IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC 38/2022**

Between	**KAINE VAN HEMERT**
	Appellant
	V
And	**THE KING**
	Respondent

SUBMISSIONS ON BEHALF OF INTERVENER
TE MATAKAHI – DEFENCE LAWYERS ASSOCIATION NEW ZEALAND

For hearing: 18 November 2022

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Counsel for Te Matakahi | Defence Lawyers Association New Zealand certify that these submissions do not contain suppressed information and are suitable for publication.

MAY IT PLEASE THE COURT | TĒNĀ, E TE KŌTI:

I. THE INTERVENERS

1. Te Matakahi Defence Lawyers Association New Zealand ("DLANZ") was established in April 2020 and is the only organisation in New Zealand that represents solely issues relevant to the conduct of defence cases and issues impacting defendants appearing before the criminal courts. DLANZ is a nationwide organisation and has hundreds of members which includes the lawyers employed by the Public Defence Service.

II. SUMMARY OF ARGUMENT

2. This Court has granted leave as follows:[1]

> …counsel should focus on the correctness of the Court of Appeal's interpretation, and application, of s 102. There are two particular issues arising from the approach to s 102 in this case which counsel should also address. They are, first, whether the Court was correct to treat the circumstances of the offending (the brutality of the murder and Ms Te Pania's vulnerability) as having "precluded" a departure from the presumption of life imprisonment.[2] The second matter relates to the correctness of the Court's assessment of the applicant's circumstances. In particular, we refer to the discussion of the extent to which the applicant's mental health contributed to the offending and whether his mental illness can or should be treated as distinct from other aspects of the applicant's behaviour, such as his heavy use of alcohol and drugs, and his anger over the relevant period.[3]

3. DLANZ respectfully submits a rational, humane and rights based approach to the sentencing exercise provides an answer to the sentencing questions raised in this case, and more generally.

4. Sentencing derives its political legitimacy from proportionality. That in turn demands a nuanced assessment of culpability. As more becomes known about the human condition (an obvious example being revelations by neuroscience as to the development of the prefrontal cortex in youth), sentencing outcomes change.

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[1] *R v Van Hemert* [2022] NZSC 94 [Leave decision]: SC COA 8 at [6].
[2] *R v Van Hemert* [2021] NZCA 261 (French, Brown and Collins JJ) [Court of Appeal judgment]: SC COA 47 at [47].
[3] SC COA 48 at [50]-[51].

5. It is critical that those coming before the courts for sentencing are treated in a humane and holistic way giving full consideration to factors impacting culpability such as mental illness. If not, sentences will be disproportionately severe and arbitrary. When a human life has been lost in brutal circumstances, the task to rationally and accurately assess true culpability can be challenging. Yet, when a combination of factors such as are present in this case fuse to significantly reduce one's moral blameworthiness for the criminal act, that must be duly recognised in the sentencing outcome.

6. Mr Van Hemert suffered from long standing mental illness which had deteriorated in the days preceding the killing, and long-standing significant drug and alcohol abuse (reported to be 12 bottles of beer, six pre-mixed bourbons and six cannabis joints a day for several years).[4] As the evidence before the sentencing court demonstrated, if he was sane, he was only barely sane. He was very seriously mentally compromised, and his culpability, as against a person of sound mind, was low. To avoid a disproportionately severe sentencing outcome, those personal factors had to be recognised when assessing culpability, that is, the *"circumstances of the offence and the offender"*.

How should sentencing be approached?

7. All agree that a rights-based New Zealand Bill of Rights Act (NZBoRA) consistent approach to sentencing and the application of the Sentencing Act 2002 (the "SA") is the correct approach.[5] And as this Court has recognised recently in *Fitzgerald* (per Winkelmann CJ):[6]

> …the Bill of Rights is to be given a generous interpretation – an interpretation suitable to give individuals the full measure of the enacted fundamental rights and freedoms, and one which renders the rights practical and effective, comprehensible beyond the ranks of judges and human rights academics.

[4] Refer PAC Report: CA COA 18.
[5] See for example the Crown making this concession in *R v Fitzgerald* [2021] NZSC 131, [2021] 1 NZLR 551 at [13]: App Auth 411.
[6] At [41].

The Sentencing Act 2002

8. Prior to the enactment of the SA in 2002, the Criminal Justice Act 1985 governed sentencing principles in New Zealand. A critical change was the codification of the purposes of sentencing, and the general principles to be applied by the courts. This included aggravating and mitigating factors and a specified clear hierarchy of sentence type (ss 7-18 SA). The SA put greater emphasis on restorative justice, and agreements between offenders, victims and the community were to be more readily recognized in the sentencing process. Of course, a crucial change was the provision for greater flexibility in sentencing for murder where life imprisonment became the maximum penalty rather than the mandatory penalty, with finite sentences being able to be imposed (ss 102-105 SA).

9. The SA guides the sentencing process - moving away from language of punishment – in preference purposes of (potentially) holding to account, acknowledging harm, denouncing conduct, providing for the interests of the victim and the protection of the public[7] where appropriate and, importantly, to provide for the offenders' rehabilitation and reintegration.

III. SECTION 102 SA APPROACH AND APPLICATION

"Manifest injustice" and the "circumstances of the offence and the offender".

10. A conviction for murder attracts a presumptive sentence of life imprisonment unless a sentence of imprisonment for life would be manifestly unjust.[8]

11. The first consideration by the Court of Appeal of this new provision, in 2003, in *R v Rapira,* established that the threshold for manifestly unjust was to be regarded as very high, crossed only rarely and in exceptional cases.[9]

[7] Noting that protection can come from reforming an offender as well as from a period of incarceration.
[8] Sentencing Act, s102.
[9] *R v Rapira* [2003] 3 NZLR 794 (CA) at [121]: App Auth 77.

12. Since *R v Williams*,[10] the senior courts have taken an increasingly restrictive approach to the interpretation of the SA's provisions in relation to murder. Not only is the term "given the circumstances of the offence and the offender" construed conjunctively, but the Court of Appeal has gone from applying the general rules of sentencing in ss 7 to 10;[11] through giving "manifestly unjust" an ambulatory meaning as between ss 102 and 104;[12] to the point of ostensibly extinguishing plea credit completely.[13]

13. The parliamentary materials (and the speeches of the Minister of Justice in particular) have been an ongoing source of justification for reading the manifest injustice test as confining the circumstances in which the courts may depart from the presumptive sentence. Consistently, the Minister is quoted as to when a departure is permissible: [14]

> However, in a small number of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate. Under this legislation, the court will be able to consider a lesser sentence.

14. DLANZ contends that these comments have operated to constrain the language in both ss 102 and 104, to the detriment of more appropriate orthodox approaches to statutory interpretation and the SA's own purpose and principles provisions.

15. Moreover, there is little in this oft-quoted excerpt that supports, far less requires, the construction of "the offence and the offender" conjunctively. It was neither the Minister's task at the time of introducing the bill, or his constitutional function more generally, to set out *in extenso* the ambit of the manifest injustice test. While the Minister may have viewed the circumstances that would give rise to the discretion as rare, that was unsupported by the absence in s 102 of the usual "only in exceptional circumstances" language that is the norm where such a limitation is intended.

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[10] *R v Williams* [2005] 2 NZLR 506 (CA)
[11] *Rapira* above n 9.
[12] *R v Williams* [2005] 2 NZLR 506 (CA) at [57].
[13] *Malik v R* [2015] NZCA 597.
[14] Sentencing and Parole Reform Bill, the Minister of Justice (594 NZPD 10910): quoted in *Rapira* above n 9, at [121].

16. As current use of s 27 SA cultural reports demonstrates, facts that justify different sentencing outcomes may be a common place thing: the role of systemic and historic deprivation is an accepted criminogenic driver, but it is anything but rare. It is not the lack of frequency that justifies a mitigating response; it is the nature and effect on the offender that informs the justice of the case.

17. The intention manifested in s 102 of the Act was to make the sentence for murder discretionary, for the first time, although subject to a presumption against exercising that discretion except in the cases where the injustice of not doing so is clear. That is the meaning of manifest injustice.[15]

18. Parliamentary debates can provide assistance with intention, but only assistance, and even then should be used sparingly to resolve "ambiguity, obscurity or absurdity".[16] There is little ambiguity to resolve in s 102, as consideration of the circumstances of the offence and offender is merely one aspect of the manifest injustice assessment and the determination of where the justice in a case lies is paradigmatically a matter for the judiciary.

19. The work in s 102 is done by the manifest injustice test, which by common use is designed to capture all relevant circumstances. It (a) is not limited by the offence / offender circumstances (although they are mandatory considerations), and (b) gives all relevant circumstances the weight they deserve in the instant case, following the application of the purposes and principles of sentencing and the aggravating and mitigating features applicable to both.

20. Manifest injustice is therefore a discretionary matter for the High Court at first instance. Recent examples of *R v Cunnard*[17] and *R v Reid*[18] refer. It defeats the essence of such an assessment to trammel it by an inquiry too rigidly framed. Manifest injustice may be determined in a number of ways; as with NZBoRA

[15] See for example, *Legal Services Agency v A* (2003) 17 PRNZ 443 (HC) at [11], in the context of "manifestly unreasonable".
[16] The rule in *Pepper v Hart* [1993] 1 All ER 60, in Catherine J Iorns Magallanes "The 'Just Do It' Approach To Using Parliamentary History Materials In Statutory Interpretation" (2009) 15 Canta LR 205 at 214.
[17] *R v Cunnard* [2014] NZCA 138.
[18] *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

interpretation, there is no one right answer, so long as there has been a proper assessment of the circumstances of the offending and offender.

21. The DLANZ position is that vulnerability of a deceased, or the circumstances of the killing on their own (or even in combination) cannot logically preclude the High Court from departing from the presumption of life imprisonment in s 102(1) SA. The High Court must consider all of the mandatory and relevant considerations.

22. In the High Court Justice Doogue noted "it is important to view the offending under the overarching matter of your history of bipolar affective disorder."[19] In ultimately sentencing Mr Van Hemert, her Honour stated "I have reached the conclusion that, because of the extent of the psychiatric illness you were suffering from at the time of the offending, it would be manifestly unjust to sentence you to life imprisonment."[20]

23. The Judge at first instance was clearly persuaded that, despite the brutality of the killing and the vulnerability of the deceased as a sex worker who should have been entitled to work without fear of assault, the overwhelming circumstances of the offender meant that the presumption was displaced. This is how s 102 is to operate.

24. The argument was made that Mr Van Hemert's mental illness was only a contributing factor, and that because alcohol and drug use may have been part of the factual matrix, that this counters the weight to be given to the mental illness.

25. This case, and indeed psychological research establishes, that it is inherently difficult to separate out mental illness from substance use.

26. Moral fault may underly the defence of insanity: New Zealand is still shackled with the deeply flawed 1843 M'Naghten Rules (still in statutory form through s 23 Crimes Act 1961) but notions of moral fault are clinically and diagnostically meaningless in the 21st century.

[19] *R v Van Hemert* [2020] NZHC 3203: SC COA 26 at [11].
[20] At [31].

27. In the sentencing context, equating the effects of alcohol and drug use with voluntary consumption or moral laxity and thus unworthy of recognition in sentencing, is largely, if not entirely, inappropriate when the substance abuse coincides with underlying psychiatric or psychological ill health. The use of alcohol and drugs in these contexts cannot be fairly characterised as "voluntary" consumption by offenders who knew the likely outcome if they continued, by choice, to remain addicted.

28. To the contrary, the SA has sufficient flexibility to accommodate alcohol and drug use as either a form of self-medication by those in significant mental distress, as a symptom of underlying psychiatric or psychological disturbance, or as a precursor contributing to subsequent ill health. All routes enliven consideration of diminished culpability/capacity. Accordingly, sentencing courts should recognise that the effects of alcohol and drug consumption are likely to be linked inextricably to the psychiatric or psychological factors of accepted sentencing relevance.

29. This crosses over into the considering the role of causation. It is unreasonable and contrary to established principles of criminal law to require proof the mental health dimension had a predominant role.[21] If the Crown does not need to establish the act on which murder is based is the sole cause of death, why should the defendant be held to such a standard in mitigation on sentencing? The present case also demonstrates the difficulty with this type of analysis, which would result in unfairness to the offender.

30. It is axiomatic that the act relied on must be a substantial and operative cause of death, though it need not be *the* substantial and operative cause.[22] A contributing cause may be substantial, even though it is not the main cause. It is sufficient that the act in question contributed in more than a minimal way to the death of the victim.[23]

[21] *Van Hemert* above n 2: SC COA 48 at [50]-[51].
[22] *R v McKinnon* [1980] 2 NZLR 31 (CA); *R v Hare* CA332/99, 15 November 1999.
[23] *R v Myatt* [1991] 1 NZLR 674, (1990) 7 CRNZ 304 (CA).

31. It is therefore a significant inconsistency of criminal principle that a contributing factor that leads to death should found liability, but have diminished significance in sentencing.[24]

32. Furthermore, by analogy, the Court of Appeal noted in *R v Carr and Anderson* in the context of considering the appropriate impact of social and cultural dislocation and poverty on sentence that "recognition of a causal linkage between matters relied on in a s 27 report and the offending does not require the Court to be satisfied the matters are the proximate cause of the offending"[25] and that "nor is it appropriate to reason that because other people with disadvantaged backgrounds do not offend, legitimate references to deprivation affecting the life of an individual offender can be put to one side".[26]

"Manifest injustice" and sentencing discounts.

33. One means by which manifest injustice may be assessed is by considering what ought to be the appropriate discounts from minimum periods of imprisonment (MPIs).

34. The tests for an MPI for finite sentences and for murder are effectively identical.[27] Both involve:

    (a) holding the offender accountable for the harm done to the victim and the community by the offending:
    (b) denouncing the conduct in which the offender was involved:
    (c) deterring the offender or other persons from committing the same or a similar offence:
    (d) protecting the community from the offender.

35. It is orthodox to view the period of a sentence where parole is unavailable as the aspect of sentencing that is covered by paragraphs (a) to (c) of ss 86(2) and s

[24] See also *W v ACC* [2018] NZHC 937, [2018] 3 NZLR 859, [2018] NZAR 829.
[25] *R v Carr and Anderson* [2020] NZCA 357 at [64].
[26] At [66].
[27] Sentencing Act 2002, ss 86(2) and 103(2).

103(2).[28] The balance of any period of detention is justified on grounds of public safety: (d). That requires a periodic assessment by an independent judicial body.[29] Moreover, detaining an offender past the point where that individual poses an undue risk is arbitrary and unlawful.[30]

36. It must be observed at the outset that community protection is inherently problematic. Given s 7(1) of the Parole Act 2002 provides that the Parole Board's paramount consideration in every case is "the safety of the community" it is hard to see that an MPI set by reference to protecting the community is doing anything other than double-counting.

37. It follows that an MPI premised on protecting the community poses a serious risk of creating an arbitrary detention. If an MPI is imposed on a sentence grounded in whole or in part by community protection it prevents reassessment of such a risk during the sentence by the Parole Board. Consistency of s 22 NZBoRA with ss 86(2)(d) and 103(2)(d) is very much an open question.

38. However, accepting the premise detention is justified on (a) to (c) grounds, that period must be determined judicially. The House of Lords granted a declaration of incompatibility with art. 6 of the European Convention[31] in *Anderson* where the minimum period (known as the tariff) was set by a politician rather than by an independent judicial body.[32]

39. As the House observed in *Lichniak*:[33]

> …any mandatory or minimum mandatory sentence arouses concern that it may operate in a disproportionate manner in some cases.

[28] While English cases refer to this as the "punitive" phase (*R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837), the SA is notable for not using the word punishment.
[29] *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837 at [31].
[30] *Vincent v New Zealand Parole Board* [2020] NZHC 3316.
[31] Fair trial rights equivalent to s 25(a), NZBoRA.
[32] Critically, in England and Wales, there is no statutory minimum period of imprisonment on the mandatory life sentence for murder.
[33] *R v Lichniak* [2003] 1 AC 903 at [13].

40. In England and Wales, the tariff is set by the Home Secretary, in consultation with both the trial judge and the Lord Chief Justice. In New Zealand there is a hard floor of ten years on a life sentence, that cannot be the subject of any judicial amelioration. If the denunciation, etc., period justifiable in the particular case is less than ten years, there is no NZBoRA-compliant means of assessing whether the offender poses an undue risk or not until the ten-year mark is passed.

41. For the same reasons as this Court set out in *Fitzgerald v R*,[34] the ability to refer a prisoner to the Parole Board prior to parole eligibility date is no sufficient answer to the problem identified above: it did not do enough to remove the underlying manifest injustice. The availability of a discretionary remedy from disproportionate punishment in s 9, NZBoRA or the breach of the fair trial right in s 25(1) will not suffice: neither right may be subject to reasonable limitations; both must be observed in all cases, without resort to any discretion.

Assessment of sentencing discounts

42. Section 86(4) provides assistance in determining the level at which sentencing discounts should be applied. An MPI may not be more than two thirds of the finite sentence (or ten years, whichever is the less).

43. The determination of how much time is required by way of MPI to represent the proper element of denunciation, etc, is amenable to finite determination. It must also be acknowledged that the only part of a life sentence that is determinable is the MPI itself; everything else relies on knowing how long an offender will live, which is obviously unknowable.

44. Allowing ordinary sentencing discounts at two thirds of the value that would ordinarily be allocated therefore accords with the purposes and principles of sentencing, at least as an initial reference point.[35] It provides an objective measure

[34] *Fitzgerald v R*, above n 5.
[35] *Rapira*, above n 9 and *Williams*, above n 10.

of culpability, applicable across sentencings, and therefore promotes consistency.[36] It is also consistent with the least restrictive outcome injunction.[37]

45. The differential between the result of the justifiable MPI and the ten-year minimum under s 103 will thus inform the manifest injustice test in s 102. Any significant difference between the two will represent an arbitrary detention: the offender will have completed the period of imprisonment necessary to give effect to the MPI criteria in s 103 and from that point on should be allowed to demonstrate he or she is no longer a risk to community safety.[38] That would include access to the courses necessary to minimise risk.

46. A denial of the opportunity either to demonstrate an absence of risk or to access the necessary courses would result in an arbitrary detention.

47. Experience informs that current implementation of Department of Corrections policy is that a ten-year MPI means offenders do not get to access rehabilitative courses until close to, or more usually the other side of, the expiry of that MPI.

48. The only way to avoid the arbitrary detentions the statutory minimum of ten years will inevitably create is to artificially incorporate considerations of justifiable denunciation (or similar) detention into the manifest injustice test in s 102.

IV. MENTAL HEALTH, ALCOHOL AND OTHER FACTORS

The role of mental health in sentencing

49. Furthermore, at a core level the Court of Appeal was wrong to conclude that the circumstances of the offence precluded an application of section 102 because orthodox sentencing principles are also engaged with every sentencing. The starting point for sentencing is the mandatory consideration of the culpability of the offender, indeed, s 8(a) SA provides that the Court must take into account "the degree of culpability of the offender". Mental health, particularly where it is

[36] Sentencing Act 2002, s 8(e).
[37] Sentencing Act 2002, s 8(g).
[38] *R v Offen* [2001] 1 WLR 253, [2001] 2 All ER 154 (EWCA (Cr.)).

directly linked to the offending, is therefore relevant as a mitigating factor on the sentence to be imposed.

50. Of note, a further mitigating factor under s 9(2) is whether an offender has, or had at the time, "diminished intellectual capacity or understanding." Whilst arguably this does not capture all types of mental illness, it has nevertheless (appropriately) been interpreted to include mental health issues that contributed to the offending as a mitigating factor.[39]

51. The presence of mental illness is directly relevant to other principles of sentencing eg, the need for denunciation may be less where there the offending came about as a result of mental health distress, so too the need for personal and general deterrence.[40] The presence of mental illness is also relevant to the impact on the offender of serving a particular type of sentence, ie. prison may be unbearably harsh for the offender to tolerate.

52. In *E(CA689/2010) v R* the Court of Appeal observed:[41]

> A mental disorder falling short of exculpating insanity may be capable of mitigating a sentence either because: if causative of the offending, it moderates the culpability; it renders less appropriate or more subjectively punitive a sentence of imprisonment; or because of a combination of those reasons. The moderation of culpability follows from the principle that any general criminal liability is founded on conduct performed rationally by one who exercises a willed choice to offend.

53. However, mental illness which is not causative of the offending, may still be considered in the sentencing exercise through s 8(h) which provides that a court in sentencing must take into account any particular circumstances of the offending that mean that a sentence or other means of dealing with the offender, which would otherwise be appropriate would, in the particular instance be disproportionately severe.

[39] Also noting that the mitigating factors set out in 9(2) are non-exhaustive: Sentencing Act 2002, s 9(4)(a).
[40] See for example *L (CA719/2017) v R* [2019] NZCA 676 at [54]: App Auth 207.
[41] *E(CA689/2010) v R* [2011] NZCA 13 at [68]: App Auth 316.

54. The Court of Appeal in *E v R* endorsed the observations of the lead Australian authority in mental illness, *R v Verdins*, that impaired mental functioning is relevant in at least six ways:[42]

> a) The condition may reduce the moral culpability of the offending conduct, as distinct from the offender's legal responsibility. Where that is so, the condition affects the punishment that is just in all the circumstances; and denunciation is less likely to be a relevant sentencing objective.
>
> b) The condition may have a bearing on the kind of sentence that is imposed and the conditions in which it should be served.
>
> c) Whether general deterrence should be moderated or eliminated as a sentencing consideration depends upon the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending, or at the date of sentence, or both.
>
> d) Whether specific deterrence should be moderated or eliminated as a sentencing consideration likewise depends upon the nature and severity of the symptoms of the condition as exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending, or at the date of the sentence, or both.
>
> e) The existence of the condition at the date of sentencing (or its foreseeable recurrence) may mean that a given sentence will weigh more heavily on the offender than it would on a person in normal health.
>
> f) Where there is a serious risk of imprisonment having a significant adverse effect on the offender's mental health, this will be a factor tending to mitigate punishment.

55. In *Shailer* the Court of Appeal noted that applying *Verdins* is a more subtle analysis than simply weighing up culpability on one hand and proportionality on the other:[43]

> We make three points about [the *Verdins* factors]. The first is that the factors (e) and (f) are likely to be more relevant in the second sentencing stage: consideration of mitigating or aggravating circumstances personal to the offender. Secondly, factors (b), (c) and (d) demonstrate that the relevance of mental disorders at the first stage is not limited to culpability. It is material to the form of sentence imposed, and to both general and specific deterrence considerations. Thirdly, we consider it is important not to place the analysis of the relevance of mental disorder in sentencing in a juristic straightjacket. The Sentencing Act 2002 establishes a somewhat different order for analysis

[42] *E(CA689/2010)* at [70]; *R v Verdins* [2007] VSCA 102 at [32].
[43] *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629, at [48]: App Auth 270.

> than the Victorian criminal legislation on which Verdins (and therefore *E (CA689/2010) v R)* were based. Section 7 and 8 sentencing purposes and principles include the need for accountability and responsibility, denunciation, community protection, rehabilitation and reintegration, and proportionality having regard to the whole of the circumstances of the offender. All of these may be engaged by mental health disorders. Some of these considerations fall within the first stage — setting the starting point based on the offending — and others are factors personal to the offender relevant at the second stage. It may also be noted that s 9(2)(e) provides as a personal mitigating factor, relevant to the second stage, "that the offender has or had at the time when the offence was committed, diminished intellectual capacity or understanding". Professor Brookbanks has noted that this provision is not appropriate to describe diminished capacity caused by mental illness or disorder.

56. While taking mental illness into account both in relation to both the offending and the offender could be construed as double-counting, in *L v R* the Court of Appeal specifically rejected this:[44]

> On the contrary, to fail to properly account for all relevant aspects of the offence and the offender is to undercount. It is not the cause of the reduced culpability or extra burden of imprisonment, but the presence of those aspects which must be provided for under ss 7—9 of the Sentencing Act 2002 (the Act)…

How do overseas jurisdictions grapple with mental health in sentencing?

United Kingdom

57. The United Kingdom has a Sentencing Council which issues guidelines for sentencing. There is a specific guideline for the sentencing of offenders who at the time of the offence and/or at the time of sentencing have any mental disorder, neurological impairment or developmental disorder.[45]

58. The guideline provides, in relation to culpability:

> 1. Culpability may be reduced if an offender was at the time of the offence suffering from an impairment or disorder (or combination of impairments or disorders) such as those listed in **Annex A.**

[44] *L v R*, above n 40, at [50].
[45] UK Sentencing Council, "Sentencing offenders with mental disorders, developmental disorders, or neurological impairments" (Crown Court version), 1 October 2020: https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/sentencing-offenders-with-mental-disorders-developmental-disorders-or-neurological-impairments/

2. The sentencer should make an initial assessment of culpability in accordance with any relevant offence-specific guideline, and should then consider whether culpability was reduced by reason of the impairment or disorder.

3. Culpability will only be reduced if there is sufficient connection between the offender's impairment or disorder and the offending behaviour.

4. In some cases, the impairment or disorder may mean that culpability is significantly reduced. In other cases, the impairment or disorder may have no relevance to culpability. A careful analysis of all the circumstances of the case and all relevant materials is therefore required.

[…]

15. Courts may find the following questions a useful starting point. They are not exhaustive, and they are not a check list as the range of offenders, impairments and disorders is wide.

- At the time of the offence did the offender's impairment or disorder impair their ability:
  - to exercise appropriate judgement,
  - to make rational choices,
  - to understand the nature and consequences of their actions?
- At the time of the offence, did the offender's impairment or disorder cause them to behave in a disinhibited way?
- Are there other factors related to the offender's impairment or disorder which reduce culpability?
- Medication. Where an offender was failing to take medication prescribed to them at the time of the offence, the court will need to consider the extent to which that failure was wilful or arose as a result of the offender's lack of insight into their impairment or disorder,
- "Self-medication". Where an offender made their impairment or disorder worse by "self-medicating" with alcohol or non-prescribed or illicit drugs at the time of the offence, the court will need to consider the extent to which the offender was aware that would be the effect,
- Insight. Courts need to be cautious before concluding that just because an offender has some insight into their impairment or disorder and/or insight into the importance of taking their medication, that insight automatically increases the culpability for the offence. Any insight, and its effect on culpability, is a matter of degree for the court to assess.

59. The guideline notes that mental impairment or disorder may be considered in the first stage of sentencing (assessing the level of responsibility) where it is linked to the offence, or at the second stage (assessing aggravating and mitigating factors) where it is not linked.

60. However, there is no exception to a mandatory life sentence for murder in England and Wales.[46] Rather, in cases such as Mr Van Hemert's the partial defence of diminished responsibility would apply and, if the criteria were met, he would be guilty of manslaughter rather than murder.[47]

Australia

61. In Australia, the lead authority on the relevance of mental health in sentencing is *R v Verdins.*[48] (discussed above)[49]

Canada

62. The position in Canada is similar to our own. There is no express reference to mental health in sentencing legislation, but it has been interpreted to be a matter affecting culpability. The Criminal Code provides that a fundamental principle of sentencing is that a sentence "must be proportionate to the gravity of the offence and the degree of responsibility of the offender."[50] It has been found that an offender's degree of responsibility for an offence is reduced due to the presence of a mental disability.[51]

63. Canadian courts have engaged with the concept that mental health and substance abuse can be closely linked and that may require consideration of both in mitigation. In *R v Badhesa*[52] the Court of Appeal for British Columbia reduced Mr Bahdesa's sentence for manslaughter. He had been convicted for killing his 61 year old mother by beating her to death, while suffering from a depressive episode with psychotic features and at the same time was drinking heavily. The Court found the sentencing Judge had made an error in failing to consider the

[46] Murder (Abolition of Death Penalty) Act 1965 (UK), s 1.
[47] Homicide Act 1957 (UK), s 2. See [56] of the Appellant's submissions.
[48] *R v Verdins*, above n 42. Applied by the High Court of Australia in *R v Guode* [2020] HCA 8 at [8].
[49] At [54].
[50] Criminal Code (R.S.C., 195, c. C-46), s 718.1
[51] See for example *R v Ayorech* 2012 ABCA 82. In that case, the Court of Appeal of Alberta rejected the Crown's argument that the sentencing judge erred by treating Mr Ayorech's mental illness and substance abuse as mitigating factors. The Court confirmed the latter was not a mitigating factor by itself, but noted the close connection of the two in this case, accepting a psychiatrist's report conclusion that Mr Ayorech had preceding mental health issues which led to "a vicious cycle of psychosis and substance abuse" at [10].
[52] *R v Bahdesa* 2019 BCCA 70.

extent to which the appellant's mental illness contributed to his excessive alcohol consumption. The Court found:[53]

> … an offender's volitional and decision-making capacity in connection with self-induced intoxication and related violence may stem, at least in part, from mental illness or other cognitive disability. Depending on the circumstances, both the mental illness and related self-induced intoxication may reduce the offender's moral culpability. The criminal law views individuals as autonomous and rational beings and seeks to impose criminal liability solely on those who are responsible for the state they were in when an offence is committed…
>
> […]
>
> Cases involving mental illness and intoxication in combination are, of course, intensely fact-driven. Detailed and specific medical evidence is essential to a proper understanding of their relationship in a particular case, if any, as well as their impact on the offender's moral culpability. Generalizations are insufficient […] In our view, insofar as possible, taking into account all of the relevant evidence, a sentencing judge should strive to determine *the extent to which an offender's mental illness contributed to the offending conduct, including any contribution to his or her self-induced intoxication.*

64. This case followed the earlier judgment of the Manitoba Court of Appeal for a manslaughter sentence appeal, *R v Friesen.*[54] Mr Friesen had partial Fetal Alcohol Spectrum Disorder (pFAS) and had been drinking alcohol at the time of the offending. The Court observed:[55]

> In our case law, voluntary intoxication is rarely capable of supporting an argument of diminished responsibility as we ascribe to the individual the ability to stop the drinking which led him to the situation in question. In this case, however, one must recognize the diagnosis of pFAS and what that entails. Given that the accused was prone to impulsive and irrational actions and with limited ability to foresee the consequence of his actions, to suggest that his self-knowledge of the effects of alcohol should lead him not to indulge is, with respect, placing too high of an expectation on someone with his diagnosis. It is inconsistent with the medical evidence. Given his diagnosis, I am of the view that his lack of control when intoxicated was a factor in his unprovoked attack. Such conduct stems from his condition and it should have been considered as a mitigating factor.

Mental Health in New Zealand

[53] At [40], [43] (citations omitted) (emphasis added).
[54] *R v Friesen* 2016 MBCA 50.
[55] At [29].

65. New Zealanders are suffering from poor mental health and highly problematic abuse of alcohol and drugs. Statistics New Zealand reported a significant increase in the proportion of people with poor mental wellbeing, up from 22 per cent in 2018 to 28 percent in 2021.[56] Use of drugs and alcohol in New Zealand is regarded as a serious public health concern.[57] The prevalence of both mental health and substance use disorders in combination is known to be substantially higher among people appearing before the criminal courts.

66. In June 2016 an investigation into mental illness and substance use disorders provided a statistical underpinning for what all those who are engaged in the NZ criminal justice system know to be true: mental illness and alcohol/drug abuse disorders are prevalent for people entering the criminal justice system. The study conducted by the Department of Corrections concluded:[58]

> New Zealand prisoners have high rates of mental health and substance use disorders including high rates of comorbidity which are often undetected and under-treated. The findings of this report provide important evidence to assist with identifying areas for improved detection, early intervention, treatment and rehabilitation and diversion away from the criminal justice system. In particular, the findings suggest that improved integration of mental health and substance use disorder treatment would be an important strategy for improving the health and reducing the re-offending of New Zealand prisoners.

67. By 2017 a review led by *ActionStation Aotearoa* in conjunction with mental health advocate Mike King gathered over 500 first person accounts of the failings of the mental health and addiction treatment and supports in New Zealand. The review published as the "*People's Mental Health Report (2017)"* highlighted real concern with the mental health system failing those suffering from mental distress and addiction

[56] Data from the 2021 General Social Survey – Statistics Government New Zealand: https://www.stats.govt.nz/information-releases/wellbeing-statistics-2021/#mental
[57] Government inquiry into Mental Health and Addiction "He Ara Oranga" November 2018 at p172: https://mentalhealth.inquiry.govt.nz/inquiry-report/he-ara-oranga/chapter-9-action-on-alcohol-and-other-drugs/9-2-what-needs-to-happen/
[58] D Indig, C Gear and K Wilhelm. "Comorbid Substance Use Disorders and Mental Health Disorders among New Zealand Prisoners" (2016) Wellington: Department of Corrections at page 88: www.corrections.govt.nz/resources/research_and_statistics/comorbid_substance_use_disorders_and_mental_health_disorders_among_new_zealand_prisoners.html

68. The New Zealand Government commenced a formal inquiry into mental health and addiction in early 2018.[59] The findings of that Government Inquiry, published in November 2018, in "*He Ara Oranga: Report of the Government Inquiry into Mental Health and Addiction*" confirm that mental illness and drug/alcohol use and addiction are inter-related. For New Zealanders who enter the criminal justice system, this is particularly so. The Inquiry reported: [60]

> The vast majority of prisoners experience significant challenges related to mental health and addiction, often in combination, and at rates much higher than in the general population. A study published in 2016 found that 91% of prisoners had a lifetime diagnosis of a mental health or substance use disorder and 62% had this diagnosis in the past 12 months.

And that: [61]

> Experiences of abuse and trauma can also contribute to an increased risk of mental distress and substance use. An overwhelming majority of prisoners have been victims of violence, with almost half of those in prison reporting experiences of family violence as a child, and 53% of women and 15% of men reporting experiences of sexual abuse.

69. NZ is not an outlier. Overseas, mental health and substance use disorders are known to be substantially higher for prisoners than for the general population and is known to be associated with their offending.[62]

70. The mental health inquiry He Ara Oranga recommended holistic treatment for people suffering from a combination of mental health and addiction issues as the most productive way to support people, that what was needed in New Zealand was to:[63]

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[59] These Terms of Reference are set out in "Establishment of the Government Inquiry into Mental Health and Addiction" (notice number 2018-go318) (2018) New Zealand Gazette 30 January https://gazette.govt.nz/notice/id/2018-go318

[60] He Ara Oranga, above n 57, at page 76: the study referred to is "Comorbid Substance Use Disorders…", above n 58.

[61] R Cunningham, A Kvalsvig, D Peterson, S Kuehl, S Gibb, S McKenzie, L Thornley and S Every-Palmer, "Stocktake Report for the Mental Health and Addiction Inquiry" (2018) Wellington: University of Otago.

[62] See for example: Chang Z, Larsson H, Lichtenstein P, Fazel S., "Psychiatric disorders and violent reoffending: a national cohort study of convicted prisoners in Sweden" (2015) 2(10) The Lancet Psychiatry, 891-900; Fazel S, Seewald K. "Severe mental illness in 33,588 prisoners worldwide: a systematic review and metaregression analysis" (2012) 200(5) British Journal of Psychiatry 364-73; Young S, Wells J, Gudjonsson GH. "Predictors of offending among prisoners: the role of attention-deficit hyperactivity disorder and substance use" (2011) 25(11) Journal of Psychopharmacology 1524-32.

[63] He Ara Oranga, above n 57 at p117.

> Build a system that is integrated across services for mild, moderate and severe mental health and addiction needs, recognising that these are not fixed categories of people, and that is a joined-up and seamless system for the people who access it, between mental and physical health and between health and other government and social services, when needed.

71. This recommendation is reflected by research endorsed by the National Institute of Drug Abuse (USA) which reported in 2020 that "Integrated treatment for comorbid drug use disorder and mental illness has been found to be consistently superior compared with separate treatment of each diagnosis".[64]

Was the Court of Appeal correct in their assessment of Mr Van Hemert's circumstances?

72. The Court of Appeal's provisional assessment was to agree with the Crown that Mr Van Hemert's mental illness was no more than a contributory factor to the murder. The Court concluded that the close correlation between his abuse of drugs and alcohol, which in turn triggers mental health relapses that on occasion involves acts of violence or aggression meant that the offending was not totally out of character[65]. These were factors, said that Court, that were relevant to the ongoing risk Mr Van Hemert is to the community.

73. Counsel for the applicant, Mr Rapley KC sets out a summary of the medical opinions of Dr McDonnell and Dr Duff at paragraphs [23]-[27] of his submissions. The Criminal Bar Association set out at paragraphs [50] and [51] of their submissions a summary of the medical evidence regarding Mr Van Hemert. DLANZ does not seek to repeat the same.

74. It appears however that the suggestion made by the Court of Appeal is that Mr Van Hemert, although suffering an underlying mental illness, triggers health relapses by abusing drugs and alcohol. The Court appears to be suggesting that this was purposeful drug taking/alcohol abuse by Mr Van Hemert that was within

[64] "Common Comorbidities with Substance Use Disorders Research Report" (April, 2020) referring to Kelly TM, Daley DC "Integrated Treatment of Substance Use and Psychiatric Disorders" (2013) Soc Work Public Health 28(0):388-406.
[65] Refer *Van Hemert,* above n 2 at [52].

his control – separate from his mental health concerns – but exacerbated them and that thereby increases his risk to the community.

75. The medical evidence presented to earlier courts in this case demonstrates the difficulty in extrapolating mental health and addiction causes and drivers. The distinction is, largely, the DLANZ contends, unhelpfully artificial.

76. DLANZ notes that risk factor assessments often appear arbitrary, with concerns that even psychological testing tools are unreliable predictors of risk.[66]

Why is mental illness and consumption of alcohol and drugs inextricably linked?

77. Research clearly shows that people who consume drugs/alcohol are more likely to develop mental health problems, and that people with severe mental illnesses are more likely to consume alcohol and drugs, sometimes in an effort to 'self-medicate" symptoms of mental health problems. The April 2020 Report from the National Institute on Drug Abuse (USA), "Common Comorbidities with Substance Use Disorders Research Report" summarised the research findings:

    (1) Common risk factors can contribute to both mental illness and substance use and addiction;

    (2) Mental illness may contribute to substance use and addiction, in particular, when an individual develops a mental illness, associated changes in brain activity may increase the vulnerability for problematic use of substances by enhancing their rewarding effects, reducing awareness of their negative effects, or alleviating the unpleasant symptoms of the mental disorder or the side effects of the medication used to treat it

    (3) Substance use and addiction can contribute to the development of mental illness.

[66] Frederickson, O "Risk Assessment algorithms in the New Zealand criminal justice system" (2020) NZLJ 328.

78. The USA body, the National Institute on Alcohol Abuse and Alcoholism agreed that alcohol and drug use often occurs with other mental health disorders, either simultaneously or sequentially.[67] The prevalence of anxiety, depression, and other psychiatric disorders is much higher among people with alcohol use disorder (AUD) compared to the general population. They identified the same mechanisms that may explain the common co-occurrence of alcohol use disorder and psychiatric disorders, namely:

(1) Pre-existing psychiatric disorders may increase the risk of developing AUD, in part because alcohol is often used to cope with symptoms of psychiatric disorders, even if alcohol ultimately makes the problems worse.[68]
(2) At the same time, alcohol use—especially adolescent drinking and long-term exposure to alcohol—may predispose individuals to develop psychiatric disorders.[69]
(3) AUD and other psychiatric disorders often share genetic risks and environmental vulnerabilities such as trauma and adverse childhood experiences.[70]

79. It is wrong to view consumption of alcohol and drugs by someone in Mr Van Hemert's position as being able to be characterised as voluntary. The research referred to above explains why mental illness and substance use and abuse are co-related. There was clearly a substance disorder which is not an unexpected finding given his mental health struggle.

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[67] The USA body, the National Institute on Alcohol Abuse and Alcoholism report, "Mental Health Issues: Alcohol Use Disorder and Common Co-occurring Conditions": https://www.niaaa.nih.gov/health-professionals-communities/core-resource-on-alcohol/mental-health-issues-alcohol-use-disorder-and-common-co-occurring-conditions. See also, Kwako LE, Patterson J, Salloum IM, Trim RS, "Alcohol Use Disorder and Co-Occurring Mental Health Conditions" (2019) Alcohol Res Curr Rev 40(1):arcr.v40.1.00.

[68] Turner S, Mota N, Bolton J, Sareen J. "Self-medication with alcohol or drugs for mood and anxiety disorders: A narrative review of the epidemiological literature" (2018) Depress Anxiety. 35(9):851 860: doi:10.1002/da.22771

[69] Hermens DF, Lagopoulos J, Tobias-Webb J, et al. "Pathways to alcohol-induced brain impairment in young people: A review" (2013) Cortex 49(1):3-17: doi:10.1016/j.cortex.2012.05.021

[70] See for example: Prescott CA, Hewitt JK, Truett KR, Heath AC, Neale MC, Eaves LJ, "Genetic and environmental influences on lifetime alcohol-related problems in a volunteer sample of older twins" (2015) J Stud Alcohol: doi:10.15288/jsa.1994.55.184; Clarke TK, Adams MJ, Davies G, et al. "Genome-wide association study of alcohol consumption and genetic overlap with other health-related traits in UK Biobank (N=112 117)" (2017) Mol Psychiatry 22(10):1376-1384: doi:10.1038/mp.2017.153; Brady KT, Back SE. "Childhood Trauma, Posttraumatic Stress Disorder, and Alcohol Dependence" (2012) Alcohol Res Curr Rev 34(4):408-413.

80. Mr Rapley KC addresses the specific detail of Mr Van Hemert's history and the mitigation that ought to be afforded to him.

81. DLANZ submits that the factors of poor mental health, alcohol and drug dependency, and interrelated difficulty coping (eg anger) all serve to inform both the circumstances of the offence, and act as mitigating factors when considering the circumstances of the offender. DLANZ submits that this analysis follows from s102 SA and from orthodox sentencing principles.

Dated at Wellington this 20th day of October 2022

E A Hall
Counsel for Te Matakahi

D A Ewen
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