation in its various forms can also have an impact on culpability, as we shortly explain.

[92] Background will also be important in deciding which, if any, of the outcome focused instrumental purposes of sentencing are activated. Such purposes include deterrence, denunciation, community protection and offender rehabilitation and reintegration.[103] For example, whether an offender will be deterred from reoffending by a particular penalty or whether rehabilitation should play a primary role in a particular

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100 See, for example, the sentencing purposes in the Sentencing Act, s 7(1)(a), (b), (e), (f), (g) and (h); the sentencing principles in s 8(a), (c), (d), (e), (h) and (i); and the aggravating and mitigating factors in s 9(1)(h), (1)(j), (2)(a), (2)(e), (2)(f) and (2)(g).

101 Emphasis added.

102 As discussed in a report submitted as evidence in *Zhang* and in this appeal: Professor Nathan Berg "*The Deterrent Effect of Sentencing on Illicit Drug Suppliers?: An Overview of Rational Choice and Behavioural Economics Approaches*".

103 Sections 8 and 9 of the Sentencing Act also isolate specific aspects of background for consideration. For example, judges must also consider whether the circumstances of the offender may make heavy penalties inappropriate (s 8(c) and (d)); whether the offending was driven by bigotry (s 9(1)(h)); any past offending (s 9(1)(j)); age (s 9(2)(a)); intellectual capacity (s 9(2)(e)); remorse (s 9(2)(f)); and previous good character (s 9(2)(g)).

sentence will also depend on the judge's assessment of the offender's context, character and make up. As a general proposition, the better the information, the better equipped the judge will be to make the assessment.

[93] The court must have access to enough information to make the necessary assessment. As we come to later, the Sentencing Act provides the infrastructure in ss 25–27.

[94] The relevance of an offender's background does not in any way reduce the importance of acknowledging, through sentences, the harm caused by an offender, and particularly the harm to victims. Indeed, provision is also made for the court to hear the perspectives of victims through victim impact statements.[104] There are other sentencing purposes and principles such as deterrence, denunciation and community protection. Where offending is particularly serious these principles will usually be more powerfully engaged. Logically, there will come a point where background, even if it has contributed to the offending, can have no impact. But that will be a matter for careful consideration on the facts of the offence and the offender.[105]

Background and commercial dealing

[95] Prior to *Zhang* the courts had consistently adopted the position that personal factors must be subordinated to the need to send a deterrent signal to potential commercial scale drug offenders.[106] This Court is generally taken to have affirmed that approach in *Jarden* which involved conspiracy to supply methamphetamine.[107] Mr Berkland argued that this should now be rejected as incorrect, and that *Jarden* should be overturned. The Crown argued that *Jarden* should be affirmed but acknowledged that it did not impose an

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104 Victims' Rights Act 2002, ss 17 and 21. See also s 8(f) of the Sentencing Act.

105 In addition to the potential effect of seriousness, a question also arises as to the impact of background in sentencing for repetitive offending. While this is not a matter before us we acknowledge that it may raise similar issues. Again, the focus must be on the facts of the offence and the offender. On the one hand criminogenic background factors tend to be reflected in repeat offending. Sentencing judges generally understand this and the need for patience. But we accept that at some point other sentencing principles however will take over.

106 See, for example, *R v Terewi* [1999] 3 NZLR 62 (CA) at [13] as to cannabis offending; and *R v Wallace* [1999] 3 NZLR 159 (CA) at [25] as to Class B offending. For a recent confirmation of the effect of this history post-*Fatu* see *Taylor v R* [2020] NZCA 584 at [17].

107 *Jarden*, above n 97, at [12]. Mr Jarden's was one of the exceptional cases. His pregnant wife had taken her own life (and that of her unborn child) a few days before his trial. The Court found that these personal circumstances were "extreme" and should have been taken into account in sentencing: at [14].

inflexible prohibition on discounts. Rather, the Crown submitted that the effect of the rule in *Jarden* reflected the (accurate) view that serious drug offending will almost always involve high levels of agency.

[96] Both views of *Jarden* seem to us be an oversimplification of its intended effect. We acknowledge *Jarden* did say that deterrence will usually be the predominant sentencing purpose in commercial drug dealing, but the Court also accepted that personal circumstances can be relevant as the result in that case demonstrates.[108] In any event, we now take the opportunity to set out what we consider to be the correct approach to offender background in commercial dealing.

What is the required degree of connection between background and the offending?

[97] The Court in *Zhang* accepted that, along with mental illness, addiction and deprivation can and should mitigate sentence in appropriate circumstances. But the Court described the required degree of connection in different ways: "non-causative addiction will be of little mitigatory relevance";[109] mental impairment must have "contributed to the offending";[110] historical dispossession must be shown to "contribute causatively" ;[111] and deprivation more generally must have "a demonstrative nexus".[112]

[98] Subsequent decisions of the Court of Appeal have taken a range of approaches. For example, in *Carr v R*, the Court of Appeal employed "causative contribution"[113] to make it clear that there is no requirement for offenders to establish that deprivation (in that case) was the "proximate cause" of the offending.[114] More recently, that court has adopted a similar articulation of the standard in relation to mental illness.[115]

[99] But other cases have taken a stricter line. The decision of the Court below in Mr Berkland's appeal is one such example. The Court held that Mr Berkland's addiction

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108 At [12] and [14].
109 *Zhang*, above n 1, at [147].
110 At [152].
111 At [159].
112 At [162].
113 *Carr v R* [2020] NZCA 357 at [65] and [71].
114 At [64].
115 See *Hall v R* [2021] NZCA 314 at [29], where the Judge acknowledged that since *Shailer*, above n 65, an offender's mental health disorder may be taken into account in assessing culpability for the offending to the extent that it has a "causative impact on culpability".

to methamphetamine was not "an operative cause" of his offending, given its commerciality, the fact that he dealt in more than one type of drug, and that the income derived was "well beyond a subsistence level".[116] As a result, Mr Berkland's background deserved only "minimal recognition".[117]

[100] These cases suggest that the courts are neither articulating nor applying a uniform standard. This may lead to inconsistency in the application of the purposes and principles of sentencing. Clarifying the appropriate standard will mitigate this risk.

Canadian and Australian approaches

[101] The courts in Canada and Australia have also grappled with this question. It has arisen primarily in relation to the effects of historical dispossession on indigenous offenders. Alongside a common colonial history and commitment to liberal democratic values (including non-discrimination), we also share with those countries a marked correlation between indigeneity and high rates of incarceration. For present purposes however, we focus on what those cases say about the question of nexus to offender background generally.

[102] In *Ipeelee*, the Supreme Court of Canada was moved to clarify its approach to sentencing indigenous offenders a full 12 years after it had drawn a line in the sand in its well-known *R v Gladue* decision.[118] The Court in *Ipeelee* rejected the suggestion that indigenous offenders should be required to establish a causal link between systemic deprivation, including colonial dispossession, and the offending. This would impose an impossible evidentiary burden on offenders.[119] Judges must, the Court considered, take judicial notice of systemic and background factors affecting aboriginal people and consider whether they are "tied in some way" to the particular offender and the

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116 Berkland CA judgment, above n 8, at [77].

117 At [77]. See also the approach in *Royal*, above n 95; and *Campbell* CA, above n 72. In *Royal*, while the Court said that addiction may well have "contributed to this offending" it held that "more is required": at [24]. In *Campbell* CA a sufficient casual connection was not established because although the appellant had a deprived background this had not resulted in the pursuit generally of a criminal life or prior prison sentences: at [25]–[30].

118 *R v Gladue* [1999] 1 SCR 688. In *Gladue* and *Ipeelee*, above n 96, the Court applied s 718.2(e) of the Criminal Code RSC 1985 c C-46 which makes specific reference to the particular circumstances of Aboriginal offenders.

119 *Ipeelee*, above n 96, at [81]–[83] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ.

offending.[120] This because, "[s]ystemic and background factors … provide the necessary context to enable a judge to determine an appropriate sentence".[121]

[103] Australia has taken a different tack. In its 2013 decision in *Bugmy v R*, the High Court of Australia rejected the *Ipeelee* approach as "antithetical to individualised justice".[122] The Court accepted that indigenous Australians are, as a group, particularly disadvantaged, but "to recognise this is to say nothing about a particular Aboriginal offender".[123] In *Munda v State of Western Australia*, a decision issued by that Court at the same time as *Bugmy*, the Court went further:[124]

> To accept that Aboriginal offenders are in general less responsible for their actions than other persons would be to deny Aboriginal people their full measure of human dignity. ... Further, it would be wrong to accept that a victim of violence by an Aboriginal offender is somehow less in need, or deserving, of such protection and vindication as the criminal law can provide.

[104] Since *Bugmy* and *Munda*, intermediate appellate courts in Australia have continued to grapple with the issue of nexus. For example, in *Kolaka v R* — a commercial drug offending case — the Northern Territory Court of Appeal acknowledged the offender's post-traumatic stress disorder[125] but concluded, based on expert psychological evidence, that it had no "direct correlation" to his offending.[126]

[105] On the other hand, in *Director of Public Prosecutions (Vic) v Herrmann*, involving a very serious rape and murder, a full Court of the Victoria Court of Criminal Appeal upheld a sentence of less than life.[127] The Court accepted that an offender's general history of deprivation will *per se* reduce moral culpability compared to that of an offender

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120 At [59] and [83] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ.

121 At [83] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ.

122 *Bugmy v R* [2013] HCA 37, (2013) 249 CLR 571 at [41] per French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ.

123 At [41].

124 *Munda v State of Western Australia* [2013] HCA 38, (2013) 249 CLR 600 at [53] per French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ.

125 *Kolaka v R* [2019] NTCCA 16. There was evidence that his mother had died of a heroin overdose when he was 23 and that he was exposed to serious drug use and occasional violence from an early age.

126 At [39], quoting the psychological report. Similarly, in *Perkins v R* [2018] NSWCCA 62 — a homicide — the offender reported familial violence until the age of nine and had resorted to heavy drug use in his teen years partly as a result of his relapse at 16 years old of Hodgkin's lymphoma. The New South Wales Court of Criminal Appeal took the view that there was no connection between the appellant's upbringing and the serious nature of his offending. Trauma in early childhood was, the Court considered, unlikely to be remembered: at [41].

127 *Director of Public Prosecutions (Vic) v Herrmann* [2021] VSCA 160, (2021) 290 A Crim R 110.

who does not have such a history.[128] There is, the Court concluded, no requirement to prove a satisfactory nexus,[129] although specific evidence about background may allow the Court to draw a more potent causal or "realistic connection" between background and offence.[130] These cases demonstrate that the language used in the Australian courts is as variable as that in New Zealand.

[106] The different approaches taken in Canada and Australia highlight the practical and conceptual challenges for sentencing judges tasked with connecting a community's traumatic but distant past with individual offending. The New Zealand courts are not alone in this respect. The sufficiency of connection between offending and more immediate background factors such as mental incapacity and addiction have proved just as problematic.

Our view: the causative contribution of background

[107] There will always be connections between the different dimensions of an offender's background and their choice to offend, although the nature and strength of those connections will vary. As the cases have said, background factors can be the "operative" or "proximate" cause of offending or they can make a less direct "causative contribution".[131]

[108] Where it can be established that background was an operative or proximate cause of the offending it is likely to be a potent sentencing factor. Proximate afflictions such as addiction or mental illness may be examples. There may be other background factors that invite similar inferences in particular cases. As we have said, restrictive rules or heuristics that tend to exclude factors at the outset without assessing their potential relevance have no place in the making of factual assessments. They create analytical blind spots.

[109] But requiring operative or proximate cause in every case sets the bar too high. We prefer the *Carr* standard of causative contribution. It captures background factors that

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128 At [41] citing *Director of Public Prosecutions (Vic) v Drake* [2019] VSCA 293 at [32].
129 At [45].
130 At [42]–[44] citing *Director of Public Prosecutions (Vic) v Snow* [2020] VSCA 67 at [75]–[76]. In its decision in *R v Millwood* [2012] NSWCCA 2, the New South Wales Court of Criminal Appeal took a similarly permissive approach: at [69].
131 See the earlier discussion of the cases that use this language above at [97]–[100].

are, as we explain below, the more diffuse drivers or the intergenerational sources of offending; factors that would be excluded as insufficiently connected under a stricter causation standard.[132] These contributory factors are important because they can provide rational explanations for why an offender has come to offend.[133] Contributory mental illness can still explain why an offender is living in the chaotic or conflictual circumstances that made the offending more likely. Contributory addiction can help to explain why an offender was drawn into the commercial drug dealing environment. Contributory deprivation, including that precipitated by historical dispossession and sustained by poor educational and other intergenerational outcomes, can help to explain an offender's limited life options, poor coping skills or other criminogenic circumstances that made the offending more likely. Where these factors do help to explain how the offender came to offend, they will amount to causative contribution and so will be relevant for the purpose of sentencing.[134]

[110] Although causative contribution is a lower standard than operative or proximate cause, it must still be satisfied. There will be a point at which background factors can no longer assist in explaining the offending. For example, the link between historical deprivation and the offending can be severed. To illustrate this, not all Māori still live in circumstances of relative economic, social or cultural deprivation today. For some, the cycle of deprivation has been broken or, at least, much weakened. This too is important to understand, because any mitigatory effects of historical deprivation must be based on explanatory facts, not ethnic assumptions.[135] As we will come to, the evidence of Mr Harding's background raises these issues.

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132 We agree with the Court in *Herrmann*, above n 127, that aspects of an offender's background can be a causative contribution to offending or its operative cause.

133 See, for example, *Solicitor-General v Heta* [2018] NZHC 2453, [2019] 2 NZLR 241 at [65].

134 Non-contributory background factors can of course also be relevant to sentencing in other ways. For example, a background factor may mean that a sentence would weigh more heavily on the particular offender compared to others. Or it may assist in the sentencing judge's assessment of the type of sentence that is appropriate for that offender: *E (CA689/2020) v R*, above n 65, at [70].

135 That said, we acknowledge and note that sentencing judges should also be aware that, even in cases where the cycle of poverty has been broken, historical stigmatisation can still have modern effects. Sometimes this is systemic, such as the ongoing effects of institutional racism (see for example *Kearns v R* [2017] NZCA 51, [2017] 2 NZLR 835), and sometimes it is more specific to the offender and their whānau — for example continuing mamae (ache, pain, injury, wound) or whakamā (shame, embarassment) derived from the experience of particularly serious historical trauma. These factors can still contribute to offending in some cases.

[111] The causative contribution of background may also be displaced, in whole or in part, where the offending is particularly serious. Complex and orchestrated offending is likely to involve careful assessment of the risks of detection and therefore increased agency. The contribution of background to offending with this level of agency may therefore be significantly reduced or even negated and other sentencing goals, such as community protection, may become more important. Such assessment will depend very much on the facts, however.

[112] Finally, it is appropriate to acknowledge that background factors will be most meaningful where the potential sentence is at the margin between imprisonment and a community-based sentence. In commercial drug dealing the latter is more likely to be a prospect for lesser roles and the lower end of the significant role category. But that does not mean background will be irrelevant in relation to more significant roles. Where imprisonment is unavoidable, background factors that contribute causatively to an offender's degree of culpability may still mitigate sentence length.

The causative contribution of deprivation, historical dispossession and addiction

[113] Having clarified the necessary nexus between background offending we turn to the three categories of background that are the focus in these appeals.

Deprivation

[114] The fact is that criminal sanctions fall disproportionately — indeed overwhelmingly — on the poor.[136] This has long been recognised — in the 1972 United States Supreme Court decision in *Furman v Georgia*, Powell J acknowledged:[137]

> The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation …

[115] In other words, poverty, whether economic, social or cultural (and often all three combined), constrains individual choice, including the choice not to offend; although the

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136 In an influential article Richard Posner took the view that this is a matter of design since "the affluent are kept in line, for the most part, by tort law": Richard A Posner "An Economic Theory of the Criminal Law" (1985) 85 Colum L Rev 1193 at 1205.

137 *Furman v Georgia* (1972) 408 US 238 at 447. This was a dissenting opinion in which Powell J would have upheld the constitutionality of the death penalty.

degree of constraint will vary from case to case. This proposition is one well established in social science literature.[138] But there is no formula against which judges can calculate the lived connection between deprivation and individual offending. At least not yet. The impacts of deprivation are too complex, multi-layered and non-linear, and they are unique to every offender.[139] But there are consistent patterns that cannot be ignored.

[116] Children raised in poverty are more likely to experience at least some of the so-called criminogenic risk factors that consistently correlate with offending later in life.[140] These factors can be environmental or intrinsic to the offender. Generally, the more factors present during a person's childhood the stronger the correlation.[141] These factors are well understood. Environmental factors include, for example, prenatal maternal alcohol and drug use; exposure to serious violence or other trauma; lack of prosocial familial support and connection; being raised in a single parent household; having a caregiver who is or has been in prison; exposure to high levels of drug and alcohol use by adults; and living in chaotic circumstances, including multiple households and schools, high truancy, poor educational outcomes (especially low literacy and numeracy) and separation from family (usually through state intervention).[142]

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138 See, for example: Craig Haney *Criminality in Context: The Psychological Foundations of Criminal Justice Reform* (American Psychological Association, Washington DC, 2020) at 217–236; Per-Olof H Wikström "Explaining Crime and Criminal Careers: the DEA Model of Situational Action Theory" (2020) 6 Journal of Developmental Life-Course Criminology 188; Sacha McMeeking "Māori and Justice" in Jarrod Gilbert and Greg Newbold (eds) *Criminal Justice: A New Zealand Introduction* (Auckland University Press, Auckland, 2017) 225 at 228–229; Jonathan Boston and Simon Chapple *Child Poverty in New Zealand* (Bridget Williams Books, Wellington, 2014) at 47–48. This social science has been acknowledged by judges in our legal system: see for example Jan-Marie Doogue "Generations of Disadvantage: A View from the District Court Bench" (2018) 15 Otago LR 223.

139 Haney, above n 138, at 308–309 referring to discussion in John Edgar Wideman *Brothers and Keepers* (Holt, Rinehart and Winston, New York, 1984) at 19.

140 Haney, above n 138, at 60–63 and 218–219 and generally at chs 2 and 3; Ministry of Social Development *The White Paper for Vulnerable Children Volume II* (October 2012) at 60; The Maori Perspective Advisory Committee *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare* (September 1988) at [174]; Te Uepū Hāpai i Te Ora | Safe and Effective Justice Advisory Group *Turuki! Turuki! Move together!: Transforming our criminal justice system* (December 2019) at 40; and Andrew Karmen "Poverty, Crime and Criminal Justice" in William C Heffernan and John Kleinig (eds) *From Social Justice to Criminal Justice: Poverty and the Administration of Criminal Law* (Oxford University Press, New York, 2000) 25 at 28–31. The persistent relationship between poverty and crime in New Zealand has been recognised as a failing of our current criminal justice system: see, for example Te Uepū Hāpai i Te Ora | Safe and Effective Justice Advisory Group *He Waka Roimata: Transforming our Criminal Justice System* (June 2019); and Waitangi Tribunal *He Pāharakeke, He Rito Whakakīkīnga Whāruarua: Oranga Tamariki Urgent Inquiry* (Wai 2915, 2021) at 51–53.

141 Haney, above n 138, at 58, 60-63, 232–233 and 308.

142 At 220–235. See also the important early work of psychologist James Garbarino: James Garbarino "The Meaning of Poverty in the World of Children" (1992) 35 ABS 220.

[117] On the other hand, where a child is raised in a secure, stable and supported environment free from want they are far less likely to offend later in life.[143] That will be so even if they possess at least some personal criminogenic risk factors such as high impulsivity and low self-control, presumably because these are mitigated by protective countervailing factors.[144]

[118] Poor children often grow into poor adults,[145] with lower expectations and trust and considerably fewer legal options available to make economic headway. They are also less likely to have access to pro-social supports if something bad happens, such as serious illness, a death in the family, or loss of a job or benefit.

[119] But socio-economic status is not the whole story. There are other drivers of offending whose connections to poverty are more remote. The social science is reasonably clear that discriminatory attitudes can become institutional, resulting, for example, in over criminalising of ethnic communities, leading in turn to asymmetric rates of conviction and incarceration irrespective of socioeconomic status.[146]

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143 Haney, above n 138, at 56; and Ministry of Social Development, above n 140, at ch 2.

144 See, for example Madeline H Meier and others "Impulsive and Callous Traits Are More Strongly Associated With Delinquent Behaviour in Higher Risk Neighborhoods Among Boys and Girls" (2008) 117 J Abnorm Psychol 377. See also a study which found that poverty can have a direct impact on late onset-offending for youth even when they otherwise exhibit personal protective factors such as low hyperactivity and impulsivity: Per-Olof H Wikstrom and Rolf Loeber "Do Disadvantaged Neighbourhoods Cause Well-Adjusted Children to Become Adolescent Delinquents? A Study of Male Juvenile Serious Offending, Individual Risk and Protective Factors, and Neighbourhood Context" (2000) 38 Criminology 1109.

145 See Sheree J Gibb, David M Fergusson and L John Horwood "Childhood family income and life outcomes in adulthood: Findings from a 30-year longitudinal study in New Zealand" (2012) 74 Social Science & Medicine 1979; and Boston and Chapple, above n 138, at 47–48.

146 As acknowledged in *Kearns*, above n 135, at [24]–[25]. Over-policing of indigenous and ethnic communities is well-studied internationally. The New Zealand studies are not recent but they suggest similar trends exist here, particularly in relation to Māori, Pasifika and other minority ethnic communities: see for example Gabrielle Maxwell and Catherine Smith *Police Perceptions of Maori: A Report to the New Zealand Police and the Ministry of Maori Development: Te Puni Kokiri* (Institute of Criminology, Victoria University of Wellington, March 1998); D M Fergusson, L J Horwood and M T Lynskey "Ethnicity and Bias in Police Contact Statistics" (1993) 26 Australian and New Zealand Journal of Criminology 193; and D M Fergusson, N R Swain-Campbell and L J Horwood "Arrests and convictions for cannabis related offences in a New Zealand birth cohort" (2003) 70 Drug and Alcohol Dependence 53. In relation to the over-criminalising of Samoan communities in Aotearoa see generally Laumua Tunufa'i "Samoan Youth Crime" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Palgrave Macmillan, Cham (Switzerland), 2017) 175.

[120] Of course, progressing from precarious poverty to life as an habitual offender is not inevitable. Not everybody raised in poverty will eventually offend.[147] As is often said, correlation does not establish causation. But, even if the relationship between poverty and the commission of a particular offence is usually too complex to take matters further than affirming, yet again, the consistent correlation between poverty and offending, that in itself is important. Long run patterns like this demonstrate (if demonstration is still needed) that there is, nonetheless, a meaningful relationship between poverty and crime. As we have said, factors associated with lives in poverty are at least the diffuse drivers of individual offending.[148] That is why circumstances of deprivation can have such powerful explanatory force in terms of revealing how an offender has come to offend and in guiding the court's assessment of what should now be done about it.

[121] For example, it is rarely possible to establish that placement in state care is the proximate cause of engagement in commercial drug offending. But few would doubt the material or logical connection between the two. It is *that* connection which must be understood and weighed. If it helps to explain how the offender has come to offend then a relevant "causative contribution" is made out. Whether such contribution, if established, is then displaced by other factors (such as extended periods of offence free living) is of course a matter of judgement. But sentencing judges should reflect on the power of background in the shaping of life opportunities and beware of imposing unrealistic expectations in hindsight.

Historical dispossession

[122] The search for causative contribution does not end at the offender's own personal story. The Court in *Zhang*, taking its lead from Whata J's careful consideration of these

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147 See generally: Per-Olof H Wikström and Kyle Treiber "Social Disadvantage and Crime: A Criminological Puzzle" (2016) 60 ABS 1232.

148 Of course, sometimes poverty can be the proximate cause of property offending for example.

matters in *Heta*,[149] acknowledged the relevance of history in the New Zealand context. Its first proposition under the heading of deprivation was as follows:[150]

> … ingrained, systemic poverty resulting from loss of land, language, culture, rangatiratanga, mana and dignity are matters that may be regarded in a proper case to have impaired choice and diminished moral culpability.

[123] Like the Victorian Court of Appeal in *Herrmann*, the Court was prepared to assume that modern Māori "systemic" poverty is the result of colonial dispossession without the need to prove actual causation every time.[151] We agree that approach is appropriate to the circumstances of this country. As a general proposition, historical dispossession of tribal capital and autonomy did indeed "result" in Māori social, cultural and economic poverty in its new urbanised setting in the latter part of the 20th century[152] and that in turn has driven disproportionate rates of offending and incarceration. Of course, it is one thing to invite sentencing judges to assume a relevant effect, and quite another for a judge to understand it well enough in relation to individual offenders.

[124] There is no single narrative of loss. Historical dispossession did not happen in one event or by one mechanism or even in a linear way. Rather, the separation of the people from their land, language, culture and authority happened progressively over a roughly 70 year period from 1840. No two iwi or hapū stories are exactly the same. These histories are readily accessible, thanks to the important work of the Waitangi Tribunal and the narratives painstakingly negotiated and recorded in Treaty settlement deeds. But whenever and however it happened, most hapū (though not all)[153] came to be corralled onto insufficient land bases at the margins of the new colonial economy. So situated, hapū and iwi social structures lost the ability to perform the political and economic functions they once did. They were replaced by settler-dominated central and local government. Post-war mass emigration of poor Māori to the cities, in

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149 *Heta*, above n 133.

150 *Zhang*, above n 1, at [159].

151 *Herrmann*, above n 127. See also *Millwood*, above n 130. Although the Supreme Court of Canada in *Ipeelee* adopted the language of judicial notice, the effect of that Court's approach is similar: *Ipeelee*, above n 96.

152 See, for example, Alan Ward *National Overview volume i: Waitangi Tribunal Rangahaua Whanui Series* (Waitangi Tribunal, March 1997) at 6–11.

153 For example, Ngāti Porou and Te Whānau ā Apanui retained much of their lands, in large part due to the energy and foresight of leaders such as Sir Apirana Ngata. But they had then to contend with the difficulties of collectivisation under the Native Lands Acts, lack of access to capital and the refusal of successive settler governments to recognise iwi rangatiratanga: see generally Ward, above n 152.

search of steady work and a better life, reduced the practical relevance of whānau and hapū life even further.[154] By these means Māori became *culturally* poor too.

[125] The economic and psychological effects of this historical process persist and are utterly pervasive. They are the *intergenerational sources* of Māori offending today. The value of historical material and therefore its impact on the choice or length of a sentence is that it explains that contribution. When the relevant material is presented in succinct, summary and helpful form judges will identify that contribution by applying the usual combination of logic and intuition.

[126] It must of course be accepted that Māori are not alone in New Zealand in having suffered historic deprivation and discrimination. Other marginalised groups characterised by ethnicity, gender, sexual orientation or socio-economic status did too.[155] Where relevant those narratives may also establish a causative contribution to the offending. But, to paraphrase the point made in *Ipeelee* in relation to indigenous Canadians,[156] the experience of Māori is unique: no community in this country was deprived of its autonomy, internal cohesion and economic resilience in quite the way Māori communities were. One of the effects of that experience has been consistently disproportionate rates of Maori offending. That is why judges need to know about it.

Addiction

[127] In the Courts below, it was accepted that Mr Berkland was addicted to methamphetamine, but the Courts declined to give a discrete discount for that background fact. The Court of Appeal relied on the fourth point made in *Zhang* under the addiction heading:[157]

> We accept that non-causative addiction will be of little mitigatory relevance, as is the case with a non-contributory mental health condition, unless in the sense

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154 See generally Richard S Hill *Maori and the State: Crown-Maori Relations in New Zealand/Aotearoa 1950-2000* (Victoria University Press, Wellington, 2009).

155 See, for example, the Asiatic Restriction Act 1896; the Chinese Immigrants Act Amendment Act 1896; the criminalisation of consensual sexual activity between men prior to the enactment of the Homosexual Law Reform Act 1986; and the discriminatory enforcement of immigration law against Pasifika peoples during the 1970s in what is commonly known as the "Dawn Raids" (see the formal apology given on 1 August 2021: Jacinda Ardern "Speech to Dawn Raids Apology" (1 August 2021) Beehive <www.beehive.govt.nz>).

156 *Ipeelee*, above n 96, at [77].

157 *Zhang*, above n 1, at [147].

> referred to below. We also accept that commercial dealing is likely to be inconsistent with the impairment of the ability to exercise rational choice, which is what diminishes culpability and justifies discounting the sentence. But we would not exclude the possibility of a case in which that impairment co-exists with more substantial offending.

[128] We understand why the Court of Appeal in *Zhang* expressed discomfort over allowing meaningful discounts for addiction where the offender still had the wherewithal to lead a commercial drug business or play a significant role in it. But we are uncomfortable with the Court's sweeping exclusion of addiction-based discounts (albeit with rare exceptions). More particularly, we disagree with the assumption that (effectively) all methamphetamine addicts who offend on a commercial scale do so in a clear-eyed and cynical way. Sentencing judges should start with the facts in relation to the particular offender and should avoid exclusionary rules or heuristics when assessing the relevance of offender background. This reduces the risk that similar sentences may be imposed on factually dissimilar cases in breach of s 8(e).

[129] In the same vein, we understand *Zhang's* preference for independent evidence in relation to claims of addiction.[158] But, again we are uncomfortable with the complete exclusion of self-report. While independent evidence is likely to be more cogent than self-report, there is no reason to disqualify the latter from consideration as incapable of proving the relevant fact. Rather, whether a mitigatory factor (if contested) is proved to the required standard will be for the sentencing judge who must consider all the circumstances of the case in the usual way.

The tools at the Court's disposal to elucidate relevant background information

[130] Section 25 of the Sentencing Act enables the court to adjourn sentencing "for inquiries as to suitable punishment". This allows the offender's rehabilitative needs to be addressed and for the outcome to be taken into account at sentencing. Section 26 provides for the preparation of pre-sentence reports by the probation service and s 27 provides an avenue for the court to hear directly from the offender's community. Sections 26 and 27 both refer to the relevance of information about the offender's "personal, family, whanau, community, and cultural background".

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158 At [148].

[131] These three sections enable the court to understand an offender's background from different perspectives: first, clinical or therapeutic; second, personal and community; and third, the institutional perspective of the responsible state agency. Each perspective will bring to the court information and options that may not be available or apparent to the others. Where possible, the court should have access to all three perspectives, especially in commercial drug offending. They can inform the court about causative contribution, the applicability of instrumental purposes and the potential impact of sentence choices. They are important generally and in this case.

Section 25

[132] The adjournment power in s 25 provides the sentencing judge with the opportunity to obtain information about an important aspect of offender background; their amenability to rehabilitation. It brings a double advantage; first, the offender has a real incentive to complete any rehabilitative programme, and second, the sentencing judge can make an informed assessment of the offender's prospects of rehabilitation and reintegration before deciding whether to opt for a community-based sentence. There is a tangential connection between this information and issues of causative contribution. Usually background factors that go to culpability will also inform an offenders rehabilitative prospects.

[133] But s 25 is not just about alternatives to incarceration, though that will be its primary focus. It can also be used to facilitate restorative justice processes, to obtain better background information about the offender, to allow a relevant community organisation to work with the offender, or to enable a remand prisoner to successfully complete Department of Corrections rehabilitative programmes. As we will come to, Mr Berkland's is a case in point with respect to the last mentioned option. Even if imprisonment is unavoidable, an offender who demonstrates a commitment to rehabilitation may appropriately receive a reduced sentence.

Section 26

[134] Under s 26 the sentencing judge may give the probation officer "guidance" on particular information that the court may require and may advise the probation officer of

the kind of sentence the judge has in mind.[159] This can be invoked to ensure that the sentencing court obtains information about an offender's background and possible programmes or other means of addressing their needs, from an institutional perspective.

Section 27

[135] Section 27 gives the offender the right to call on people from within their own community to address the court directly on matters of the offender's personal, family, whānau, community and cultural background that may be relevant to sentence. Although this provision is 35 years old, it has only recently come into regular use. And, its implementation has not always been consistent.

Purposes and principles

[136] Since this is the first opportunity this Court has had to consider the implications of its current use it may help to spend a little more time on s 27. It provides as follows:

> (1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—
>
> (a) the personal, family, whanau, community, and cultural background of the offender:
>
> (b) the way in which that background may have related to the commission of the offence:
>
> (c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:
>
> (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
>
> (e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.
>
> (2) The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.
>
> (3) If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.

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159 Sentencing Act, s 26(4).

> (4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.
>
> (5) If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).

[137] The history of this section has been recorded in judgments and academic writing.[160] It need not be repeated here except to mention that, according to the Hon Dr Michael Cullen, the focus of the Bill that first introduced s 16 of the Criminal Justice Act 1985 (the predecessor to s 27) was:[161]

> … a conscious attempt to recognise in particular the importance of trying to meet the needs of Maori offenders, and more particularly young Maori offenders, who form such a disproportionately large element within the prison population and the population coming before the courts, to the shame of us all.

[138] Section 27 is a sophisticated provision. It was designed, first and foremost, to draw the offender's community — including, where appropriate, whānau, hapū and iwi — into the courtroom to provide insights into the offender and to share responsibility for addressing the offender's needs.[162] It contains three elements: court-community engagement; obtaining relevant background information about the offender; and identifying community resources relevant to sentence.

[139] Thus s 27 interventions can reveal offender background relevant to the consistency and retributive principles of sentencing; they can suggest how the offender's community might help the offender to address their offending; and they can propose alternative sentencing options (as well as pre and post-sentencing options) about which the judge might otherwise have been unaware. Options might include enrolling the offender in community-based programmes, connecting them to more informal community support networks to aid in rehabilitation and reintegration, or to pro-social mentoring from within the community in order to bring the offender to a better understanding of their own

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160 See, for example: Oliver Fredrickson "Getting the most out of s 27 of the Sentencing Act 2002" (2020) November Māori LR. See also Stephen O'Driscoll "A Powerful Mitigating Tool?" [2012] NZLJ 358.

161 (12 June 1985) 463 NZPD 4759.

162 See generally the Department of Justice submission to the Statutes Revision Committee that considered the Criminal Justice Bill in 1985.

responsibility for the offending. Such options can also serve other sentencing purposes such as deterrence and community protection.

Community

[140] In other words, s 27 was designed to be a means by which the court might draw on connections between the offender and their community to better achieve the purposes and principles of sentencing. None of this is new. Specialist therapeutic courts here and overseas have used these kinds of connections to address offender and community needs for many years.[163] They work.[164] Current proposals in the District Court — a package of procedural and other reforms called Te Ao Marama — are designed to bring these therapeutic approaches into the mainstream.[165] The proposal may have a Māori name but it is context driven. It will apply equally to all offenders from all communities no matter how composed.

Form and content

[141] There is no rigid formula for the provision of s 27 information. Interventions can be informal — oral comments from the body of the court, or a letter provided by a member of the offender's family, whānau or community and spoken to at court. Or they can be in report form. The report writer may be from within the offender's community — for example, an employee of a social service provided by iwi, urban Māori, church or other community-based organisation or from a writer with expertise in the general subject of criminal justice, but who is otherwise unrelated to the offender or their community. However presented, the judge must receive that information unless there is a good reason

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163 See, for example, the longstanding approach of the New Zealand Youth Court and the many specialist criminal courts in Aotearoa New Zealand, such as: the Alcohol and Other Drug Treatment Court | Te Whare Whakapiki Wairua; Te Kooti o Timatanga Hou | the New Beginnings Court; the Matariki Court; and the Court of Special Circumstances.

164 See, for example: Kaipuke Consultants *Evaluation of the Early Outcomes of Ngā Kooti Rangatahi* (Report to the Ministry of Justice, 17 December 2012); Alex Woodley *A Report on the Progress of Te Kooti o Timatanga Hou – The Court of New Beginnings* (Auckland Homeless Steering Group, 25 September 2012); and Heemi Taumaunu "Rangatahi Courts of Aotearoa New Zealand – an update" (2014) November Māori LR 1.

165 Heemi Taumaunu, Chief District Court Judge of New Zealand "Mai te Pō ki te Ao Mārama | The Transition from Night to the Enlightened World: Calls for Transformative Change and the District Court Response" (Norris Ward McKinnon Annual Lecture 2020, University of Waikato | Te Whare Wānanga o Waikato, Hamilton, 11 November 2020). See also John Walker, District Court Judge "'Te Ao Mārama: It's a Matter of Fairness' – Being seen, heard, understood and participating in the criminal justice system" (Norris Ward McKinnon Annual Lecture 2022, University of Waikato | Te Whare Wānanga o Waikato, Hamilton, 20 September 2022).

not to. As the interveners, Te Hunga Rōia Māori o Aotearoa, submitted, a fundamental purpose of s 27 is to improve "access to justice for the individuals, whānau, hapū and iwi". Indeed judges can request a s 27 intervention if they consider it would be helpful. It will of course be for the sentencing judge to decide what weight the information should be given.

[142] We understand a tendency has developed of treating s 27 as if it simply mandates the preparation of a report by an independent professional report writer. The value of such reports is not to be minimised — they can make a material difference to sentence, but they meet only one of the three s 27 purposes we outlined above. They are not all that the architects of the provision had in mind.

[143] In the case of formal s 27 reports, it may help to outline the sorts of material which, if included, might better achieve the section's three-purpose framework of community engagement, eliciting information about offender background and exploration of sentencing options. We suggest the following:

(a) the writer's knowledge of the offender's background and their offending;

(b) the extent of their engagement with the offender and their family or whānau for the purposes of compiling the report, and whether the report is supported by the family or whānau;

(c) the specific background of the offender including socio-economic context, educational qualifications and cultural context — if Māori, the offender's marae, hapū and iwi and extent of connection with them (if the offender does not know, the report writer should find out through their own networks);

(d) family or whānau history, including economic, cultural and social circumstances;

(e) any relevant comments or insights about the offender's circumstances and the drivers of their offending provided by family, whānau or wider community spokespeople;

(f) information about relevant historical sources of offending which may help establish a causative contribution to the offending, for example, if the offender is Māori, a summary of the colonial experience of their iwi. As we

have said, this can be obtained without unnecessary difficulty from treaty settlement deeds, Waitangi Tribunal reports, kaumātua or iwi organisations; and

(g) details of consultation with the offender's community, including relevant community organisations and any proposals they may have in relation to achieving sentencing purposes such as rehabilitation or reintegration, or to assist the Court in any other way in arriving at a just sentence.

[144] As always, this list is no more than a guide. Indeed to some extent it should be seen as a work in progress. Ultimately, the content of written s 27 reports must be driven by the facts of the offender's background and the views of their community.

A caution

[145] Finally, we reiterate two important points.

[146] The first relates to formal s 27 reports. They must be case and offender focused. Generalised statements and templates are of no value and so will waste the courts' time and resources. For example, intergenerational background information, where relevant to sentencing principles and purposes, will be important, but long generalised historical dissertations will not help. Rather, what is required is succinct summaries focused on the experience of the offender's own community. For example, if the offender is Māori, the experiences of their hapū and iwi will often have already been summarised by the Waitangi Tribunal or in Treaty settlement deeds and legislation. A connection must then be drawn between those narratives and the offenders' lived experience. A primary purpose is to assist the judge in deciding whether causative contribution is established.

[147] Second, whether formal reports or informal interventions, they are the primary means by which the court can engage with the offender's community to assist in making the necessary evaluation. That is, they are one means by which the offender's community is brought into the sentencing process. Where a report writer has been engaged, one of their key functions will be to facilitate this.

E APPLICATION TO MR BERKLAND'S BACKGROUND

The Courts below and submissions

[148] In Mr Berkland's case, the sentencing Judge accepted, relying on clinical and other evidence, that Mr Berkland was addicted to methamphetamine. The Judge gave him a six-month discount for that and for other personal matters referred to in a letter from his (current) partner, but not extrapolated upon by the Judge. On appeal, the Court of Appeal accepted that certain relevant material that had been filed in the High Court was not provided to the sentencing Judge. In particular, the Court of Appeal referred to two "very positive" letters from Corrections Officers indicating that Mr Berkland was an "exemplary prisoner" whilst on remand and had made genuine attempts to "address his addiction and rehabilitate himself".[166] The Court accepted that a further discount of six months was justified for these matters.[167] But in other respects, as noted, the Court rejected the suggestion that background factors were sufficiently causative in light of the circumstances of the offending.

[149] For Mr Berkland, it was argued that these discounts were too small, and the test applied in relation to addiction was too restrictive. Ms Blincoe submitted that Mr Berkland's history of trauma, abuse, deprivation and his addiction to methamphetamine (together with his prospects of rehabilitation) ought to have attracted a discount of at least 30 per cent.

[150] For the Crown, Mr Barr submitted that Mr Berkland's background did not establish the required level of impaired choice. Rather, his choice to offend was driven primarily by the desire for profit rather than addiction or other background factors and so, in accordance with *Zhang*, they were irrelevant to his sentence.

Our view on background

[151] We start by observing that we take a less serious view of Mr Berkland's offending than was taken in the courts below, a view which leaves rather more scope for allowance for personal mitigating factors than was available on their assessment.

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166 Berkland CA judgment, above n 8, at [78].
167 This amounts to a total discount of just under 6 per cent for personal factors.

[152] There was a great deal of material before the sentencing Judge in relation to Mr Berkland's background; or at least there should have been but for an administrative error that meant key documents were omitted. Relevant information was in a Provision of Advice to Court report (PAC report) from the Probation Service, an Alcohol and Other Drug Assessment report from a professional counsellor, letters from two of Mr Berkland's children and his ex-partner, and character references from two Corrections Officers. Because some of this material has not been addressed in any detail in the courts below, it is necessary to briefly summarise it in context.

[153] Mr Berkland's ex-partner and mother of two of his children is a senior registered social worker. She provided a letter describing in considerable detail Mr Berkland's background and character. The letter demonstrates the potential benefit to the court of obtaining advice from thoughtful insiders about offender background. Among other things, it contained the sort of information that sentencing judges might hope to receive in a s 27 intervention, whether by report or otherwise.

[154] His ex-partner records that Mr Berkland was the fourth of five children raised by their mother in Cannons Creek, a working class neighbourhood in Porirua. They were poor. His father, who left the home when Mr Berkland was five, was a heavy drinker and violent to his mother and the children both before and after he left. He provided no financial support to the family. His mother, of necessity, worked long hours meaning the children had almost no supervision. Mr Berkland left school shortly after starting college, functionally illiterate and without qualification. In all he has seven children to multiple mothers.

[155] When his relationship with his ex-partner ended, Mr Berkland returned to Porirua, reconnected with some former associates and eventually joined the local chapter of the Mongrel Mob. She considered that Mr Berkland suffers from low self-esteem due to illiteracy and poor economic prospects. In her view, his poor economic prospects were also exacerbated by the responsibility and inevitable stress of having multiple children under his full-time care. She observed he carries significant unresolved childhood-related trauma, including trauma due to sexual abuse at the hands of adult visitors to his home, which he had disclosed to her years earlier during the course of their relationship. As a result Mr Berkland had few skills for coping with emotional or economic adversity.

[156] We conclude, based on all the material reviewed, that Mr Berkland's upbringing involved multiple criminogenic risk factors including poverty, trauma, chaotic home circumstances and poor educational outcomes. Some of these factors, namely poverty, unresolved trauma, poor educational outcomes and chaotic circumstances, continued into adulthood, leading to, or exacerbating, poor resilience in the face of adversity.[168]

[157] This profile was confirmed by his interview with an addiction counsellor in which Mr Berkland reported engaging in regular abuse of drugs and alcohol from childhood. Given the poverty and lack of boundaries in his upbringing, this is unsurprising. Mr Berkland then said he commenced methamphetamine consumption in his early 30s and became a heavy user following the death in 2016 of his older brother with whom, in more recent years, he had become very close. The High Court Judge accepted Mr Berkland's self-report was consistent with the addiction therapist's view that he likely had a dependency to methamphetamine. Thus, it may be concluded that drug and alcohol abuse has been a primary coping strategy for Mr Berkland from an early stage, leading to heavy methamphetamine use and addiction later in life, including at the time of his offending, when his personal circumstances deteriorated.

[158] This matrix of fact demonstrates why it is too simplistic to restrict the availability of addiction-based discounts to low-level operators whose entanglement with the drug is so complete that their offending reflects significant compromise of their own agency. The facts are often more complicated than that and it is important for the Court to grapple with them. We are satisfied that Mr Berkland's addiction together with his history of deprivation and trauma are drivers of his offending. They have contributed causatively to his offending and so will be relevant to his sentence. That is not to ignore or minimise this offending; it was by any standards serious commercial drug offending which is why a lengthy term of incarceration is inevitable. But the Court must address the offender as well as the offending in accordance with the Sentencing Act.

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[168] Despite this, Mr Berkland's prior offending is relatively limited. According to his Criminal and Traffic History report it includes minor traffic, cannabis and dishonesty offending and just one prison sentence (for drink driving) of two months. His last conviction was in 2003.

Rehabilitation and character

[159] This brings us to the instrumental purposes of sentencing and, in particular, the character references from the two Corrections Officers and a report from the Rimutaka Prison Drug Treatment Unit (DTU). They speak to the fact that Mr Berkland has taken every opportunity offered to him before sentencing and had become a positive role model for his peers in the DTU programme. The references describe him as hardworking, trustworthy and honest, and as someone who is respected by staff. According to one officer, Mr Berkland "is a prisoner who I have watched go through stages of change which can be rare but it has been rewarding to see this evolving, he is a prisoner of change."

[160] This aspect of Mr Berkland's background is genuinely exceptional and warrants a significant sentencing response despite the gravity of the offending. He appears to have broken the cycle in his own life, and turned to help other inmates do the same in theirs. As the DTU Report suggests, his respected status among the inmates means this help is likely to be impactful. Such leadership can accrue benefits to Mr Berkland in terms of building the self-esteem and resilience his ex-partner considered had been in deficit prior to his incarceration. Equally, the potential social and economic advantages for the inmates whose lives he helps to turn around, and ultimately the benefits for their families and communities, could also be very significant.

[161] Sentencing judges should encourage offenders to take up the opportunities offered by rehabilitative programmes to make the necessary changes in their lives. One way to do this is by providing material sentencing discounts when the evidence suggests that is what an offender is genuinely willing to do. Such encouragement can be an inflection point in the life of a prisoner.

Mr Berkland's final sentence

[162] In summary therefore, we consider that Mr Berkland should have received separate material discounts for these factors:

(a) a discount of 10 per cent for his deprived background and the role of addiction in his offending; and

(b) a discount of 10 per cent to account for his efforts at rehabilitation.

[163] The overall discount for background factors is therefore 20 per cent. The existing discount of 20 per cent for guilty plea was accepted. From a starting point of 14 and a half years' imprisonment, this leaves a final sentence of eight years and eight months imprisonment.

F APPLICATION TO MR HARDING

The Courts below

[164] In the High Court Moore J acknowledged that gang association as well as alcohol and gambling abuse shed "some, albeit incomplete, light" on how Mr Harding came to be where he was today.[169] While Mr Harding had a long list of previous convictions, the Judge noted none were drug-related. Nevertheless, Moore J concluded that "there is nothing in [Mr Harding's] personal circumstances which could attract a sentencing discount".[170]

[165] In the Court of Appeal, the Court addressed background matters in brief terms:[171]

> [57] We agree with the Judge that there is no evidence establishing the necessary link between any mental health issues, or Mr Harding's abuse of alcohol and gambling, and the offending. In particular, there is nothing to suggest that any of those matters impaired Mr Harding's ability to exercise rational choice in relation to the offending. If anything, Mr Harding's personality issues underscore the risk he poses to the community, as the Crown submitted. None of these factors can justify a discount.

[166] As we noted earlier, however, the Court did express some concern about the relevant sentencing purposes of very long finite sentences, and Goddard J expressed concern about the potential relevance of offender life expectancy to such sentences.

Submissions

[167] For Mr Harding, Ms Park argued that the Courts below did not give sufficient weight to Mr Harding's history of deprivation. He appears to have had a significant

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169 Harding sentencing notes, above n 13, at [67].
170 At [87].
171 Harding CA judgment, above n 17.

learning difficulty. He left high school effectively illiterate and with no formal qualifications. He was an unemployed beneficiary with minimal work experience and problems with alcohol and gambling.

[168] To support this aspect of the appeal, Ms Park sought leave to admit a s 27 report prepared by Jennifer Reid who is of Te Rarawa and Te Aupouri descent. She holds a doctorate in sociology and indigenous studies. Also contributing to the report was Louise Henare of Ngāti Porou. She is a masters student in applied indigenous studies with a background in human resource consulting. She is also an associate member of the Criminal Bar Association. The report was filed for the first time in this Court.

[169] Ms Park also took up the matter raised by Goddard J in relation to the life expectancy of Māori male offenders in their early 40s (Mr Harding's age at the time of sentencing). Ms Park submitted that the life expectancy of a Māori male born in 1976 is between 73.5 and 75 years. Should Mr Harding be required to serve his whole sentence, he will be released at the age of 69. Referring to s 8(h) of the Sentencing Act, she submitted this is tantamount to a life sentence and "disproportionately severe".

[170] Overall, Ms Park submitted that a discount of between 10–15 per cent was justified for these personal background factors.

[171] Reflecting the Crown's views on the proper legal test, Mr Barr submitted that Mr Harding's circumstances of deprivation do not provide any basis for the Court to infer that his decision-making was constrained or impaired. Rather, supported by the fact he was not a user and the large scale of the operation, Mr Harding's offending was said to be driven by a cynical desire for financial reward.

[172] The Crown opposed the admission of the s 27 report. Mr Barr submitted that the report's content is untested in the courts below. Further, he argued it includes assertions by Mr Harding of parental violence that contradicted statements he made earlier to the psychiatrist who provided a report (under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003) and makes assertions about Mr Harding's medical condition that are outside the report writer's expertise. We will return to the matter of the admissibility of the s 27 report in our analysis below.

[173] In relation to Mr Harding's life expectancy, Mr Barr reviewed the approach of the courts in Australia, UK and Canada to issues of sentencing for older or unwell offenders, and submitted that generalised life expectancy data is of no probative value for two reasons. First, it is not specific to Mr Harding's own life expectancy, and second, in any event, early release will be a matter for the Parole Board and/or compassionate release, should the limits of Mr Harding's life expectancy eventually arise during the course of his sentence.

Should the s 27 report be admitted?

[174] We are minded to admit the report. As we have said, background information is important in sentencing and s 27 is a key tool for eliciting it. Although its content is plainly not fresh, and no meritorious reason was offered for the failure to adduce it at sentencing, it is nonetheless important that courts have access to in-depth background information in sentencing, especially where lengthy terms of imprisonment are in contemplation. In this case, for whatever reason, the sentencing Court may not have been provided with sufficient background information to address the relevant purposes and principles of sentencing by means of s 26 or through counsel. Given the starting point in the High Court for all the offending is 30 years, it would be a disproportionate response to refuse to consider the report even at this late stage.

[175] We acknowledge the Crown's concerns in relation to some of the report's conclusions, but such shortcomings as there may be can be adequately addressed in the weight to be attributed to the various conclusions in the report, rather than as a question of admissibility. There is little to be gained by placing technical obstacles in the way of admitting such information. Given that it is necessary now to resentence Mr Harding due to error in the courts below in relation to starting point, it is appropriate to consider Mr Harding's background afresh.

Should Mr Harding's background factors have affected his sentence?

[176] Relevant material before the courts below included a brief PAC report and a psychiatric report.[172] The PAC report recorded Mr Harding's advice that he suffers from

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[172] Prepared pursuant to the Criminal Procedure (Mentally Impaired Persons) Act 2003, s 38.

addiction to drinking and gambling. Mr Harding also advised that he "hates meth" and that because his motivation for offending was to support his whānau, he would do it all again. The psychiatric report assessed Mr Harding as having an antisocial and narcissistic personality disorder characterised by poor impulse control and "a pervasive pattern of disregard for, and violation of the rights of others". The report found that confounding factors such as developmental dysfunction, upbringing, maladaptive behaviour traits and possible dysfunction within family dynamics contributed to Mr Harding's background of significant alcohol abuse. He did not however suffer from a major mental illness. He was instead, the report found, a manipulative malingerer.

[177] Turning now to the s 27 report, it discussed Mr Harding's family and cultural background in much greater detail than did either of the two previous reports. As it was first introduced in this Court we provide a brief summary. Mr Harding recorded that his maternal grandfather was from Te Pātū (of Ngāti Kahu in the Far North) and his father's family were from the Ruawai area.[173] He said he had little to do with his marae and generally avoided going to them.

[178] Mr Harding said that he was punished physically at home and abused sexually by a baby sitter. He said he felt unloved as a child. He advised that his mother was assaulted at home. He reported that he did not enjoy school and left in the fourth form. According to his mother he became mixed up with the wrong crowd. Mr Harding records that he joined the Crips in Whangārei as a 15 year old, then the Black Power. He later joined the Head Hunters, to which he is still patched.

[179] Mr Harding's father recorded that Mr Harding had been a handful from a young age and very difficult to control. He said:

> After his last [court] case, I wished I was a better father … I don't think I was there for him. Once he started into serious trouble, I don't think I was there. If I asked him, he said "no, no I'm alright." We've all got family members in gangs but want your kids to do better.

[180] Mr Harding's mother also expressed regret. She said:

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[173] Mr Harding's father noted that they were originally from Whirinaki (in the Hokianga).

> … we could have been better parents. I blame myself. If he'd had more help … it's just he never talks to you. … Every time his father talks to him he goes off the rails.

[181] The report writers related Mr Harding's offending to a lack of pro-social support within his whānau and their difficulties in managing his behavioural issues as a child. They noted that Mr Harding's sense of isolation within the whānau was not countered by his parents.

[182] They concluded further that the level of offending for which he had been convicted was beyond his capacity:

> … Brownie lacked the capacity to coordinate a sophisticated methamphetamine operation; rather his neurodevelopmental delays left him vulnerable to manipulation, given his access to a rural property suitable for the manufacture of methamphetamine. Brownie's comment that: "the Judge says that 'no one made money like I did but it wasn't my money' appears to be supported by [his ex-partner's] comment that: "he had to sell his car to get [his subsequent ex-partner] back to NZ." Brownie's ability to exercise rational choice also needs to be juxtaposed against his mental wellbeing and the absence of protective factors in community or whānau contexts.

[183] For our part, we accept that Mr Harding appears to have had a difficult childhood, characterised by difficult relationships with key adult influencers: first his parents and then his teachers. But the suggestion in the s 27 report that he was physically abused at home as a child is doubted. The psychiatric report advised that Mr Harding had denied being subjected to physical abuse during his childhood. Rather, the position seems to be, as Mr Harding's parents reflected, he was a difficult child who did not quite fit in either at home or at school.

[184] Overall, we consider Mr Harding's intrinsic criminogenic tendencies appear to have been accentuated by poor educational outcomes and a related resort to alcohol and gambling. We accept that his background is likely to have led to self-medication at some level, but we do not see alcohol and gambling as causatively contributing to the scale and extent of his offending.

[185] This is consistent with the sentencing Judge's assessment. For example when sentencing his former partner and co-offender, Ms Rewha, the Judge remarked:[174]

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[174] *R v Rewha* [2016] NZHC 2825 at [37]

> Having heard many, many hours of intercepted communications; some relating to Brownie Harding's dealings with others and the numerous telephone conversations and text messages between you and Brownie Harding, I am left in no doubt that he is an extremely manipulative, domineering and threatening man.

[186] This view was also expressed by Ms Rewha when interviewed for the purposes of the psychiatric report on Mr Harding. The suggestion in the s 27 report that it was Mr Harding who was being manipulated into this offending cannot be accepted as accurate.

[187] Further, although the s 27 report writers point in general terms to historical intergenerational deprivation as a driver of Māori offending, they make no real attempt to connect Mr Harding's own circumstances to those processes. What we do know is that Mr Harding's grandparents and parents each owned farms in the North. Whatever might be said about the land losses suffered by Mr Harding's Ngāpuhi and Muriwhenua communities (and they were undoubtedly significant),[175] two generations of his immediate family did manage to retain or obtain sufficient capital to go farming in their own right. All in all, we are not satisfied there is sufficient evidence of a background of deprivation to warrant a discrete discount.

[188] As noted, Mr Harding did not do well at school, leaving with no skills by which he might have better utilised his obvious energy and intellect. This is often a driver of offending and it was probably so in his case too. But Mr Harding was raised in a stable family home by two hard working parents who, despite their faults, loved and cared for him as best they could. They cared enough to wish they had done better.

[189] Stepping back and considering these background factors in the round, we are not satisfied that they justify a discount. His offending was extremely serious. Background provides only limited explanation for his decision to offend in the complex and carefully orchestrated manner described by the sentencing Judge. He has a number of other serious convictions, including kidnapping, all of which, along with the other material before the sentencing Judge, indicate a likelihood of re-offending. These considerations are

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[175] See, for example, Waitangi Tribunal *Muriwhenua Land Report* (Wai 45, 1997) which records that by the end of the 19th century Mr Harding's Ngāti Kahu ancestors on his maternal grandfather's side were in dire economic straits due to land loss.

sufficient to swallow up any discount that could realistically be provided in relation to background.

[190] That leaves only the submission in relation to Mr Harding's life expectancy.

[191] For two reasons we do not find this submission persuasive. First, Mr Harding's sentence will now be considerably less than 28 and a half years. And second, while the statistical evidence about average life expectancy in the context of a long finite sentence may raise a concern, broad brush statistical averages alone are not a sufficient basis upon which to render a long sentence unjust in a specific case. We prefer to leave the question of whether individualised life expectancy evidence will make a difference for a case in which there is such evidence.

Mr Harding's end sentence

[192] From a starting point of 22 years we deduct approximately five per cent for a late guilty plea leaving an end sentence of 21 years' imprisonment.

G RELEVANCE OF BACKGROUND TO MPIs

[193] Mr Berkland's end sentence will now be 8 years 8 months. Fifty per cent of that is four years four months. That period elapsed toward the end of 2021 or the beginning of this year depending on when he was remanded in custody. In the circumstances it is no longer necessary to address this issue since imposing an MPI of 50 per cent on that sentence would serve no relevant purpose.

[194] For completeness we note that Mr Harding's MPI will not be adjusted. Since his final sentence will now be 21 years, and since (rightly in our view) he did not suggest an MPI of less than 50 per cent could be justified, his MPI will remain at the 10 year maximum.

H DISPOSITION

[195] Mr Berkland's appeal is allowed. His sentence of 12 years and nine months' imprisonment, together with a 50 per cent MPI, is quashed, and a sentence of eight years and eight months' imprisonment is substituted.

[196] Mr Harding's appeal is allowed. His sentence of 28 and a half years is quashed, and a sentence of 21 years is substituted. There is no adjustment to the MPI.

ELLEN FRANCE J

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Introduction

[197] I agree both appeals should be allowed and I agree with the sentencing outcomes which have been substituted for the appellants.[176] I write separately to explain where I differ from the approach adopted by the majority as set out in the judgment of Williams J. The principal differences relate to the re-formulation of the relevant indicia in *Zhang v R* and to the reasoning relating to the link required between background factors and the offending.[177]

The revision of the indicia in *Zhang*

[198] I would not amend the *Zhang* indicia.[178] The "significant" role is an intermediate category between that of "leading" on the one hand and "lesser" on the other.[179] It is not immediately apparent that the existing indicia do not adequately differentiate between the categories in this way and nor that they do not sufficiently differentiate between leading and significant players. I add that I see the Court of Appeal as better placed than this Court to review the utility and workability of these indicia given that Court's role in sentencing guidelines and that Court's regular exposure to the cases. That is particularly so where the appropriateness of the indicia the majority reformulates was not a matter

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176 I agree both with the starting points adopted and with the discounts from those starting points for each appellant.

177 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648.

178 Contrast Williams J above at [16](b), [65]–[71].

179 *Pratap v R* [2021] NZCA 308 at [16].

addressed in any detail by the parties.[180] It is also relevant that this guideline is relatively recent and in this respect it should be given time to settle.

[199] In any event, the problem in this case as I see it is not with the indicia but rather that the assessment of the facts by the Courts below led to Mr Berkland being placed higher up the "significant" category than the facts warranted.[181]

The correct approach to personal mitigating circumstances

[200] Like Williams J, I attach significance to the statements of this Court in *Hessell v R* which emphasise the need for sentencing decisions to be made following a "full evaluation of the circumstances to achieve justice in the individual case".[182] While, the Court said, Parliament was concerned about the need for consistency it was "equally concerned" that the sentence was the appropriate one in the particular case.[183] Both the sentencing and the appellate judge are engaged in an "an evaluative task".[184] Guideline judgments, such as *Zhang*, are intended to assist in the evaluative task but do not remove the need for judgement on the part of the sentencing judge.[185]

[201] The evaluative task requires consideration of, amongst other matters, the personal circumstances of the offender. The personal circumstances of an offender may be relevant, as this Court said in *R v Jarden*, because they contributed in some way to the offending.[186] They may reduce both the offender's legal responsibility and/or moral culpability. Personal circumstances may also, of course, be relevant for other reasons such as to rehabilitation options (as s 27(1)(d) of the Sentencing Act 2002 makes clear); to the type of sentence that is imposed and any conditions of that sentence; and they may mean that punishment should be mitigated because, for example, of significant adverse effects on mental health.

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180 No doubt reflecting the indication in the Court's leave judgment that there would be no wholesale re-litigation of *Zhang*: *Berkland v R* [2020] NZSC 125 at [2].

181 In respect of the indicia Williams J reformulates, Mr Berkland accepted he had an operational function, but not a management one. He accepted he was partly motivated by financial advantage and that there was some degree of actual or expected commercial profit.

182 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38]; and see Williams J above at [22].

183 At [38].

184 At [43].

185 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750 at [36].

186 *R v Jarden* [2008] NZSC 69, [2008] 3 NZLR 612 at [14]. The Court noted that personal circumstances may also be relevant on purely compassionate grounds.

[202] In terms of the way in which the necessary contribution to the offending is assessed, I too adopt the approach taken by the Court of Appeal in *Carr v R*, which discussed how the *Zhang* approach to factors such as economic, social and cultural deprivation applied to other, non-drug related, offending.[187]

[203] The two appellants in *Carr* appealed against sentences for aggravated robbery and related offending. Reports under s 27 of the Sentencing Act had been provided at sentencing for both appellants, Mr Carr and Mr Anderson. Two key points emerge from the Court's consideration of Mr Carr's appeal. The first is the way in which the Court described why it was that the various factors (including poverty, a long association with a criminal fraternity, gangs, dislocation from Te Ao Māori, drug and alcohol abuse and methamphetamine addiction) were relevant to sentencing. In particular, the Court said that the s 27 report:[188]

> … gave a credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative contribution to offending, of the kind envisaged in *Zhang*. Where that is shown, we consider it must have an effect on the sentencing outcome.

[204] The second point is that the Court in *Carr* made it clear that "[r]ecognition of a causal linkage between matters relied on in a s 27 report and the offending" did not "require the Court to be satisfied the matters are the proximate cause of the offending".[189] So, although the s 27 report addressed aspects of Mr Carr's life at a much younger age, and the offending began when he was 36 years of age, the Court was able to say it was "clear" Mr Carr's "early life [had] contributed to the course his life subsequently took".[190] The Court went on to say that "[d]rug taking and early entry into the justice system continued to affect him".[191]

[205] A link based on causative connection, albeit not necessarily the proximate cause, seems to me to meet the concerns about ensuring personal circumstances affecting culpability are properly addressed. It also fits with the notion, as described by the Court of Appeal in *E (CA689/10) v R*, that "[t]he moderation of culpability follows from

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187 *Carr v R* [2020] NZCA 357. I make no comment on the causes of offending. The discussion in Williams J's judgment above at [113]–[121] is on its face a confined one.
188 At [65].
189 At [64].
190 At [64].
191 At [64].

the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend".[192]

[206] I emphasise the requirement in *Carr* for a "causative contribution" which impairs choice and diminishes moral culpability. It may be that treating factors which "help to explain" how an offender came to offend (rather than an operative cause), as meeting the *Carr* test, does not alter that test.[193] If so, I am content with that approach. If that is not the case, however, I prefer the *Carr* formulation.[194]

[207] I accept, as Oliver Fredrickson says, that *Carr* has not always been applied consistently.[195] But an analysis of Court of Appeal cases which have considered *Carr* indicates that the approach is a workable one and one which will see discounts for these factors as appropriate.[196]

[208] I add that I also accept that there are difficulties, as the Supreme Court of Canada recognised in *R v Ipeelee*, in establishing causation when dealing with factors such as the effects of dispossession and colonisation.[197] But that Court was dealing with a legislative provision relevantly directed to the position of indigenous peoples with a specific direction to avoid imprisonment where possible.[198] The statutory scheme in relation to drug offending in New Zealand explicitly starts with a different presumption.[199] Further, given the unfortunately high proportions of those in prison who have experienced the effects of colonisation, a disadvantaged background, or suffer from mental health issues, an unduly loose link would result in discounts for the majority of offenders across the full

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192 *E (CA689/10) v R* [2010] NZCA 13, (2011) 25 CRNZ 411 at [68].

193 Williams J above at [16](c) and [109]–[110].

194 I do not understand the Court of Appeal in *Hall v R* [2021] NZCA 314 at [29] or in *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 to move away from the notion that in evaluating culpability the offender's mental health must have a causative impact on "the offender's willed choice to offend": *Shailer* at [50]. See Williams J above at [98] and n 115.

195 Oliver Fredrickson "Re-thinking systemic deprivation sentencing discounts" (2021) August Māori LR 1 at 10–12.

196 See, to illustrate this point: *Waho v R* [2020] NZCA 526; *Waikato-Tuhega v R* [2021] NZCA 503; *Williams v R* [2021] NZCA 535; and *Aramoana v R* [2021] NZCA 558.

197 *R v Ipeelee* 2012 SCC 13, [2012] 1 SCR 433 at [83] per McLachlin CJ, Binnie, LeBel, Deschamps, Fish and Abella JJ.

198 Criminal Code RSC 1985 c C-46, s 718.2(e). At the time, the section stated that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders".

199 Misuse of Drugs Act 1975, s 6(4).

range of offences.[200] I see the merits of that outcome as something for Parliament to grapple with, as was the case in Canada.

[209] The Court in *Carr* also acknowledged that "the gravity of the offending might temper the extent of any discount" but that did not mean necessarily that there should not be any allowance.[201] In terms of drug offending, there must be some recognition that in relation to various serious commercial offending it is going to be more difficult to see the requisite link. It follows that I consider it is unfair to describe the Court's approach in *Zhang* in the way Williams J does particularly where that Court would have considered it was constrained by *Jarden*.[202]

[210] I add that as I have noted, in *Jarden* the Court made some allowance for personal circumstances although there was no evidence of a causal link between those circumstances and the offending. In that case the circumstances were described as "so extreme" that they should have been taken into account even in respect of serious commercial offending.[203] Nothing I have said is intended to detract from the ability of the sentencing judge to recognise such circumstances.

[211] Finally, I agree that ss 25 to 27 of the Sentencing Act are an important means of ensuring that the Court has the necessary information.[204] Those sections are not, however, the only means by which information as to background factors and other personal circumstances can be brought before the Court. On occasion, for example, whānau or other community members may appear in person and in other cases less formal means of providing relevant information may be adopted. In particular, it should be clear that where, for example, an offender re-offends and the Court already has considerable information before it, less formal ways of providing this material or any additional information may be well appropriate.[205]

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200 For example, a 2016 study found that 91 per cent of our prison population have a "lifetime diagnosis of a mental health or substance use disorder" and that the prison population was three times more likely than the general population to have received a diagnosis of mental disorder in the previous year: Devon Indig, Craig Gear and Kay Wilhelm *Comorbid substance use disorders and mental health disorders among New Zealand prisoners* (Department of Corrections, June 2016) at v–vi and 9.

201 *Carr*, above n 187, at [65].

202 See Williams J above at [128].

203 *Jarden*, above n 186, at [14].

204 Compare Williams J above at [16](c) and [147].

205 Williams J above at n 105.

Other matters

[212] In terms of Mr Berkland's appeal, I make one further point. I do not accept that it is proper to consider the material from the subsequent forfeiture proceeding.[206] Mr Berkland pleaded guilty on the basis of the summary of facts and it is not for us now to second guess the factual position based on subsequent material prepared for a different context.

[213] In terms of Mr Harding's appeal I make three points. First, it is wrong to say, as the Crown does in supporting the approach of the Courts below, that Mr Harding is one step down from life imprisonment. A consideration of cases where life imprisonment has been imposed indicates a combination in those cases of a large commercial scale operation, a person who is the mastermind and/or the addition of relevant previous offending.[207] Previous drug offending was not a feature in Mr Harding's case; nor was the quantum of drugs when viewed against the quantities involved in importations as high.

[214] Second, *Zhang* removed the subdivision of the *R v Fatu* bands functionally between supply, importation, and manufacture.[208] The amount being manufactured relative to other manufacturers is not irrelevant but when Mr Harding's offending is considered in the context of *Zhang*, I agree that a contrast can be made with the starting point of Mr Yip in *Zhang*.[209]

[215] Finally, sentencing judges obviously operate within a framework for which life imprisonment is the maximum sentence for drug offending like that in issue here. The Sentencing Act makes it clear that the maximum sentence is to be imposed for the most serious cases.[210] However, in my view, the Court can say we have got to a point where the sentencing levels for commercial drug offending are simply too high.[211] It is difficult

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206 Contrast Williams J above at n 94.
207 Contrast, for example, *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158 (large scale and leading role); and *Rhodes v R* [2009] NZCA 486 (large scale and offending whilst on parole for other drug offending).
208 *Zhang v R*, above n 177; and *R v Fatu* [2006] 2 NZLR 72 (CA).
209 Williams J above at [50].
210 Sentencing Act 2002, s 8(c).
211 *R v AM*, above n 185, at [28].

to see that personal or general deterrence are better served by a 28 year sentence rather than, say, a 22 year sentence.

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