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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC110/2025

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BETWEEN

JESSICA MULFORD

Appellant

AND

THE KING

Respondent

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RESPONDENT'S SUBMISSIONS ON APPEAL

26 March 2026

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o te Karauna**  
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## INTRODUCTION

1. In April 2022, when aged 18 years, Ms Mulford killed Harlee-Rose Niven, her partner’s two-year-old daughter. Whether by stomping on or punching the child, the force she used caused catastrophic internal injuries. It split the girl’s pancreas in two, caused a full thickness laceration to her liver and damaged her small bowel. A jury found Ms Mulford guilty of manslaughter. It also convicted her of strangling Harlee-Rose five months before the fatal attack, resulting in the child’s hospitalisation for a week. At the time of that offending, Ms Mulford was 17 years and 10 months old.
2. In the High Court, Campbell J sentenced Ms Mulford to five years and seven months’ imprisonment for the manslaughter. In reaching that sentence, the Judge noted that the earlier strangulation aggravated her later offending. However, because Ms Mulford was under 18 when she committed that crime, s 18 of the Sentencing Act 2002 prevented her receiving imprisonment for it; she was instead convicted and discharged.
3. The Court of Appeal upheld Ms Mulford’s sentence.
4. Ms Mulford now brings a second appeal against her sentence. She challenges the starting point of seven years’ imprisonment, as well as the allowances made for personal mitigating factors, particularly her age, psychological difficulties and drug addiction:
  - 4.1 As to starting point, Ms Mulford argues that because she could not be imprisoned for strangling Harlee-Rose, s 18 required the Judge to ignore that offending entirely when assessing her culpability for the later manslaughter. She also submits allowances to the starting point should have been made for her age and psychological factors because these “diminished [her] will to choose”.<sup>1</sup> Overall, she says the starting point should have been between four and five years.

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<sup>1</sup> Appellant’s submissions at [40].

- 4.2 As to personal mitigation, Ms Mulford submits that the 20 per cent reduction (15 per cent for youth and five per cent for her background) afforded to her was insufficient. From a reduced starting point, she seeks at least twice that figure: 30 per cent for youth and 10–15 per cent for her background, psychological difficulties and addiction.
- 4.3 While not articulated, Ms Mulford appears to seek an end sentence of between 26 months<sup>2</sup> and 36 months' imprisonment.<sup>3</sup>

### SUMMARY OF RESPONDENT'S SUBMISSIONS

5. In the Crown's submission, no error has been shown in Campbell J's sentence nor in the Court of Appeal's judgment dismissing Ms Mulford's first appeal:
- 5.1 The seven-year starting point reflected the aggravating features of the manslaughter: serious violence; the victim's extreme vulnerability; the grave breach of trust; and the earlier strangulation. Nothing in the text of s 18 nor its purpose required the Judge to blind himself to Ms Mulford's earlier violence, which was an orthodox aggravating factor. Nor should the Judge have reduced the starting point for factors personal to Ms Mulford. Consistent with settled authority, those factors were properly considered at the second stage of the sentencing process.
- 5.2 The allowance for Ms Mulford's personal mitigating factors was adequate. Given she was 18 years old at the time of the offending, a discount of 15 per cent for her age was consistent with authority. Similarly, because her psychological difficulties and background were at most "part of the explanation" for her offending, a further five per cent was open to the Judge. While slightly greater allowances might have been available,<sup>4</sup> the Judge was right to

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<sup>2</sup> Taking a starting point of four years, reduced by 45 per cent for personal mitigating factors.

<sup>3</sup> Taking a starting point of five years, reduced by 40 per cent for personal mitigating factors.

<sup>4</sup> Judgment under appeal: *Mulford v R* [2025] NZCA 444 at [34] and [42] [[01 SC Casebook at 14 and 16]].

observe that “some restraint needs to be exercised in cases of serious violence against children, given s 9A of the Sentencing Act”.<sup>5</sup>

- 5.3 Standing back, Ms Mulford’s sentence was far from manifestly excessive.

### **SUPPRESSION ORDERS**

6. Specific background facts have been suppressed under s 205 of the Criminal Procedure Act 2011 (CPA).<sup>6</sup> That order remains in place.

### **BACKGROUND<sup>7</sup>**

7. Harlee-Rose was born on 25 January 2020 to her parents, Paige Niven and Dylan Berry. She was conceived and born during Ms Mulford and Mr Berry’s relationship. This became a source of tension between the couple, although they remained together.
8. Harlee-Rose spent the first 18 months with her mother. In August 2021, however, she went to live with her father and Ms Mulford in Tauranga. Ms Mulford, aged 17 at the time, cared well for the child and formed a bond with her,<sup>8</sup> but she also struggled with parenting and resented having to care for a child that was not hers.

### **Injuring with intent to injure by strangulation**

9. On 9 November 2021, Ms Mulford strangled Harlee-Rose, injuring the back of her neck and causing her face and eyes to swell and discolour. The child was taken to hospital where medical staff noted bruises on her temple and cheeks, marks on her neck, and bruising on her ear consistent with pinching.<sup>9</sup> She remained in hospital for about a week.<sup>10</sup> Ms Mulford lied

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<sup>5</sup> Sentencing notes: *R v Mulford* [2025] NZHC 249 at [39] **[[01 SC Casebook at 26]]**.

<sup>6</sup> In a Minute dated 21 February 2025, Campbell J made an order suppressing the publication of a specific background matter, separate to the traumatic incident referred to at [44] of the sentencing notes **[[01 SC Casebook at 26]]** and [37] of the Court of Appeal judgment **[[01 SC Casebook a 15]]**.

<sup>7</sup> Sentencing notes at [5]–[14] **[[01 SC Casebook at 17]]**; judgment under appeal at [5]–[12]: **[[01 SC Casebook at 7]]**.

<sup>8</sup> Sentencing notes at [8] **[[01 SC Casebook at 18]]**; see also **[[05 CA Notes of Evidence at 62]]**.

<sup>9</sup> **[[05 CA Notes of Evidence at 189–191]]**.

<sup>10</sup> **[[05 CA Notes of Evidence at 21]]**.

about how Harlee-Rose was injured, telling the paediatrician she climbed out of a window and fell off the deck onto the concrete.<sup>11</sup>

10. While Police attended the property the day after Harlee-Rose was admitted to hospital and conducted a scene examination,<sup>12</sup> charges were not filed at the time.

### **Manslaughter**

11. Five months later, aged 18,<sup>13</sup> Ms Mulford killed Harlee-Rose.
12. On the morning of 9 April 2022, Mr Berry was outside when Ms Mulford came running out to tell him to come inside. He found Harlee-Rose lying on her bed, blue and unresponsive.<sup>14</sup> Mr Berry attempted CPR before running to a neighbour's house for help. Harlee-Rose was taken to Waikato Hospital where she later died.
13. At trial, the Crown proved that Ms Mulford had killed Harlee-Rose by striking her abdomen with such force that it ruptured her internal organs. Harlee-Rose's liver and pancreas were effectively torn in two. Her small bowel was also lacerated. The injuries indicated a compressive force on the child's abdomen, while her back was against a fixed or flat surface.<sup>15</sup> Similar patterns of injury in children were seen in high-speed car crashes:<sup>16</sup> they were incompatible with "with normal handling of a child" or even "a simple accidental fall".<sup>17</sup> Within minutes of the blow(s), Harlee-Rose would have been rendered unconscious.<sup>18</sup>
14. Ms Mulford again claimed the injuries were accidental. She gave numerous accounts to different people, mainly that Harlee-Rose had fallen off her

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<sup>11</sup> [[05 CA Notes of Evidence at 182]].

<sup>12</sup> [[05 CA Notes of Evidence at 211]].

<sup>13</sup> Ms Mulford's date of birth is 23 January 2004 and therefore was 18 years and 2 months old on 9 April 2022.

<sup>14</sup> [[05 CA Notes of Evidence at 34]].

<sup>15</sup> [[05 CA Notes of Evidence at 317]].

<sup>16</sup> [[05 CA Notes of Evidence at 321]].

<sup>17</sup> [[05 CA Notes of Evidence at 321]].

<sup>18</sup> [[05 CA Notes of Evidence at 293 and 303]].

bike the day before<sup>19</sup> (but she told a detective on 9 April 2022 it was a few days before) and that she had given her crushed ibuprofen in a bottle that morning before she was found unresponsive. At trial, she also sought to blame Mr Berry.<sup>20</sup>

15. The jury acquitted Ms Mulford of murder but convicted her of manslaughter and injuring with intent to injure (for the strangulation).

### Sentencing

16. The trial Judge, Campbell J, sentenced Ms Mulford. His Honour identified four aggravating features of the manslaughter:<sup>21</sup>

16.1 Serious violence, noting “the force required to produce the catastrophic injuries suffered by Harlee-Rose must have been very high”;

16.2 The two-year-old child’s extreme vulnerability;

16.3 The breach of trust inherent in assaulting a young child who depended on her caregivers;

16.4 The fact this “was not the only incident of violence against” Harlee-Rose, given Ms Mulford had previously strangled her.

17. Having regard to a number of comparable cases,<sup>22</sup> Campbell J adopted a starting point of seven years’ imprisonment. He declined to make allowances at this stage for Ms Mulford’s psychological difficulties, age and lack of parenting skills, which were later considered as mitigating factors.<sup>23</sup>

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<sup>19</sup> Ms Mulford also told Mr Berry’s sister that Harlee-Rose had a fall in the bath or shower **[[05 CA Notes of Evidence at 477]]**.

<sup>20</sup> It was suggested that the fatal injuries could have been caused by Mr Berry taking Harlee-Rose on a “magic carpet ride” (towing a child on a tarpaulin attached to a motorbike): see **[[05 CA Notes of Evidence at 136, 291, 332, 416 and 628]]**.

<sup>21</sup> Sentencing notes at [27]: **[[01 SC Casebook at 22]]**.

<sup>22</sup> *R v Wichman* [2016] NZHC 1663 (caused the death of his 10-month old baby by shaking – starting point 5 ½ years’ imprisonment); *R v Ikamanu* [2012] NZHC 2755 (slamming his two-year-old daughter into a wall and stomping pelvic area – starting point of 8 years’ imprisonment); *R v Pene* [2010] NZCA 387 (striking 13-month-old baby on the head several times during the night – Court of Appeal held a starting point range of 5 to 7 years’ imprisonment was appropriate); *Robinson v R* [2011] NZCA 479 (considerable force inflicted on a 14-month-old infant, likely violent shaking – starting point of 7 years and 6 months upheld on appeal).

<sup>23</sup> Sentencing notes at [32]–[33] **[[01 SC Casebook at 23]]**.

His Honour also, consistent with standard practice, cross-checked the starting point with the guideline in *R v Taueki*.<sup>24</sup>

18. Turning to Ms Mulford’s personal circumstances, the Judge allowed:

18.1 A discount of 15 per cent for Ms Mulford’s youth. This reflected the causal contribution to her offending of age-related difficulties with impulse control, as well as the greater rehabilitative prospects that are ascribed to young people.<sup>25</sup> But the Judge considered it necessary to exercise restraint “in cases of serious violence against children, given s 9A of the Sentencing Act”.<sup>26</sup>

18.2 A further discount of five per cent for background factors, particularly a traumatic incident and associated mental health issues. While these were not operative causes of the offending, they did form part of the explanation for why she was unable to cope with the pressure of being one of Harlee-Rose’s caregivers.<sup>27</sup>

19. Applying these reductions, the Judge reached an end sentence of five years and seven months’ imprisonment on the conviction for manslaughter.

20. In relation to the conviction for injuring Harlee-Rose, the Judge held that s 18 prevented him imposing any further sanction. He accordingly convicted and discharged her on that charge.<sup>28</sup>

### **Court of Appeal decision**

21. The Court of Appeal upheld the manslaughter sentence. It found the Judge was right to treat the strangulation as an aggravating factor and otherwise held the starting point was within range. The Court distinguished *Diaz v R*,<sup>29</sup>

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<sup>24</sup> *R v Taueki* [2005] 3 NZLR 372 (CA), band two, which has a range of 5 to 10 years’ imprisonment **[[Resp Bundle at 19]]**.

<sup>25</sup> Sentencing notes at [36]–[38]

<sup>26</sup> Sentencing notes at [39].

<sup>27</sup> Sentencing notes at [44]; see also psychological report at [15]–[16] **[[04 CA Additional Materials at 5]]**.

<sup>28</sup> Sentencing notes at [34] and [48].

<sup>29</sup> *Diaz v R* [2021] NZCA 426 **[[Resp Bundle at 50]]**.

in which it had been held that unrelated offending caught by s 18 could not be used to uplift the sentence for other offending.<sup>30</sup> The Court explained:<sup>31</sup>

[27] ...In contrast, in the present case, the less serious offence was directly and intimately connected with the more serious offence. It was logically an aggravating feature of the manslaughter, and without it, the later offending could properly have been seen as less culpable. As it was, it meant the killing was not a one-off loss of control but rather an escalation in a pattern of violence. Furthermore, it shows the killing could even have been avoided had Ms Mulford told the truth about the earlier offending and sought greater support.

22. As to the discounts for mitigating factors, the Court held:
- 22.1 Youth: the Court was not persuaded that an allowance of 15 per cent amounted to an error, particularly in a case involving “such extreme violence against a defenceless toddler”.<sup>32</sup>
- 22.2 Drug addiction: the Court agreed that absent any evidence of a causal or contributory nexus between the addiction and the offending, no discount was warranted on account of Ms Mulford’s cannabis use.<sup>33</sup>
- 22.3 Mental health issues: the five per cent allowance was justified; while the Judge was mindful of the limitations of the psychological report, he took the contextual matters into account “and did so in a principled way consistent with *Berkland v R*”.<sup>34</sup>
23. Finally, the Court stood back and confirmed the end sentence of five years and seven months’ imprisonment was not manifestly excessive, having regard to the circumstances of the offending and the offender.

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<sup>30</sup> Judgment under appeal at [27]: **[[01 SC Casebook at 12]]**.

<sup>31</sup> *Ibid.*

<sup>32</sup> At [34] **[[01 SC Casebook at 14]]**.

<sup>33</sup> At [40] **[[01 SC Casebook at 16]]**.

<sup>34</sup> At [42].

## RESPONDENT'S SUBMISSIONS

24. The Crown submits:

24.1 The Judge's approach to fixing the starting point was correct. His Honour properly had regard to all the relevant aggravating factors, including the earlier strangulation. Nothing in s 18 – which was not directly engaged on the manslaughter conviction – or in sentencing policy required him to be blind to the full circumstances of this offending. Seven years was consistent with authority, as was treating the appellant's youth and psychological difficulties as mitigating factors relevant to the second stage of sentencing.

24.2 The allowances made for mitigating factors at the second stage – 15 per cent for youth and five per cent for background matters – were within the Judge's discretion.

### Starting point

#### *Section 18 of the Sentencing Act*

25. Section 18 limits when offenders can be sentenced to imprisonment for certain offences committed when under the age of 18 years. At the time, it read:<sup>35</sup>

#### **18 Limitation on imprisonment of person under 18 years**

(1) No court may impose a sentence of imprisonment on an offender in respect of a particular offence, other than a category 4 offence, or a category 3 offence for which the maximum penalty available is or includes imprisonment for life or for at least 14 years, if, at the time of the commission of the offence, the offender was under the age of 18 years.

26. On its text, s 18 is only engaged for a "particular offence" where two criteria are satisfied:

26.1 First, youth: the offence must have been committed when the offender was under the age of 18 years; and

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<sup>35</sup> As from 1 July 2019 to 28 June 2025.

- 26.2 Second, lack of seriousness: the offence must not have been a category 3 offence with a maximum penalty of at least 14 years' imprisonment or a category 4 offence.
27. In the present case neither condition was met for the appellant's conviction for manslaughter: she was over the age of 18 when she killed Harlee-Rose; and manslaughter is a category 4 offence. There is no dispute that Ms Mulford was properly imprisoned for this crime.
28. By contrast, both criteria were satisfied for the strangulation of Harlee-Rose: Ms Mulford was under 18 (17 years and 10 months) at the time of this crime; and the maximum penalty for injuring with intent, a category 3 offence, is five years' imprisonment. Ms Mulford was not liable to a sentence of imprisonment (or home detention) for this offence. Campbell J therefore convicted and discharged her on this count.<sup>36</sup>
29. Accordingly, this appeal solely concerns the sentence imposed for an offence – manslaughter – that is *not within s 18's prohibition*. The text of s 18 does not expressly apply. The issue is whether, and if so how, the policy underpinning s 18 is engaged.<sup>37</sup> But, before turning to that policy, these submissions address the way in which the starting point was set. This analysis confirms it was orthodox for the Judge to have regard to Ms Mulford's prior violence towards the victim when assessing the gravity of the manslaughter.

***The Judge's starting point was available***

30. As described above, the Judge fixed a starting point of seven years for the manslaughter by reference to four aggravating features: the seriousness of the violence; Harlee-Rose's extreme vulnerability; the appellant's breach of trust; and her prior violence towards the child.

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<sup>36</sup> Because Ms Mulford was being sentenced to imprisonment, no other less restrictive sentence could be imposed: Sentencing Act 2002, s 19(1)(b).

<sup>37</sup> Compare *Diaz v R*, above n 29 at [32] **[[Resp Bundle at 67]]** and judgment under appeal at [28] **[[01 SC Casebook at 13]]**.

31. As to the seriousness of the violence, the appellant relies on the fact the precise mechanism of injury is not known.<sup>38</sup> However, as the Court of Appeal held, what was important was the “extremity of the violence” inflicted rather than the exact mechanism.<sup>39</sup> That violence was “massive, catastrophic, severe”,<sup>40</sup> involving at least one blow, possibly a stomp, delivered while the toddler’s back was against a firm surface such as the ground or a wall.<sup>41</sup> It caused injuries – a full thickness laceration to the child’s liver,<sup>42</sup> the tearing of her pancreas into two pieces<sup>43</sup> and a laceration of her small bowel<sup>44</sup> – that are seen in “very high speed motor vehicle accidents”.<sup>45</sup> Any uncertainty as to whether Ms Mulford killed Harlee-Rose by, for example, stomping on or punching her was not material to sentence. Delivering a blow with massive force to the abdomen of a prone child and inflicting catastrophic injuries was an extremely violent, dangerous act.
32. The appellant does not appear to dispute the other three aggravating factors (other than the submission, addressed below, that s 18 required the Judge to be blind to the earlier strangulation).
33. As to the strangulation, it was orthodox for Campbell J to treat this as relevant to Ms Mulford’s culpability for later killing Harlee-Rose. This incident was, as the Court of Appeal held, “directly and intimately connected with the more serious violence”.<sup>46</sup> It involved the infliction of significant force, resulting in the child’s hospitalisation for a week, and occurred at a time when Ms Mulford had her own family’s support available.<sup>47</sup> It demonstrated her later fatal assault was not a one-off loss of

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<sup>38</sup> Appellant submissions at [12].

<sup>39</sup> Judgment under appeal at [19] **[[01 SC Casebook at 10]]**.

<sup>40</sup> **[[05 CA Notes of Evidence at 284]]**.

<sup>41</sup> **[[05 CA Notes of Evidence at 317, 322 and 348]]**.

<sup>42</sup> **[[05 CA Notes of Evidence at 346]]**.

<sup>43</sup> **[[05 CA Notes of Evidence at 347]]**.

<sup>44</sup> **[[05 CA Notes of Evidence at 349]]**.

<sup>45</sup> **[[05 CA Notes of Evidence at 315, 321, 331 and 347]]**.

<sup>46</sup> Judgment under appeal at [27] **[[01 SC Casebook at 12]]**.

<sup>47</sup> While this offending occurred at Mr Berry’s family’s home, Ms Mulford, Mr Berry and Harlee-Rose were living at the time with Ms Mulford’s parents in Papamoa: **[[05 CA Notes of Evidence at 10, 13 and 433]]**.

control, but “an escalation in a pattern of violence”.<sup>48</sup> Tragically, it also highlighted how Harlee-Rose’s death could have been avoided had Ms Mulford not lied about what had occurred or had sought help to protect her stepdaughter from further harm. In combination, these events were plainly relevant to the gravity of Ms Mulford’s offending.

34. The Court of Appeal’s judgment in *Broadhurst* confirms this analysis.<sup>49</sup> The 18-year-old appellant killed his two-year-old stepdaughter by violently shaking her and slamming her with great force on a hard padded surface, such as a carpeted floor. At trial, the Crown called evidence of other injuries observed on the child over an eight-month period. At sentencing, Winkelmann J was satisfied beyond reasonable doubt that one of those injuries had been intentionally inflicted by the defendant. In arriving at a starting point of eight and half years, she treated that previous assault as aggravating the later manslaughter. On appeal, the Court of Appeal upheld her approach, noting it followed that this was not a “single brief loss of control”.<sup>50</sup> It also had “no doubt” that the end sentence of seven and a half years’ imprisonment was appropriate.<sup>51</sup>

35. The starting point was also consistent with other decisions involving a caregiver’s manslaughter of a child.<sup>52</sup> Three Court of Appeal authorities are particularly relevant:

35.1 The appellant in *Robinson v R*<sup>53</sup> killed her 14-month-old foster child by inflicting head injuries, likely by violently shaking her. She sought medical assistance promptly and there was no previous

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<sup>48</sup> Judgment under appeal at [27] **[[01 SC Casebook at 12]]**.

<sup>49</sup> *R v Broadhurst* [2008] NZCA 454 **[[Resp Bundle at 143]]**.

<sup>50</sup> At [76] **[[Resp Bundle at 163]]**. See also *R v Leuta* [2002] 1 NZLR 215 (CA) at [82] – [83], noting that a “history of physical abuse of the child” aggravates a manslaughter.

<sup>51</sup> At [78].

<sup>52</sup> *R v Pene* [2010] NZCA 387 (the appellant, suffering from a depressive illness, hit her 13-month-old foster child to the head three to four times and angrily shook him. Other injuries suggested assaults during the two months prior. The Court agreed the starting point should have been in the range of 5 to 7 years); *R v Roberts* [2021] NZHC 146 (foster parent killed a 14-month-old child in her care by inflicting head injuries which would have required considerable force, likely by violently shaking her. There was no previous violence and she promptly sought medical help. A 7 ½ starting point was upheld, and the Court noted starting points at the lower end of the range – such as in *R v Pene* – tended to reflect the offender’s mental impairment: at [12]).

<sup>53</sup> *Robinson v R* [2011] NZCA 479 **[[Resp Bundle at 8]]**.

violence. The Court upheld a starting point of seven and a half years.

35.2 The appellant in *Ikamanu v R*<sup>54</sup> threw his three-year-old daughter forcefully against a wall, fracturing her shoulder and inflicting serious head injuries which led to her death. When she fell to the ground, he stomped on her pelvis causing it to fracture. For the pelvic injury he was convicted of intentionally causing her grievous bodily harm. He alerted his wife, who called an ambulance. Holding the incident was a one-off loss of self-control, the Judge adopted an eight-year starting point for the manslaughter, uplifted by one year for the stomping. The Court of Appeal noted “a higher starting point... would have been justified”.<sup>55</sup>

35.3 In *Woodcock v R*,<sup>56</sup> the appellant killed his three-month-old daughter by inflicting a 4cm skull fracture, likely from striking her head with “very considerable force” against a padded surface using a single blow.<sup>57</sup> A post-mortem disclosed other substantial injuries including eight rib fractures and a haemorrhage to the child’s chest, most likely caused by an adult leaning on her chest with the knee. On appeal, the Court held the appropriate starting point for the manslaughter was **10 years**, uplifted by two and a half years for his other offending against the baby. The Court of Appeal reviewed a collection of sentences imposed for child manslaughter<sup>58</sup> and observed:<sup>59</sup>

[41]...It is understandable that all the sentences are not necessarily reconcilable given the factual differences of each case. However, the more serious have attracted a starting point of ten years and above and *most incorporate the aggravating feature of prior offending* which establishes a pattern of abuse. The absence of that

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<sup>54</sup> *Ikamanu v R* [2013] NZCA 510 [[**Resp Bundle at 165**]].

<sup>55</sup> At [58].

<sup>56</sup> *Woodcock v R* [2010] NZCA 489 [[**Resp Bundle at 188**]].

<sup>57</sup> At [5].

<sup>58</sup> See Appendix A of the *Woodcock* decision [[**Resp Bundle at 203**]].

<sup>59</sup> Emphasis added.

feature, allowing the fatal blow to be *properly characterised as an isolated event evidencing a momentary and uncharacteristic loss of control, may operate to mitigate the starting point depending on the circumstances.*

36. These decisions provide ample support for the Judge’s starting point, even setting aside the previous violence, which fell in the lower half of the five-to-ten-year range identified by the Court of Appeal.<sup>60</sup> Indeed, given the extremity of the force used, a higher figure could have been selected. This is so given the eight-and-a-half-year starting point in *Broadhurst* was imposed before s 9A of the Sentencing Act was enacted, which signalled tougher sentences for violence against children.<sup>61</sup>
37. While the appellant points to decisions in which lower starting points have been adopted, they are of less assistance: *Wichman*,<sup>62</sup> *Ngawhika*,<sup>63</sup> *Wallis*<sup>64</sup> and *Paea*<sup>65</sup> are first instance sentencings, with *Paea* subsequently categorised as an outlier;<sup>66</sup> and *Pene*<sup>67</sup> and *Iorangi*<sup>68</sup> both tend to support seven-year starting points for materially less serious offending.
38. Finally, cross checking the Judge’s starting point against *Taueki* also confirms its propriety. It fits comfortably within the ranges identified in comparable cases and the applicable *Taueki* band 2, of five to 10 years.<sup>69</sup>

<sup>60</sup> Judgment under appeal at [30] **[[01 SC Casebook at 13]]**.

<sup>61</sup> Introduced by s 4 of the Sentencing (Offences Against Children) Amendment Act 2008.

<sup>62</sup> *R v Wichman* [2016] NZHC 1663 **[[Resp Bundle at 4]]**.

<sup>63</sup> *R v Ngawhika* [2023] NZHC 520 **[[Resp Bundle at 210]]**.

<sup>64</sup> *R v Wallis* [2023] NZHC 2029 **[[Resp Bundle at 222]]**.

<sup>65</sup> *R v Paea* [2016] NZHC 822 **[[Resp Bundle at 233]]**.

<sup>66</sup> See *JB v R* [2024] NZCA 669 at [50] **[[Resp Bundle at 255]]**.

<sup>67</sup> *R v Pene*, above n 52.

<sup>68</sup> *R v Iorangi* CA533/99, 30 March 2000: having lost his temper with his 17-month-old son, Mr Iorangi hit him over the head and shook him violently before throwing him three metres across the room. The toddler died from severe head and internal injuries. Mr Iorangi was found guilty by a jury of manslaughter, which he had been willing to plead guilty to, having accepted responsibility at an early stage. The starting point approved by the Court of Appeal was in the vicinity of six to seven years **[[Resp Bundle at 260]]**.

<sup>69</sup> *S (CA632/2015) v R* [2016] NZCA 367 where a starting point of 7 ½ years was upheld for causing grievous bodily harm to the appellant’s two-year-old stepson, resulting in bleeding between the inner lining of the skull and the brain. The sentencing Judge categorised the offending as falling within band 2, and the Court of Appeal noted this was an orthodox application of the *Taueki* principles. See also *Gray v R* [2022] NZCA 659 (upholding a starting point of 9 years for an appellant who caused 40 fractures of his infant son by squeezing, shaking or throwing him against soft objects) and *R v K* CA97/06, 19 September 2006 (upholding a 9 year starting point for parents who had fractured their baby’s arms and 16 of his ribs,

39. These submissions now explain why nothing in the policy underlying s 18 or its legislative history, required the Judge to dispense with the orthodox sentencing approach by ignoring Ms Mulford’s previous violence towards the victim and treating her fatal assault as an isolated incident.

***Legislative history of s 18 of the Sentencing Act***

*Section 8 of the Criminal Justice Act 1985*

40. The predecessor to s 18 was s 8 of the Criminal Justice Act 1985. It provided:

**8 Limitation on imprisonment of persons under 16 years**

- (1) No court shall impose a sentence of imprisonment on a person who at the time of conviction is under the age of 16 years except for a purely indictable offence.
- (2) In subsection (1) of this section, "a purely indictable offence" means any indictable offence within the meaning of section 2 of the Summary Proceedings Act 1957, other than an offence for which, by virtue of section 6 of that Act, proceedings may be taken in a summary way in accordance with that Act.
41. When inserted into the Criminal Justice Bill as cl 7A, it was noted as imposing “a severe limitation on the possibility of the imprisonment of those who are under 16”.<sup>70</sup> At the Bill’s second reading, the Minister of Justice, Hon Geoffrey Palmer, recorded that cl 7A arose from “widely held concerns about the detrimental effects of penal institutions on very young offenders”.<sup>71</sup> The provision was seen as consistent with the Bill’s “desire to

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but without causing lasting injuries).

<sup>70</sup> (12 June 1985) 463 NZPD 4759. This, in turn, reflected a recommendation made by the Ministry of Justice in its report on the Criminal Justice Bill: “The Department proposes that there be a blanket prohibition on the remand of 14 and 15 year olds to penal institutions. It is also suggested that 14 and 15 year olds should not be able to be sentenced to imprisonment except in cases where the offender is convicted of a purely indictable offence. These proposals arise out of long held concerns about the detrimental effects of penal institutions on very young defendants and offenders.” **[[Resp Bundle at 270]]**.

<sup>71</sup> (23 July 1985) 464 NZPD 5833-5834 **[[Resp Bundle at 275-276]]**. The Minister observed that this was not the same matter as the recent controversy relating to “16-year-olds who are sent to penal institutions on remand”. That observation appears to reference complaints raised by the Auckland Committee on Racial Discrimination (ACORD) about the experiences of young people remanded in custody at Mt Eden Prison. The controversy resulted in an inquiry, led by Judge Wallace, into the detention of young people at Mt Eden Prison. In her final report to the Secretary for Justice, Judge Wallace described the standard of accommodation in the cells as “primitive” and recommended that youths up to 17 years ought not to be placed on remand at Mt Eden Prison: G C P A Wallace “Report to the Secretary for Justice on the Enquiry into ACORD Complaints Concerning Detention of Young Persons” (21 November 1984) at 24 **[[Resp Bundle at 306]]**.

protect the community from violent offenders”, while at the same time “discourag[ing] the use of imprisonment for property and other minor offenders”.<sup>72</sup>

42. Section 8’s focus was thus younger offenders than those to whom s 18 applies,<sup>73</sup> both in terms of age (16 rather than 18) and when age was determined (at conviction rather than when the offence was committed). Perhaps because of its narrow scope, it appears rarely to have featured in published decisions.<sup>74</sup> Six years after its enactment, noting that there appeared to be no authority on the section,<sup>75</sup> the High Court observed that “the aim of the legislature is to prohibit the imprisonment of a person who is under the age of 16 years other than for the most serious offences”.<sup>76</sup>

*Section 18 (as enacted)*

43. In 2002, the Sentencing Act repealed s 8, replacing it with s 18. While reflecting the language of s 8, the new provision differed in two respects. First, it increased the age ceiling by one year, to those aged under 17 years. Second, it provided age was to be determined at the time of the offending, rather than at the time of conviction. It “cast[] a wider net” than s 8, applying to “[m]ore young people who commit serious (but not purely indictable) offences”.<sup>77</sup> The reasons for these changes, however, received little attention in the parliamentary materials.<sup>78</sup>

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<sup>72</sup> Ibid.

<sup>73</sup> It applied to a broadly similar range of offences, namely those that were not “purely indictable”.

<sup>74</sup> One exception is *Titoko v R* CA144/96, 11 September 1996, where the Court of Appeal quashed a sentence of imprisonment for unlawfully taking a motor vehicle that had been imposed cumulatively on a sentence of three years’ imprisonment for rape.

<sup>75</sup> *Delamere v Police* HC Rotorua AP 39/91, 17 October 1991 at 3 **[[Resp Bundle at 320]]**.

<sup>76</sup> Ibid.

<sup>77</sup> *R v C-W* [2007] NZCA 216, [2007] 3 NZLR 797 at [56] (per Heath J) **[[Resp Bundle at 334]]**.

<sup>78</sup> At [14] (per Chambers and Gendall JJ) **[[Resp Bundle at 328]]**. The sole policy indication appears to be a single sentence in the departmental report on the Bill, which simply read: “It has been raised to 17 at the time of the offending to align it with the Human Rights Act and the CYPF Act” (Departmental Report: Sentencing and Parole Reform Bill 2001 at 22 **[[Respondent’s Bundle at 358]]**). Neither component of this explanation, however, sheds much light. It is far from clear how the Human Rights Act 1993 was engaged, given the Act’s focus on discrimination in non-criminal contexts and the fact the material age (for most purposes) is 16 years, rather than 17: Human Rights Act 1993, s 21(1)(i); see also *Make It 16 Inc v Attorney-General* [2022] NZSC 134, [2022] 1 NZLR 683 at [14], [50] and [67]. And while under the Children, Young Persons, and Their Families Act 1989 the jurisdiction of the Youth Court turned on the person’s age at the time of the alleged offending, proceedings were not limited to the Youth Court if they were commenced after the offender turned 18 (now 19 years): s 2(2). Similarly, given the lack of more serious disposition options for older offenders, transfer to the District Court for sentencing was

44. In 2007, the High Court first considered s 18 in *Police v Moala*,<sup>79</sup> a Solicitor-General appeal against a sentence imposed on a 16-year-old for 32 offences (six being purely indictable) over an eight-month period. Harrison J rejected the submission that the 26 summary offences, which would themselves have justified “a lengthy term of imprisonment” (had s 18 not been engaged),<sup>80</sup> could increase the starting point for the indictable offences. Such an uplift “would be a backdoor means of frustrating a clear legislative intent”. He did, however, agree with the District Court that the result presented an “almost idiotic conundrum” in circumstances in which “any right thinking individual would demand a sentencing response”.<sup>81</sup> Importantly, however, he held that the lesser offending could still have a material impact on the term of imprisonment insofar as it “diminish[ed] any allowance for prospects of rehabilitation”.<sup>82</sup>
45. Despite similar misgivings, the *Moala* approach was taken in *Fonua v Police*, where it was held improper to uplift the starting point for an aggravated robbery on account of another robbery committed on the same day.<sup>83</sup> By contrast, in *Pouwhare*, neither the High Court nor the Court of Appeal criticised the starting point for an aggravated robbery being uplifted because it was committed while the young appellant was on bail for an unrelated robbery for which she was also being sentenced.<sup>84</sup>
46. While not directly relevant to the present appeal, the Crown notes that judicial concerns were also raised as to other aspects of s 18. In *R v C-W*,<sup>85</sup> the Court of Appeal divided over whether s 18 “trumped” s 17 (which preserves a court’s discretion to imprison an offender who will not comply with any other appropriate sentence). Dissenting, Heath J noted the

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more likely for serious offenders who were aged over 17 years, six months at disposition: ss 283 and 296.

<sup>79</sup> *Police v Moala* [2008] DCR 70 (HC).

<sup>80</sup> At [52] **[[Resp Bundle at 452]]**.

<sup>81</sup> At [22], [24] and [53].

<sup>82</sup> At [53].

<sup>83</sup> *Fonua v Police* HC Auckland CRI-2009-404-341, 22 February 2010 at [23]–[25] **[[Resp Bundle at 462]]**.

<sup>84</sup> *Pouwhare v R* HC Wanganui CRI-2010-483-11, 16 April 2010 at [13]; *Pouwhare v R* (2010) 24 CRNZ 868 at [33] **[[Resp Bundle at 475]]**.

<sup>85</sup> *R v C-W*, above n 77.

Sentencing Act “was Parliament’s response to a referendum in 1999 in which those of voting age were asked whether reform of the justice system was required to provide harsher responses to serious violent offending”.<sup>86</sup> He considered it unlikely Parliament had intended to “curtail completely a Court’s ability to sentence a young offender to imprisonment for a non-purely indictable offence”.<sup>87</sup> Requiring the imposition of a sentence with which compliance is not expected would “undermine[] the sentencing process to an extent that is likely to impact adversely on public confidence in the criminal justice system”. It would also result in young persons being able to commit “serious offences... with impunity, so long as they were not purely indictable”.<sup>88</sup>

#### *The 2019 amendments*

47. The next material amendment to s 18 was in 2019,<sup>89</sup> raising the age ceiling a further year, to 18 years. This followed the expansion of the youth justice jurisdiction to include young persons under 18.<sup>90</sup> Those amendments did not, however, result in the Oranga Tamariki Act providing a “complete code for youth justice”: a number of “off-ramps” required certain offending to be resolved in general courts.<sup>91</sup> Those off-ramps were broadest for 17-year-olds for whom sexual violation and other serious violent, property and drug offending, as well as any related less serious charges, had to be transferred out of the Youth Court.<sup>92</sup> There is no indication in these amendments, which envisaged “sentencing for all admitted or proven offences... occur[ring] together” in the general courts,<sup>93</sup> that it was

<sup>86</sup> At [54] **[[Resp Bundle at 333]]**.

<sup>87</sup> At [56].

<sup>88</sup> At [59]. Applying *C-W*, the High Court in *Wanahi v Police* HC Hamilton CRI-2007-419-83, 29 August 2007 at [12] quashed the sentence of imprisonment imposed for non-purely indictable offending on a young offender who had “shown disdain” for his sentence of community work and “had refused to carry out any aspect of it”. Asher J noted, at [20], this was “an unsatisfactory situation”, given “the offender may well escape any effective sanction for defiance of the sentence originally imposed”.

<sup>89</sup> The provision was amended in 2013 following the abolition of summary and indictable offences, but this did not significantly change the offences within its scope because there were few purely indictable offences with maximum sentences less than 14 years (notable Crimes Act exceptions were s 188(2) wounding with intent to injure (7-year max penalty), s 189 disabling a person (5-year max penalty) and s 198(2) discharging a firearm (7-year max penalty)).

<sup>90</sup> Oranga Tamariki Legislation Bill 2019 (121—2) Select Committee report at 1 **[[Resp Bundle at 488]]**.

<sup>91</sup> *G (SC130/2024) v R* [2026] NZSC 19 at [45] **[[Resp Bundle at 554]]**.

<sup>92</sup> Oranga Tamariki Act 1989, ss 275 and 276AB. See also *G (SC130/2024) v R*, above n 91 at [45]–[46].

<sup>93</sup> Oranga Tamariki Legislation Bill 2019 (121—2) Select Committee report at 4 (referencing the provision

intended that the less serious offending be functionally irrelevant at sentencing where a sentence of imprisonment was being imposed.

48. The 2019 amendments to s 18 were considered by the High Court in *Matkovich v Police*.<sup>94</sup> Gault J held that while s 18 prevented uplifting an aggravated robbery sentence for the associated theft of a car, it did not preclude “the sentencing Court from taking into account the wider circumstances of the offending”.<sup>95</sup> The court was thus entitled to treat both an assault committed during the aggravated robbery and the earlier vehicle conversion (indicating planning) as aggravating features.<sup>96</sup>
49. The Court of Appeal first considered the amended s 18 in *Diaz v R*.<sup>97</sup> It held that the sentence of imprisonment on a charge of causing grievous bodily harm could not be uplifted to account for an unrelated offence, involving a different victim, of injuring with intent to injure (to which s 18 applied). Such an uplift, the Court reasoned, “would be inconsistent with the policy underpinning s 18”, as it would “result in the young person spending (additional) time in prison as a result of the less serious charge”.<sup>98</sup>
50. The Court subsequently applied a similar approach in *Waikato-Tuhega v R*,<sup>99</sup> *A (CA104/2022) v R*<sup>100</sup> and *Hobin v R*.<sup>101</sup> The last two judgments, in particular, reflect a broad interpretation of s 18:

50.1 In *A*, the Court held that when sentencing a young offender to imprisonment for the sexual violation of a child, s 18 prevented

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that became s 276AC, which provides that where a 17-year-old pleads guilty to a specified serious charge in the adult jurisdiction, any related charge must also be dealt with in that jurisdiction unless it is in the interests of justice for the charge to be dealt with in the Youth Court.

<sup>94</sup> *Matkovich v New Zealand Police* [2021] NZHC 1660.

<sup>95</sup> At [30] **[[Resp Bundle at 597]]**.

<sup>96</sup> At [30].

<sup>97</sup> *Diaz v R*, above n 29.

<sup>98</sup> At [32] **[[Resp Bundle at 67]]**.

<sup>99</sup> *Waikato-Tuhega v R* [2021] NZCA 503 at [26]–[27] **[[Resp Bundle at 615]]**.

<sup>100</sup> *A (CA104/2022) v R* [2022] NZCA 651 at [78] – [80] **[[Resp Bundle at 646]]**.

<sup>101</sup> *Hobin v R* [2024] NZCA 500 **[[Resp Bundle at 653]]**.

the Judge from uplifting that sentence for other sexual offences committed during the same incident.<sup>102</sup>

50.2 In *Hobin*, the Court held that s 18 precluded the uplift of a sexual violation sentence for a 69-year-old defendant being sentenced for historic offending. This was despite the fact that the unrelated indecent assault, which occurred in the 1970s, would likely have been charged as a sexual violation if committed today.<sup>103</sup> The Court held that, “[p]olicy implications aside,... the plain wording of s 18” required the sentence imposed for the sexual violation, to which s 18 did not apply, to be quashed.<sup>104</sup> The judgment does not, however, identify what wording in s 18 (as opposed to the policy considerations relied on in *Diaz*) required this result.

51. Finally, *R v Lama* also reflects a broad approach to s 18. Following *Diaz*, the sentencing Judge held that when setting the starting point for a 17-year-old defendant’s kidnapping conviction he was “required to be blind” to his participation in the associated torture of the victim, because those violent offences were protected by s 18.<sup>105</sup>

#### *The 2025 amendments*

52. For completeness, the Crown observes that, in 2025, Parliament further amended s 18. Subsection (4) now provides that the limit on imposing a sentence of imprisonment “does not apply if the offender is already serving a sentence of imprisonment for any other offence that they committed, in whole or in part, before, with, or after the offence” committed when they were under the age of 18 years. While not in issue on this appeal, as the

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<sup>102</sup> At [80] **[[Resp Bundle at 674]]**. By contrast, it considered an uplift for a low-level indecent assault later committed when the appellant was 19 was necessary, notwithstanding it may not have attracted a sentence of imprisonment on its own: at [81].

<sup>103</sup> At [150].

<sup>104</sup> At [151].

<sup>105</sup> *R v Lama* [2025] NZHC 2059 at [57]–[58]. Those offences were assault with a weapon (pouring hot water onto the victim’s chest and genitals) and injuring with intent to injure (striking the victim across the chest with a belt, shaving his eyebrows and burning his forehead with a cigarette).

authors of *Adams on Criminal Law* observe, subs (4) effectively reverses *Diaz*.<sup>106</sup> It resolves the “almost idiotic conundrum” first identified in *Moala*.

*Drawing the threads together*

53. The following can be drawn from the legislative history of s 18:
- 53.1 As conceived in s 8 of the Criminal Justice Act, the provision was designed to limit the circumstances in which very young offenders could be sent to prison. Parliament’s concern was the detrimental impact imprisonment might have on young people. The provision had no application to adults, including those sentenced for offences committed as young persons.
- 53.2 While s 18 was and is broader in scope, there is little indication in the legislative materials that this expansion was driven by any substantive policy change. Nor was there any discernible consideration of the impact of expanding such a bright line rule on wider sentencing norms and practice.
- 53.3 When s 18 was enlarged in 2019 to include 17-year-old offenders, it fell to be considered more regularly by the senior courts. A line of authority, represented by *Diaz*, confirmed a sentence of imprisonment for a non-s 18 offence cannot be *uplifted* for *unrelated* s 18 offending. But those authorities did not confront the question arising in this appeal: whether sentencing judges must also “blind” themselves to relevant aggravating conduct, just because it was committed before the defendant turned 18.
- 53.4 The amendments in 2025 resolved concerns expressed judicially that s 18 prevented any sanction being imposed on the most

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<sup>106</sup> Matthew Downs (ed) *Adams on Criminal Law — Sentencing* (online looseleaf ed, Thomson Reuters) at [SA18.01]: “For offences committed on or after 29 June 2025, ...[t]he offender may receive a cumulative or concurrent sentence of imprisonment for a lesser offence. It follows that, consistently with the purpose of this provision, the offender may also receive concurrent or cumulative prison sentences for a category 4 or specified category 3 offence and a lesser offence if they are being imposed at the same time.” While the Departmental Report *Sentencing (Reform) Amendment Bill* (12 December 2024) indicated at [212] that subs (4) was intended to address the anomaly of young offenders not being able to receive a further sentence for offending in prison, it does not describe this as its exclusive focus **[[Resp Bundle at 732]]**.

serious young offenders – i.e. those who committed purely indictable offences – for other serious (but not purely indictable) offending.

54. The history of s 18 therefore provides little support for the appellant’s argument. There is nothing that suggests Parliament intended the appropriate term of imprisonment for offending not within s 18’s scope to proceed without any reference to relevant s 18 offending. It does not follow that because Parliament acted to keep certain young offenders out of prison entirely that it also intended to shorten the sentences for other offenders – particularly adult offenders – by preventing relevant aggravating factors from being considered. The 2025 amendments tend to confirm this.<sup>107</sup>

#### ***Scheme of the Sentencing Act***

55. The broader scheme of the Sentencing Act also points against an interpretation that prevents a judge from considering relevant s 18 offending when setting a term of imprisonment for non-s 18 offending. The key provisions are as follows.
56. The purposes of sentencing are set out in s 7(1). Relevantly, these include holding the offender accountable for the harm done by the offending, denouncing the offender’s conduct, deterring both the offender and others from committing similar offences, and protecting the community from the offender. As to the principles of sentencing, s 8(1)(a) provides that the court “must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender”. An interpretation

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<sup>107</sup> While subsequent amendments to legislation are generally unlikely to be of assistance (*Teddy v Police* [2014] NZCA 422 at [32]), later amendments may be used as an interpretive aid where they are directly relevant (*Commissioner of Inland Revenue v Vector Ltd* [2016] NZCA 396, (2016) 27 NZTC 22-065 at [36]-[37] per Kós J) or where the earlier Act is ambiguous (*Golden Bay Cement Co Ltd v Commissioner of Inland Revenue* [1999] 1 NZLR 385 at 392 per Lord Nolan). Further, in *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445, McGrath, Glazebrook and Arnold JJ noted, with approval, that s 129(1) of the Crimes Act 1961 had been “interpreted in its statutory context, specifically, the immediate context involving other sexual violation provisions as amended in 1985 and subsequently. These changes in legislative context had the effect of changing the scope of the text in s 129(1).” Burrows and Carter *Statute Law in New Zealand* (6<sup>th</sup> ed, LexisNexis, Wellington, 2021) explain that later legislation is sometimes used to resolve ambiguity in earlier legislation, and the case for doing so is much stronger if that later legislation amends the earlier: at 901 **[[Resp Bundle at 774]]**.

of s 18 that requires a Judge to be “blind”<sup>108</sup> to conduct that is directly relevant to the gravity of the offending or the culpability of the offender sits uncomfortably with this statutory injunction and the purposes of sentencing.

57. Such an approach also tends to make compliance with s 8(1)(e), the general desirability of consistency in sentences for similarly placed offenders,<sup>109</sup> more difficult. Consider two young offenders of the same age convicted of the same aggravated robbery, but where one also commits a number of related offences during the incident such as using a stolen vehicle and striking members of the public with a weapon (as in *Matkovich*). On the appellant’s argument, both are likely to receive the same starting point, despite one’s offending being more serious. Inconsistency can also be expected where evidence of aggravating conduct is led for two similar offenders but is the subject of charges for one and thus caught by s 18 (as in this case) but not the other (as in *Broadhurst*).<sup>110</sup>
58. Section 9 sets out aggravating and mitigating factors that must be taken into account to the extent they are applicable. The use of violence and/or weapons is a common such factor. Courts must also consider “the number, seriousness, date, relevance, and nature of... any convictions for which the offender is being sentenced or otherwise dealt with at the same time”.
59. Finally, while not directly relevant to the present case, s 85 reinforces the Act’s concern that sentences reflect the overall gravity of the offending and culpability of the offender. Where a court imposes concurrent sentences for multiple offences, for example, s 85(4) makes clear that “the most

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<sup>108</sup> As in *R v Lama*, above n 105.

<sup>109</sup> As this Court observed in *G (SC130/2024) v R*, above n 90 at [36]: “It is a fundamental value of the law that those whose circumstances are materially similar should be treated consistently.” The reverse must also be true: offenders who have materially different circumstances should be treated differently.

<sup>110</sup> Section 24(1) of the Sentencing Act makes clear that, in determining a sentence, a court “may accept as proved any fact that was disclosed by evidence at the trial” and “must accept as proved all facts, express or implied, that are essential to a plea of guilty or a finding of guilt”. On the Ms Mulford’s argument, however, it appears s 18 prevents consideration of the latter but not the former.

serious offence must... receive the penalty that is appropriate for the totality of the offending”.

60. It follows, in the Crown’s submission, an interpretation of s 18 that requires a sentencing court to ignore relevant, often highly relevant, aggravating factors when sentencing a serious offender to imprisonment is inconsistent with the policy underpinning the Sentencing Act.

### **England and Wales**

61. This approach accords with that of the Court of Appeal for England and Wales in an analogous statutory context.<sup>111</sup>
62. In *Mills v R*,<sup>112</sup> the Court considered the principles applying to the imposition of custodial sentences on offenders aged 14–17 years.<sup>113</sup> One issue was sentencing where longer custodial sentences were available for some offending (due to its seriousness) but not others.<sup>114</sup> Lord Bingham CJ held that because a court may impose a custodial sentence “commensurate with the seriousness of... the combination of the offence and one or more offences associated with it”, when assessing the seriousness of the lead offence, it was appropriate to consider lesser, associated offences.<sup>115</sup> Thus, there had been no error in a Judge sentencing a young defendant to three and a half years’ detention on a lead charge of burglary, reached by also taking into account an aggravated vehicle taking (for which long-term detention was not an available sentence).<sup>116</sup> The Court confirmed that where a sentence of long-term detention was available, it should reflect the totality of all the offending.<sup>117</sup>

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<sup>111</sup> Counsel have been unable to find relevant authorities in other cognate jurisdictions.

<sup>112</sup> *Mills v R* [1998] 2 Cr App R (S) 128.

<sup>113</sup> At 129 **[[Resp Bundle at 779]]**.

<sup>114</sup> Albeit a different, shorter form of detention appears to have been available for such offending.

<sup>115</sup> At 133–134. Relevantly, s 31(2) of the Criminal Justice Act 1991 provided at the time that “an offence is associated with another if—(a) the offender is convicted of it in the proceedings in which he is convicted of the other offence, or (although convicted of it in earlier proceedings) is sentenced for it at the same time as he is sentenced for that offence...”.

<sup>116</sup> At 138 **[[Resp Bundle at 788]]**. See also the discussion at 141, where the same principle was applied in relation to a different appellant.

<sup>117</sup> At 141: “The totality of Marsh’s offending was in our judgment was very serious.”

63. In *R v JC*,<sup>118</sup> the Court affirmed *Mills* under a new statutory regime. The Court considered the sentences for offences committed by two young people, both aged under 18 at the time of sentencing. The lead offence was rape, for which the Judge sentenced both appellants to seven years in a young offender institution. Shorter cumulative sentences of detention were also imposed on both for unrelated offences of indecency committed against other young women.<sup>119</sup>
64. The Court held that the cumulative sentences were unlawful, because of a provision broadly equivalent to s 18: the indecency offences did not have maximum terms of imprisonment of 14 years or more, so could not result in sentences of detention.<sup>120</sup> Importantly, however, while those sentences could not stand,<sup>121</sup> the Court emphasised that justice required the sentences for the rape to be “commensurate with the seriousness of all of the offences for which sentence is being passed”.<sup>122</sup> The Court accordingly *increased* the sentences imposed on those counts from seven to nine years’ detention.<sup>123</sup> This ensured the overall sentences were appropriate for the “offences taken together” and “to see that the justice of these cases [was] met”.<sup>124</sup>
65. While, as in *G (SC130/2024)*, these decisions were made in different statutory contexts, and they endorsed uplifts rather than aggravating factors, the principle that emerges is nevertheless of “general application”:<sup>125</sup> when imposing a custodial sentence, justice will often

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<sup>118</sup> *R v JC* [2004] EWCA Crim 1367, [2005] 1 Cr App R (S) 10 **[[Resp Bundle at 796]]**. See also *R v Robinson* [2020] EWCA Crim 866, [2020] 2 Cr App R (S) 48 at [13] **[[Resp Bundle at 809]]**. In *R v Dacus* [2020] EWCA Crim 1879 at [8]–[10], the Court applied *JC* in relation to similar provisions under the Criminal Justice Act 2003 **[[Resp Bundle at 812]]**; similarly in *R v NH* [2023] EWCA Crim 241, [2023] 2 Cr App R (S) 22 at [17] and [33] the Court applied *JC* to equivalent provisions under the Sentencing Code 2020 **[[Resp Bundle at 825 and 827]]**.

<sup>119</sup> At [19]–[20] **[[Resp Bundle at 800]]**.

<sup>120</sup> At [19], citing s 91 of the Power of Criminal Courts (Sentencing) Act 2000.

<sup>121</sup> Nor could the sentences that would otherwise have been available for that offending (detention and training orders) be imposed together with a sentence of detention.

<sup>122</sup> At [27].

<sup>123</sup> At [32]–[33].

<sup>124</sup> At [30].

<sup>125</sup> *G (SC130/2024) v R*, above n 91 at [65] **[[Resp Bundle at 561]]**.

require the Judge to have regard to all relevant offending even if a custodial term is not available for some of that offending.

***The lower courts interpreted s 18 correctly***

66. It follows, in the Crown’s submission, that both the High Court and the Court of Appeal applied s 18 correctly. Nothing in the provision’s text or policy prohibited the Judge, in fixing the sentence for manslaughter, from considering the appellant’s earlier strangulation of Harlee-Rose. Such a blinkered approach would be inconsistent with the scheme of the Sentencing Act and orthodox sentencing principles. More generally, it would require courts to impose sentences that may not meet the “justice of [the] cases”,<sup>126</sup> which, in turn, risks bringing the administration of criminal justice into disrepute. Parliament cannot have intended such a result.

***Fairness***

67. Finally, contrary to Ms Mulford’s submission,<sup>127</sup> there was no unfairness in the fact she was not charged with strangling Harlee-Rose until after her fatal assault five months later. Ms Mulford lied about strangling the child, concealing her offence by claiming the injuries had been caused by a fall. Moreover, even if a charge had been filed and somehow resolved (despite Ms Mulford’s denials) prior to the manslaughter proceeding,<sup>128</sup> this would not have changed the position that confronted the Judge at sentencing: his Honour would still have been entitled to view that incident as material to her culpability for the later offending.

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<sup>126</sup> *R v JC*, above n 118, See *Moses v R* at [49]: “We repeat that the ultimate question... is... whether the sentence is a just one in all the circumstances.”

<sup>127</sup> Appellant’s submissions at [24].

<sup>128</sup> It is not, in any event, accepted that Ms Mulford would have received a discharge under s 282 of the OTA. This would have required: (1) the charge being admitted or proved; (2) completion of a Family Group Conference (FCG); (3) judicial approval of an agreed plan following a FCG; (4) completion of that plan; and (5) a judicial decision, after “an inquiry into the circumstances of the case”, to grant a discharge under s 282, having regard to the primary considerations in s 4A(2) and the youth justice principles in ss 5 and 208 of the OTA. Given Ms Mulford continues to deny this offending, a discharge would have been an unlikely outcome.

***No basis to reduce starting point based on age or psychological factors***

68. Ms Mulford argues there was an operative connection between her psychological factors, age, and lack of parenting skills and her offending, such that it should have resulted in a lower starting point.<sup>129</sup> Both the High Court and the Court of Appeal held that these personal mitigating factors were properly considered by way of discounts from the starting point.
69. The lower Courts’ approach was correct. This Court in *Berkland* affirmed the “well-known two-stage methodology”, first introduced in *Taueki*.<sup>130</sup> At the first stage, a starting point must be set “by reference to the facts of the offending and the offender’s role in it”; at the second stage, adjustments may be made to reflect “the wider circumstances of the offender”.<sup>131</sup>
70. On occasion, mental health disorders that are “operative and proximate” causes of the defendant’s offending (“diminishing their willed choice”) may be taken into account when fixing a starting point. However, this is “relatively rare”, because, as Kós P explained in *Orchard*:<sup>132</sup>
- ... the first stage is concerned with the intrinsic seriousness of the offending conduct, viewed objectively.<sup>[133]</sup> This enables sentencing comparisons to be made from case to case.<sup>[134]</sup> To be a proper stage one consideration, mental disability must have altered the character and gravity of the offending itself.
71. Consistently with *Berkland*, factors personal to the offender that have made a “causative contribution” to the offending are best considered at the second stage of sentencing. This is not to diminish the relevance of such factors to determining a just sentence: where a factor personal to the offender is an operative cause of the offending, “it is likely to be a potent sentencing factor”.<sup>135</sup> Rather, it ensures starting points continue to be an

<sup>129</sup> Appellant submissions at [41]-[42].

<sup>130</sup> *Berkland v R* [2022] NZSC 143 at [23] **[[Resp Bundle at 98]]**. See also *G (SC 130/2024) v R* above n 91 at [9], endorsing “the normal sentencing methodology”.

<sup>131</sup> *Berkland v R*, above n 130 at [23].

<sup>132</sup> *Orchard v R* [2019] NZCA 529 at [45].

<sup>133</sup> *R v Taueki*, above n 24 at [28]; *De Reeper v R* [2012] NZCA 617 at [55]; and *Pesefea v R* [2016] NZCA 35 at [8].

<sup>134</sup> *R v Taueki*, above n 24, at [43].

<sup>135</sup> *Berkland v R*, above n 130 at [108] **[[Resp Bundle at 118]]**. See also *Liddington v R* [2024] NZCA 457 at [56]-[57].

objective standard with which other like cases can be compared, and it promotes transparency, consistency and predictability.

72. The factors upon which the appellant relies fall well short of altering the character and gravity of her offending:

72.1 Dr Nuth’s psychological report makes clear that it does not provide any opinion on “any purported causal nexus between her psychological difficulties and her index offence”.<sup>136</sup> While Ms Mulford grew up in a loving, stable family,<sup>137</sup> she struggled with her mental health, bullying,<sup>138</sup> drug use and a traumatic incident when she was 13.<sup>139</sup> Little connection, however, is apparent between these difficulties and her abuse of Harlee-Rose.

72.2 The alcohol and drug report prepared for sentencing opines that Ms Mulford developed moderate to severe substance disorders. However, it also records that when Harlee-Rose came into Ms Mulford’s care, she reduced her use of methamphetamine, stopped using the drug completely when they moved to Hamilton, and also reduced her use of cannabis.<sup>140</sup> Again, there is no indication of any causative nexus between these difficulties and her violent offending.

72.3 The same may be said about Ms Mulford’s youth. Certainly, she assumed responsibility for Harlee-Rose at a young age. But there was little before the High Court to demonstrate that her youth, or lack of parenting skills, amounted to anything more than “a contributing factor to [her] offending”.<sup>141</sup>

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<sup>136</sup> Additional Materials at [38] **[[04 CA Additional Materials at 9]]**.

<sup>137</sup> Psychological report at [9]-[10] **[[04 CA Additional Materials at 4]]**.

<sup>138</sup> At [12] **[[04 CA Additional Materials at 5]]**.

<sup>139</sup> At [15] **[[04 CA Additional Materials at 5]]**.

<sup>140</sup> At [6.5] **[[04 CA Additional Materials at 21]]**.

<sup>141</sup> Sentencing notes at [37] **[[01 SC Casebook at 25]]**.

73. It follows that Campbell J was correct to consider these personal circumstances at the second stage of the sentencing process.

#### **Discounts for personal mitigating factors**

74. Campbell J reduced Ms Mulford’s sentence by 15 per cent for her youth and five per cent for other background factors. While the Court of Appeal accepted “slightly greater” discounts would have been within the Judge’s discretion, it did not find any error warranting appellate intervention.<sup>142</sup>
75. Before this Court, Ms Mulford repeats her arguments below: she seeks a 30 per cent reduction for her age; and a further 10 to 15 per cent for other matters including addiction.
76. In the Crown’s submission, no error has been shown in the Judge’s approach.
77. Discounts for youth recognise a range of important considerations. This Court recently summarised “the essential propositions” in *G (SC130/2024) v R* as being neurological immaturity, particularly in relation to executive functioning; the adverse impacts of imprisonment on young people; and, if kept out of prison, their “better prospects of rehabilitation”.<sup>143</sup>
78. Discounts for youth are, however, contextual.<sup>144</sup> Relevantly, in *JB v R*, the Court of Appeal held 10 per cent was the appropriate youth discount for a 20-year-old with the sole care of two young children who had killed her newborn after previously assaulting him.<sup>145</sup> And, in *Broadhurst* (discussed above), that Court upheld the reduction of six months (six per cent) afforded by Winkelmann J in the High Court to an 18-year old appellant.<sup>146</sup>

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<sup>142</sup> Judgment under appeal [34] and [42] **[[01 SC Casebook at 14 and 16]]**.

<sup>143</sup> *G (SC130/2024) v R*, above n 91, citing *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]–[86], *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55] and [77]–[91], *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [33], and *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [61]. The Court also noted the frequent presence of intellectual deficits, mental illness and experiences of abuse or other childhood trauma, but observed that “[t]hese characteristics also tend, separately, to mitigate culpability”.

<sup>144</sup> *Pouwhare v R*, above n 84 at [98] **[[Resp Bundle at 487]]**.

<sup>145</sup> *JB v R* [2024] NZCA 669 at [69] **[[Resp Bundle at 259]]**.

<sup>146</sup> *R v Broadhurst*, above n 49.

79. Such moderation, in part, reflects society's abhorrence at the violent killing of defenceless children. As the Full Court of Appeal explained in *R v Leuta*:<sup>147</sup>

[80] Of course child homicides often occur in complex relational and domestic situations. They bear upon the offender frequently to evoke sympathy and mitigate the offending. They are to be taken into account for sentencing. But they should not cloud the essential fact that the violent, cruel and brutal treatment of a defenceless and vulnerable child, to whom there are duties of trust and responsibility, constitutes conduct of grave criminality and, where death ensues, the sentencing task is in respect of a very serious crime.

80. Subsequently, in 2008, Parliament unanimously enacted s 9A of the Sentencing Act.<sup>148</sup> In *Pene*, the Court of Appeal explained that the provision "reflects widespread public concern about violence against and neglect of children" and "[i]f anything,... signals tougher sentences might be required".<sup>149</sup> Chambers J for the Court went on:<sup>150</sup>

[16] ... Suffice to say we do feel great sympathy for Ms Pene and the situation in which she found herself. It appears she was badly let down by her partner and by her partner's family and her own. That is, however, a common feature of most of these tragic cases leading to children's deaths. In lots of these cases of baby killings, ... the offenders have been under great stress at the time they killed the children in their care. Nearly always, these offenders feel remorse afterwards; but that is not the point. *What society is trying to make clear, through legislative amendments by their Parliamentary representatives and by court decisions, is that there can and should be only limited discounts for those who end up killing innocent children, whatever the difficulty of the offenders' personal situations.* Obviously, the sentencing approach can be more lenient where recognised psychiatric or psychological disorders are clearly established as causative.

81. Relatedly, this Court emphasised in *Berkland* that where offending is "particularly serious", factors that have causatively contributed to the

<sup>147</sup> *R v Leuta* [2002] 1 NZLR 215 (CA) at [80] (per Elias CJ, Gault, Blanchard and McGrath JJ).

<sup>148</sup> As confirmed in *R v Leuta*, above n 147, at [90] and [132] also relevant is New Zealand's obligation under art 19 of the Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) to take measures to protect children "from all forms of physical or mental violence, injury or abuse... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child". Such measures include, as appropriate, "judicial involvement".

<sup>149</sup> *R v Pene*, above n 52 at [13].

<sup>150</sup> Emphasis added.

offending may “be significantly reduced or even negated and other sentencing goals... may become more important”.<sup>151</sup>

82. Having regard to the gravity of Ms Mulford’s offending (including earlier strangling the victim) and the limited information suggesting a causative connection, the discount of 15 per cent for youth and five per cent for background factors was appropriate and within range.

### **CONCLUSION**

83. The ultimate question for this Court is whether the end sentence of five years and seven months’ imprisonment falls within the range of available sentences for the violent killing of a defenceless toddler.<sup>152</sup> The Crown submits that it does, and the appeal should accordingly be dismissed.

26 March 2026

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P D Marshall | N J Wynne  
Counsel for the respondent

**TO:** The Registrar of the Supreme Court of New Zealand.

**AND TO:** The appellant

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<sup>151</sup> *Berkland*, above n 130 at [111] **[[Resp Bundle at 119]]**.

<sup>152</sup> *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].