IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 76/2024

SOUTHERN CHEYENNE THOMPSON
Appellant

v

THE KING
Respondent

APPELLANT SUBMISSIONS IN SUPPORT OF APPEAL AGAINST SENTENCE

Date: 27 May 2026
For hearing: 7 July 2026

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Counsel certify that to the best of their knowledge, these submissions are suitable for publication and does not contain any information that is suppressed.

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MAY IT PLEASE THE COURT:

Introduction

1. Between January and July 2018, the Appellant, Ms Thompson was suffering from a major depressive disorder that occurred in the context of pre-existing persistent depression and post-traumatic stress disorders. Following the birth of her third child, her symptoms deteriorated significantly.

2. The Appellant's mental state continued to worsen throughout the first half of 2018 as her personal circumstances became increasingly unstable. Against a backdrop of fractured relationships, escalating dysfunction within the household, and chronic exposure to drug and alcohol abuse, Ms Thompson bore the primary responsibility for the care of several children with little support from other adults residing in the home. The cumulative stressors compounded her pre-existing psychiatric difficulties and limited her capacity to cope with the ordinary demands of daily life.

3. It was within this context that she began to mistreat her daughter Comfort Thompson-Pene (**Comfort**), which escalated to the infliction of a non-survivable head injury, resulting in Comfort's tragic death at 18 months old. On 13 May 2022, Ms Thompson was sentenced by Lang J to life imprisonment with a minimum period of imprisonment (**MPI**) of 17 years for Comfort's murder.[1] A first appeal against sentence was dismissed by the Court of Appeal on 25 June 2024.[2]

4. Ms Thompson now appeals against her MPI for a second time, on the grounds that it was manifestly unjust. More broadly, this appeal concerns the correct approach to assessing manifest injustice under s 104(1A)(h) of the Sentencing Act 2002 (**the Act**) involving the murder of a vulnerable victim, and its application to the facts of this case.[3]

Synopsis of Submissions

5. Section 104 of the Act mandates a sentence of life imprisonment with a default MPI of at least 17 years for cases of aggravated murder, where particular aggravating factors exist. This minimum term can only be avoided if it would be 'manifestly unjust'.

6. Murders captured by s 104(1A)(h) vary greatly both in terms of the seriousness of the offence and the culpability of the offender. This is because the aggravating

[1] SC Casebook p 20-29.
[2] SC Casebook p 7-19.
[3] SC Casebook p 6.

aspect of the murder is attributed to the identity of the victim, rather than a feature of the murder which elevates its inherent seriousness. A review of current sentencing practices[4] reveals that notwithstanding the vastly disparate circumstances in which murders of a vulnerable victim may arise, the test of manifest injustice is generally only met in a limited category of cases.[5]

7. As a result, minimum terms of 17 years have been imposed in circumstances which do not truly justify its application, inadvertently capturing offenders and offences who do not fit the category of one of the "worst murders".[6] The Appellant is one such example, where notwithstanding the extent and nature of the prolonged period of mistreatment against her daughter, the root of that behaviour can be linked directly back to her impaired mental state at the time.

8. This fails to acknowledge that levels of agency can differ widely, and that personal circumstances and poor mental health can have a significant mitigating effect on the gravity of the murder, even where the circumstances of the offence itself are abhorrent.

9. The problem lies in the current approach to determining 'manifest injustice', which requires the Court to form an "overall impression" as to whether the case is of a type to which Parliament intended s 104 to apply.[7] This risks placing overemphasis on the s 104 categorisation of the murder, rather than its inherent gravity. The solution is to adopt a more prescriptive test in assessing manifest injustice – one that expressly considers the different ways in which it can arise.

10. In *R v Williams,* the Court of Appeal held that in sentencing an offender under s 104, a two-step process should be followed.[8] Expanding upon this existing methodology, Counsel submits that assessing 'manifest injustice' at the second stage should involve a tripartite process:

    (1) What MPI would be appropriate in the absence of s 104, that is, setting a notional MPI with reference to s 103 (noting that the s 103 purposes are focused on deterrence, denouncement and protection)?

[4] See Appendix annexed to the Appellant's submissions on leave to appeal. The sample of cases examined has focused on those involving the murder of a vulnerable child or teenager by a parent or caregiver, and is not an exhaustive list of all murder sentencing cases under s 104(1A)(h). Nevertheless, there are identifiable trends/patterns within these cases.
[5] Cases involving youth or significant mental impairment.
[6] See Tim Conder "Murder Most Foul: An Analysis of the courts' approach to s 104 of the Sentencing Act 2002" [2015] NZ Law Review 355 at 357. The legislative intent behind the Sentencing and Parole Reform Bill was to capture only the "worst murders" or the "worst murderers".
[7] *R v Williams* [2005] 2 NZLR 506 (CA) at [66].
[8] Ibid.

(2) If the MPI reached at stage one is less than 17 years, would it be manifestly unjust to impose a 17 year MPI, either because:

(i) The case does not fall within the category of murders contemplated by s 104, and the presumption is inappropriate (an inquiry focused on **gravity of the offence)**; or

(ii) A 17 year MPI is a grossly disproportionate sentence (with comparison to step one), which does not reflect personal mitigating considerations (an inquiry focused on the **circumstances of the offender**); or

(iii) A 17 year MPI is unnecessary, having regard to all relevant principles and purposes of sentencing under ss 7 and 8 of the Act, as each case requires (a question of **individualised justice**).

11. Applied to the present case, the Appellant submits that the sentence of life imprisonment with a MPI of 17 years does not reflect the extent to which her mental illness, falling short of the legal standard of infanticide, had an operative and proximate effect behind her offending. This is not an example of one of the 'worst murders' and imposing a sentence based on that presumption would be manifestly unjust. Instead, the purposes of accountability, deterrence and community protection can be met by a lower MPI of 12 years. Accordingly, it is manifestly unjust to impose an MPI of 17 years, and the appeal ought to be allowed.

Factual Background

12. Comfort was born on 12 January 2027 and passed away on 24 July 2018. She was born with gastroschisis, a birth defect of the abdominal wall which required hospitalisation during the first five months of her life. Due to the limited contact in these initial months, the Appellant struggled to form a close bond with her daughter compared to her two other children.

13. Following the birth of her third child in January 2018, Ms Thompson's pre-existing conditions of PTSD and persistent depressive disorder worsened. She struggled with low mood, episodes of irritability, tearfulness, poor self-care, and feeling overwhelmed.[9] The household was chaotic and the her relationships with her siblings and her partner continued to deteriorate. Ms Thompson struggled to manage.[10] She would find herself in the shower crying.[11] Over time, she began "flipping out".[12] She began to mistreat Comfort. Prior to this period, the Appellant had been a good mother. She did not struggle with parenting.[13]

[9] Psychological Report of Dr Jensen at [34]: CA Casebook p 201.
[10] At [54]: CA Casebook p 205.
[11] At [56]: CA Casebook p 205.
[12] At [56]: CA Casebook p 205.
[13] At [48]: CA Casebook p 203.

14. Comfort was airlifted to hospital on 23 July 2018, after Ms Thompson found her in an unresponsive state. Comfort was found to have suffered an irreversible brain injury, caused by blunt force trauma inflicted in the 48 hours prior. Her life support was switched off the following day.

15. In addition to the fatal head injury, Comfort had healing injuries and visible bruises indicating assaults on prior occasions. Ms Thompson admitted to hitting Comfort on a regular basis in the 6 months leading up to her passing. Comfort also showed signs of neglect upon her admission. As a result, the Appellant pleaded guilty to charges of murder, ill-treatment of a child x2 and injuring with intent to injure.

Procedural History

<u>High Court Sentencing</u>

16. In the Rotorua High Court, Lang J confirmed that the offending triggered s 104(1A))(h),[14] and proceeded to undertake the two-step process set out by *Williams.*[15] At the first stage in setting the nominal MPI, the Judge considered that the murder would ordinarily require a starting MPI of 18 years 6 months. However, factoring in the Appellant's guilty pleas, her genuine remorse and her "extraordinarily disadvantaged life"[16] including the "particularly abysmal" living arrangements in the months leading up to Comfort's death,[17] the MPI was reduced to 16 years 3 months.[18]

17. In the course of his sentencing remarks, the Judge accepted it was "really no surprise" that the Appellant offended in the way she did,[19] having regard to her personal circumstances and the stress which she was under in the leadup to the index offence. His Honour accepted that her life had been 'extraordinarily disadvantaged'[20] and that her circumstances in the lead up to the offending were 'particularly abysmal'.[21]

18. Nevertheless, this was insufficient to overcome the presumption. Lang J reiterated that manifest injustice required the Court to determine "whether, as a matter of overall impression, your offending is of a type to which Parliament

[14] Section 104(1)(g) as it then was.
[15] *R v Williams*, above n 7.
[16] High Court sentencing notes at [28]: SC Casebook p 27.
[17] At [30]: SC Casebook p 28.
[18] At [33]: SC Casebook p 28.
[19] At [32]: SC Casebook p 28.
[20] At [28]: SC Casebook p 27.
[21] At [30]: SC Casebook p 28.

intended s 104 to apply."[22] In circumstances where the offending involved "the systematic physical abuse and neglect of a young child who was completely defenceless and reliant on you for protection", the Judge considered this fell "squarely within the type of offending to which Parliament intended s 104 to apply".[23] Accordingly, the Appellant was sentenced to life imprisonment with a minimum term of 17 years.[24]

Court of Appeal Judgment

19. On appeal, it was contended that Lang J placed insufficient weight on the Appellant's personal circumstances and remorse in calculating the notional MPI. Not only did the Appellant's deprived background form part of the background to the offending, the information contained with various pre-sentence reports demonstrated that the Appellant was ill-equipped to deal with the stresses of life, particularly in the lead up to Comfort's death, which was characterised by "instability and dysfunction".[25]

20. The Court of Appeal did not consider there was sufficient correlation between these factors and the offending pointing towards diminished culpability. In doing so, the Court placed significant emphasis on the "sustained pattern" of abuse, and the fact that the Appellant only abused Comfort, indicative of a higher degree of agency.[26] A 17 year MPI was not found to be manifestly unjust, given this was "not a case where s 104 was engaged only peripherally", nor where culpability fell at the lower end of the range of cases falling under s 104.[27] Accordingly, the MPI of 17 years imposed by the High Court was upheld.[28]

21. The approved question is whether the Court of Appeal was correct to dismiss the appeal. Counsel have also been asked to specifically address the correct approach to manifest injustice under s 104(1A)(h).

Murder and 'Manifest Injustice'

22. In assessing how the language of manifest injustice should be applied in cases invoking s 104(1A)(h), it is useful first to consider how the safety valve in s 104 (and other cognate provisions) should be applied in general.

[22] At [34]: SC Casebook p 29.
[23] At [34]: SC Casebook p 29.
[24] On the three remaining charges, the Appellant was sentenced to 3 years' imprisonment for each.
[25] Court of Appeal judgment at [20]: SC Casebook p 14.
[26] At [30]: SC Casebook p 17.
[27] At [36]: SC Casebook p 19.
[28] At [37]: SC Casebook p 19.

History of the Murder Provisions

23. Until 1993, the sentence for Murder in New Zealand was mandatory.[29] While the period to be served before an offender could be considered for parole fluctuated,[30] Judges had no influence over the sentence imposed. In 1993,[31] courts were given the discretion to impose an MPI[32] greater than the statutory minimum of 10 years.[33] This discretion was limited to cases which were "*so exceptional*" that a MPI of more than 10 years is justified."[34]

24. In the years immediately following, around 20% of those convicted of murder received sentences of more than the statutory minimum.[35] This was criticised by the Court of Appeal in *R v Parsons*, where the Court observed that it did not reflect Parliament's intention,[36] and that exceptionality could not be applied so broadly.[37] Parliament responded by amending the 'exceptional' standard to a lower threshold of "sufficiently serious"[38] – effectively overturning *Parsons*. It is against this background that the Act was passed.

25. The Select Committee report provides insight into how the murder provisions were expected to operate in practice. In that report, the committee identified four categories. The first category, which was expected to be very small, was those cases where life imprisonment was inappropriate. The second category, expected to incorporate the vast majority of cases, was where life imprisonment was imposed together with a standard 10 year MPI. A third, somewhat smaller category, was cases where the Court would impose a higher minimum period, but less than 17 years. Finally, in a very small number of cases, which the Committee described as the *"worst of the worst"*, the 17 year minimum period would apply.[39]

26. In practice the distribution of sentences differed significantly from that which was anticipated. While very few cases were included in the first category, the

[29] Either the death penalty: Criminals Executions Act 1883; Crimes Act 1908, Capital Punishment Act 1950, or life imprisonment: Crimes Amendment Act 1941, s 2; Crimes Act 1961. The first time the legislation expressly recognised two sentences for the crime was in s 3 of the Capital Punishment Act 1950.
[30] *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [89].
[31] Criminal Justice Amendment Act 1993.
[32] Referred to at the time as a 'non-parole period'.
[33] Criminal Justice Amendment Act 1993, s 39.
[34] Section 39; Section 80(2) of the Criminal Justice Act 1985 as amended.
[35] *R v Parsons* [1996] 3 NZLR 129 (CA) at 131.
[36] At 131.
[37] At 131.
[38] Criminal Justice Amendment (No 2) Act 1999, s 2. This Act also introduced a mandatory 13 year MPI in cases involving home invasion – the first example of a formal aggravated murder category in New Zealand.
[39] Sentencing and Parole Reform Bill 2002 (148-2), select committee report at 8.

remaining three categories were much more evenly distributed.[40] More murderers received sentences of more than 10 years than received the standard MPI, while a third of those sentenced for murder were sentenced under the aggravated murder provision. The consequence was a success in part – MPIs imposed for murder were significantly longer – but also a failure in part as principles of proportionality and differentiation of sentences were undermined by the 17 year mandatory MPI under s 104.

27. Meanwhile, after an initial dearth of determinate sentences under s 102,[41] sentences short of life imprisonment, especially for young people, have become significantly more common since the 2023 decision in *Dickey v R*, which held that such a sentence should be considered in every case of a young person convicted of murder.[42] In the three years since that decision, more than a dozen further determinate sentences have been imposed under s 102.[43]

Different Approaches to Manifest Injustice

28. The language of manifest injustice now occurs more than 20 times in the Act, but in the murder context the two main uses are ss 102 and 104. Section 102 creates a presumption of life imprisonment for murder unless it would be manifestly unjust. Section 104 mandates a MPI no less than 17 years for aggravated murder unless it would be manifestly unjust. Within the framework of murder sentencing, manifest injustice has been found in at least four different ways:

    (a) First, by a categorical assessment, that the case is not one to which Parliament intended the particular presumption (life imprisonment, a 17 year MPI)

[40] Tim Conder "Murder Most Foul: An Analysis of the courts' approach to s 104 of the Sentencing Act 2002" [2015] NZ Law Review 355 at 384; this change is partly explained by the impact of the Sentencing Amendment Act 2004, but there were signs of such a shift even before that legislation came into effect.

[41] After the first such sentence was imposed in *R v Law* (2002) 19 CRNZ 500 (HC) less than four months after the Act received the Royal Assent, it was six years before another such sentence was imposed and by 2022 only 11 such sentences had been imposed: *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2008; *R v Wihongi* [2011] NZCA 592, [2012] 1 NZLR 775; *R v Rihia* [2012] NZHC 2720; *R v Nelson* [2012] NZHC 3570; *R v Innes* [2014] NZHC 2780; *R v Cunnard* [2014] NZCA 138; *R v Knox* [2016] NZHC 3136; *R v Lawrence* [2021] NZHC 2992; *R v Madams* [2017] NZHC 81; *R v Cole* [2017] NZHC 517. Notably, two of these defendants were later acquitted on appeal: *Baker v R* [2015] NZCA 306 and (indirectly) *McNaughton v R* [2013] NZCA 657.

[42] *Dickey v R*, above n 30 at [177].

[43] Not including the three defendants in *Dickey* itself: *R v TH* [2023] NZHC 630; *M (CA434/2022) v R* [2023] NZCA 319; *R v Yu* [2023] NZH 1391; *R v Faiers* [2023] NZHC 3368; *R v Richards* [2023] NZHC 3625; *R v Huntley* [2024] NZHC 182; *R v Dickason* [2024] NZHC 1704; *R v D* [2024] NZHC 2118 (2); *R v Ronaki* [2024] NZHC 3019; *R v Messervy* [2024] NZHC 3770; *R v McCarthy* [2025] NZHC 4039; *Lo v R* [2024] NZCA 359; *Taylor v R* [2025] NZCA 693.

should apply. This approach is typical, even necessary, under s 102,[44] but also occurs under s 104.[45]

(b) Second, by an overall assessment that the default penalty would be grossly disproportionate to the facts of the case. This can be seen most clearly in *Dickey*[46] and in earlier cases under s 86E.[47]

(c) Third, by a direct comparison between a notional sentence and the mandatory sentence, where the size of the disparity alone is seen as being manifestly unjust.[48]

(d) Fourth, where a mandatory sentence would silence a specific mitigating factor, resulting in treatment of a defendant that is plainly unfair.[49]

29. Most recently, the Court in *Dickey* conducted a review of the way in which 'manifest injustice' has been interpreted and arrived at the conclusion that the term has attracted a "generally consistent meaning" under the Act.[50] It requires that the instant case be "exceptional" in the sense that it justifies departure from legislative policy, though qualifying cases need not be rare. The injustice must be clear. Each case is to be assessed on its own merits, having regard to the full register of sentencing purposes, principles and factors.

'Manifest Injustice' under s 104

30. Section 104 of the Act mandates a sentence of life imprisonment with a default MPI of at least 17 years for cases of "aggravated murder", where particular aggravating factors exist. The presumptive minimum term under s 104(1) can only be avoided if it would be 'manifestly unjust'. This exception operates as a safety valve clause that allows a judge to override the mandatory sentence if that sentence is obviously and substantially disproportionate.[51] Section 104(1A)(h) will apply to the murder of a particularly vulnerable victim. The murder of children and young people consistently falls within this category.

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[44] *Dickey v R*, above n 30 at [194].

[45] See for example: *R v Ford* [2020] NZHC 2579. As to the reverse, see *Phillips v R* [2023] NZCA 588 at [29] where the fact that a case where s 104 was 'clearly engaged' meant that no notional MPI was required. Perhaps significantly, there are no examples under s 104(1A)(h) where the Court did not also have reference to a nominal MPI, except for those cases where manifest injustice was also found under s 102 (for example: *R v Dickason* [2024] NZHC 1704).

[46] *Dickey* above n 30, this point is implicit in much of the reasoning in that decision, but is made explicit at [203(d)].

[47] *Harrison and Turner v R* [2016] NZCA 381 at [106] – [107]; *Davis* [2019] NZCA 40, [2019] 3 NZLR 43 at [30].

[48] See, for example, *R v Williamson-Atkinson* [2024] NZHC 611 at [34].

[49] *R v Lackner* [2015] NZHC 690; *R v Fraser* HC Christchurch CIR-2009-061-244, 9 July 2009; *R v Terewa* HC Rotorua CRI-2009-087-2744, 19 February 2010.

[50] *Dickey v R*, above n 30 at [167].

[51] Tim Conder "Murder Most Foul: An Analysis of the courts' approach to s 104 of the Sentencing Act 2002" [2015] NZ Law Review 355 at 360.

31. The 2005 Court of Appeal decision of *R v Williams* remains the leading authority setting out the correct approach to sentencing under s 104.[52] Where s 104 is triggered, courts should undertake a two-step process.[53] First, determining what the appropriate nominal MPI is, but for the operation of s 104. Second, where that nominal MPI is less than 17 years, determine whether it would nevertheless be manifestly unjust to impose a minimum term of 17 years. As to the meaning of 'manifestly unjust', the Court held:

> [67] We conclude that a minimum term of 17 years will be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope of the legislative policy that murders with specified features are sufficiently serious to justify at least that term. That conclusion can be reached only if the circumstances of the offence and the offender are such that the case does not fall within the band of culpability of a qualifying murder…

32. Such cases, though exceptional, need not be rare.[54] The language of s 104 reflects a legislative intention to limit judicial discretion.[55] To that extent, the presence of mitigating factors under s 9(2) relating to the personal circumstances of an offender would rarely displace the presumption.[56] Powerful mitigating circumstances bearing on the offence are more likely to do so.[57]

The Problem – Forming an 'Overall Impression' In Practice

33. Notwithstanding an acknowledgment that cases meeting the test of 'manifestly unjust' are exceptional but need not be rare, a review of sentencing decisions captured by s 104(1A)(h) demonstrates that the threshold is rarely ever crossed except in cases involving youth or exceptional mental illness.

34. This general reluctance to impose an MPI less than 17 years where s 104(1A)(h) is triggered is at odds with the principle that the punishment should fit the crime.[58] This is a fundamental principle to the administration of justice.[59] So too, is the principle of consistency,[60] requiring that like cases be treated alike. As this Court said in *Berkland v R,*[61] "[t]he Sentencing Act's purposes and principles mandate individualised justice."[62]

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[52] *R v Williams,* above n 7.
[53] At [52]-[54].
[54] *R v Williams,* above n 7 at [67].
[55] *R v Williams,* above n 7 at [63] and [67].
[56] *R v Parrish* (2003) 21 CRNZ 571 (CA) at [21].
[57] At [21]
[58] *Williams*, above n 7 at [65].
[59] At [65].
[60] Sentencing Act 2002, s 8(1)(e).
[61] *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509.
[62] At [16(c)].

35. This problem stems from the existing phrasing of the test. A requirement to form an 'overall impression' of the offending is broad and unhelpful. It invites undue emphasis being placed on the quality or 'aggravating' feature of the murder committed without sufficient inquiry into relative seriousness or culpability. This is particularly problematic when it comes to offending captured by s 104(1A)(h) because of how it arises.

The Special Nature of s 104(1A)(h)

36. With two exceptions,[63] the nine factors that warrant inclusion under s 104 are facts about the quality of the murder itself. They are designed to reflect an element of the offending which inherently elevates its seriousness above that of a standard murder. These include murders involving multiple victims,[64] a high level of brutality, depravity or callousness,[65] and those with an element of home invasion.[66] In such instances it is the quality of the murder which places it into the aggravating category.

37. In contrast, under s 104(1A)(h), it is the identity or status of the victim which brings it into the aggravating category.[67] While prison and Police staff, and vulnerable people like children are undoubtedly worthy of special protection,[68] the fact that inclusion on these grounds relates to the status of the victim and not a decision of the offender inevitably means there is a risk that these factors become overinclusive.

38. Offending captured by s 104(1A)(h) will vary widely both in terms of the circumstances of the murder and the culpability of the offender. This causes an immediate tension.

39. On one hand, Parliament has expressly recognised that all murders of vulnerable victims are inherently serious and should attract a presumptive minimum term. This automatically captures any murder involving a child. At the same time, in passing the Act, Parliament expressly recognised that there are situations where the murder of a child by its mother is uniquely undeserving of serious punishment – and may require even a sentence of less than life imprisonment.[69] Likewise, the Crimes Act 1961 recognises that some cases that would otherwise qualify for

[63] Sentencing Act 2002, ss 104(1A)(g) and (h).
[64] Section 104(1A)(i).
[65] Section 104(1A)(e).
[66] Section 104(1A)(c).
[67] Section 104(1A)(g) applies where the victim was a constable or a prison officer acting in the course of their duty. The remaining exception is s 104(1A)(i), where it is the characteristic of the offender that triggers s 104. This will apply where the offender has previously been convicted of 2 or more counts of murder.
[68] A fact recognised throughout the Act, for example s 9A.
[69] *R v Albury-Thomson* (1998) 16 CRNZ 79.

aggravated murder, should instead be subject to a term of imprisonment not exceeding 3 years where a special verdict of infanticide is reached.[70]

40. For this reason, it is particularly important that the Court, in approaching manifest injustice under s 104(1A)(h), must consider whether the higher default penalty is truly warranted in every particular case. As currently formulated, judges are invited to consider the end sentence imposed as a matter of 'overall impression'. However, this makes it difficult for sentencing judges to look beyond the abhorrent nature of the offending. There are very few topics more prejudicial and distressing than the murder of innocent, defenceless victims – children in particular who are entirely reliant upon others for care and protection. While such offending is tragic, preventable and indeed must be strongly denunciated, the offender must receive individualised justice.[71]

41. In cases such as the present, 'overall impression' results in the evaluative assessment being overwhelmed by the vulnerability of the victim, and insufficient regard had for the offender's level of agency and moral culpability. Failing to break this process down into multiple evaluations – as is done in other sentencing contexts – elides a variety of different considerations and can result in sentences that do not reflect the unique circumstances of each case. This is inappropriate, especially when offending against vulnerable victims often occurs in the context of poor mental health or extenuating personal circumstances.[72]

<u>Result – Inconsistent Sentencing Outcomes</u>

42. As it stands, sentencing under s 104(1A)(h) continues to focus primarily on the aggravated categorisation of the murder. The presumptive minimum term has been applied strictly, with manifest injustice found only in very limited scenarios. As a result, identical sentences of life imprisonment with an MPI of 17 years are being imposed notwithstanding the overall gravity of the offence varying widely - a problem originally envisioned by the Court in *Williams*:[73]

> [64] …Applying the general rule rigidly would create anomalies because different levels of offending may attract the same minimum period of imprisonment (17 years) in some

[70] Crimes Act 1961, s 178 (Infanticide).
[71] *Berkland v R*, above n 61 at [16(c)].
[72] See for example – mercy killings, though in such cases the circumstances of the offending are usually so exceptional that MPIs of under 17 years are imposed, and often life sentences are displaced by determine sentences. See for example *R v Lawrence* [2021] NZHC 2992, where a finite sentence of 6 years 6 months' imprisonment imposed for a murder involving both brutality and vulnerability, involving the manual strangulation of a severely disabled daughter. That case involved elements of a "mercy killing" as well as the defendant's precarious emotional state caused by the pressures of caring for the victim, both of which contributed to the Judge's decision that it would be manifestly unjust to impose a sentence of life imprisonment.
[73] *R v Williams*, above n 7 at [64].

> situations. Ultimately, the court must do its best to make the legislation work, having regard to the ordinary meaning of the words used and the identified legislative purpose.

43. Take for example the following three cases, each involving very different circumstances but nevertheless attracting the same minimum term of 17 years.

44. *R v Paul* involved an offender who killed his partner's 14 month child with a single blow to the abdomen during an isolated violent outburst.[74]

45. *R v Barriball*[75] on the other hand involved the ongoing torture of a young child over a period of months. 5 year old Malachi Subecz was assaulted on an almost daily basis by his caregiver after being placed into her care.[76] Amongst other things, he was struck against a wall, held underwater while bathing, starved, locked outside, and burnt with scalding hot water. On the final occasion, Malachi was subjected to a "violent and brutal beating"[77] that was intended to kill him. There were no psychological or physiological explanations behind the offending.[78] Yet this case received an identical sentence to *Paul*.

46. The circumstances of the offending were again very different in *R v Lee*.[79] After losing her husband to cancer, Ms Lee had a breakdown. She was stricken with grief and developed a major depressive disorder.[80] She killed her two children aged 6 and 8 years old by giving them an overdose of prescriptive anti-depressant pill[s]. Their bodies were concealed in suitcases and left in a storage locker. Ms Lee then flew back to Korea. Notwithstanding a finding that the "tragic"[81] offending would not have occurred but for the offender's psychiatric condition,[82] the Judge did not consider it would be manifestly unjust to impose an MPI of 17 years. This was despite Ms Lee presenting with "profound psychological distress and an enduring sense of hopelessness", and "no desire for continued existence or life beyond incarceration",[83] and an order being made that she be detained as a special patient.[84]

47. The outcome of *R v Lee* is difficult to reconcile with *R v Dickason*,[85] an "unprecedented"[86] case of triple maternal filicide marked by striking factual

[74] *R v Paul* CA496/05, 1 August 2006.
[75] *R v Barriball* [2022] NZHC 1555.
[76] At [16].
[77] At [90].
[78] At [103].
[79] *R v Lee* [2025] NZHC 3630.
[80] At [17]-[19].
[81] At [7].
[82] At [48].
[83] At [21].
[84] At [59].
[85] *R v Dickason* [2024] NZHC 1704.
[86] At [36].

parallels, yet culminating in a markedly different sentencing outcome. Ms Dickason murdered her three young daughters through asphyxiation.[87] The offending was described as "the gravest of homicides",[88] but occurred against a backdrop of severe mental illness. At the time of the murders, Ms Dickason was suffering from a major depressive disorder which coincided with an acute mental breakdown.[89] Although the offending on its face constituted a "wicked crime",[90] Mander J considered the policy behind s 104 did not intend for the provision to apply to cases where the offender's psychiatric condition was "so predominant" to the offending, and concluded it would be manifestly unjust to impose an MPI of 17 years.[91] Ms Dickason ultimately received a finite sentence of 18 years' imprisonment with no non-parole period, and was detained as a special patient.[92]

48. These case examples demonstrate how the current approach prescribed by *Williams* is failing to achieve individualised justice, and carries a risk of misfiring in practice capturing an unintended subcategory of offenders, as illustrated by *Lee*. Whereas the manifest injustice exception was expressly created to remedy these injustices and filter such offenders out, the approach to date placing an emphasis on 'overall impression' has significantly hindered the courts' ability to invoke the safety valve clause. This requires correction.

A Tripartite Approach to 'Manifest Injustice'

49. The answer to these problems is to more closely mirror in the test for manifest injustice the kind of structured reasoning present in other sentencing contexts. Rather than approaching it as one general issue of 'overall impression', Counsel respectfully submits that manifest injustice should be considered in three steps. Imposing a 17 year MPI will be manifestly unjust in cases where:

    (i) The case does not fall within the category of murders contemplated by s 104, and the presumption is inappropriate (an inquiry focused on **gravity of the offence)**; or
    (ii) The 17 year MPI is a grossly disproportionate sentence (with comparison to step one), which does not reflect personal mitigating circumstances (an inquiry focused on the **circumstances of the offender**); or
    (iii) A 17 year MPI is unnecessary, having regard to all relevant principles and purposes of sentencing under ss 7 and 8 of the Act, as each case requires (a question of **individualised justice**).

[87] At [3].
[88] At [34].
[89] At [16].
[90] At [55].
[91] At [39].
[92] At [81].

50. Each of these limbs addresses a different way in which manifest injustice may arise, and assessing each stage ensures that all of the possible components of that injustice may be properly considered.

First Limb: Does This Case Fall Within the Category of Murders Contemplated by s 104?

51. The first limb focuses on gravity of the offence, which is informed by the circumstances surrounding the murder – including the culpability of the offender.

52. To give effect to the overriding purpose behind the enactment of s 104 intended to capture what the Select Committee described as murders "of the worst" kind,[93] the first stage should require courts to consider whether the murder it is presently dealing with truly fits that definition. That involves making a fund amental assessment about whether the murder is one that truly belongs at the most serious level, notwithstanding its 'aggravated' categorisation under s 104(1A)(h). This is an evaluative judgment, not an analytical one.[94]

53. Murders of children and vulnerable victims will always be inherently serious. However, within that same category of offences there will be some more serious than others.[95] Identifying the relative seriousness of each case against the spectrum of cases caught by s 104(1A)(h) is helpful in assessing whether a particular murder was intended to attract a 17 year MPI. A high presence aggravating features under s 9 of the Act such as planning and premeditation, breach of trust, heightened violence, the more difficult it will be to overturn the presumption under s 104.

54. On the other hand, where a murder is labelled as 'aggravated' due to a technicality only, this may lower the threshold that needs to be satisfied before 'manifest injustice' is established. An example of the latter might be a case of death resulting from a punch. The murder of an adult victim in such circumstances would unlikely trigger s 104. However, where that victim is a vulnerable child, this technicality brings it within the scope of s 104(1A)(h). Whilst the offending undoubtedly remains serious, its relative seriousness is lesser for example in comparison to a child who dies as a result of prolonged and extensive torture.

55. Relative seriousness should also be assessed with reference to the circumstances in which the victim's vulnerability has arisen. The starting presumption is that cases triggering s 104 are inherently more serious. Majority of the time, this will

[93] Sentencing and Parole Reform Bill 2002 (148-2), Select Committee Report at 8.
[94] *Regina v Howe* [1987] 1 AC 417 (HL) at 433. To similar effect, see the comments of Heath J in *R v Christison* [2013] NZHC 2813 at [37].
[95] Take for example *R v Barriball*, above n 75, involving the prolonged torture and physical and emotional abuse of a young boy spanning months. Compared to *R v Paul*, above n 74, involving an isolated assault resulting in immediate death.

hold. But sometimes it will not. For example, this presumption is inappropriate in cases where a mother is suffering from psychiatric illness, and her violence is driven by stress, deprivation and her own victimisation. To treat it as elevating the seriousness of the murder would be wrong in principle, particularly as offending under s 104(1A)(h) is often driven by an offender's circumstance, rather than disposition.[96]

56. In such cases, the Court should ask whether a victim's vulnerability is balanced (or explained) by factors underlying the offending. This was true in the *Dickason* case.[97] Likewise, where the vulnerability of the victim arises as a direct result of mitigating circumstances (eg. maternal mental health), this suggests it should not be treated as one of the most serious murders.

57. Such reasoning processes ensures consistency both with the partial defence of infanticide and with the approach under s 102. It would not be right to create a binary for mothers whose mental health either qualifies them for a determinate sentence (or a lesser charge) and those who otherwise suffer an automatic 17-year MPI. A middle ground must exist where the seriousness of the crime prohibits a determinate sentence, but nevertheless falls short of being one of the 'worst murders'.

58. This is particularly true given that the difference between infanticide and murder in this context will frequently be the presence of mental illness prior to pregnancy, which undermines one of the elements of the partial defence.[98] As Dr Dean noted in his fresh report, the effect of this is potentially to disadvantage women with social disadvantage,[99] which reinforces the clear injustice that would arise if such a binary were adopted.

59. Such an approach is also consistent with the approach taken to mental health discounts more generally, where mental illness that is causative of offending, typically has a greater impact on end sentence. This can be seen in the bipartite approach taken in *Berkland*.[100] In that decision, this Court was tasked with determining what degree of causal connection needed to be established before an offender could seek a discount for personal background. The judgment, given by Williams J, confirmed there were two different causative standards – "causative contribution" and "proximate" or "operative" cause.[101]

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[96] See for example the 'mercy killings' category of cases, and cases of infanticide.
[97] *R v Dickason*, above n 85 at [56].
[98] Psychiatric Report of Dr Dean at [43].
[99] At [46].
[100] *Berkland v R*, above n 61.
[101] At [107].

60. Causative contribution is a lower, less direct standard.[102] It captures background factors that are "more diffuse drivers" or "intergenerational sources of offending" – factors which provide rational explanations as to why an offender has come to offend.[103] In contrast is the stricter standard of "operative" or "proximate" cause. This is where a direct causative link can be established, and is a high bar.[104]

61. In Counsel's submission, where this enhanced level of causation can be established, that is likely to support a finding that the case is not one that falls within the category of the 'worst murders', and so applying the presumption would prove manifestly unjust. This was the case in *Dickason* where Mander J observed when sentencing Ms Dickason, s 104 cannot have been intended to apply to offending which "at its root involves the dire mental breakdown of the offender."[105]

62. Another way to implement the different standards is to apply a 'but-for' test. Where an offender would not have killed but for their mental illness or psychological impairment, the gravity of the offence is dramatically reduced, and the presumptive term under s 104(1A)(h) should give way to an MPI that appropriately reflects their reduced culpability. Such exceptional cases are anticipated to arise most commonly where issues of insanity and/or infanticide are raised. However, this is not an exclusive, restricted category.[106]

63. Child abuse and murder occur in a range of contexts – the majority which have no connection to maternal mental health. In these cases, the category of aggravated murder is precisely correct, and application of the revised approach suggested by the Appellant will also reach the same conclusion.

<u>*Second Limb*: Does a 17 year MPI Sufficiently Account for Personal Mitigating Factors?</u>

64. This second limb asks whether the default MPI of 17 years suppresses discounts for personal factors that results in an unjust outcome. This focuses on the circumstances of the offender.

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[102] At [107].
[103] At [109].
[104] At [109].
[105] *R v Dickason*, above n 85 at [55].
[106] The legal definition of infanticide under s 178 of the Crimes Act 1961 means its availability will extend only to a small fraction of offenders whose initial onset of symptoms can be traced directly to childbirth or lactation. Consequently, the defence is more likely to avail itself to women of privilege who have never struggled with a pre-existing mental disorder, or have had the ability to receive appropriate treatment.. On the other hand, mothers like the Appellant who have suffered social deprivation and had their existing psychiatric symptoms exacerbated by childbirth can be unfairly disadvantaged, a concern noted by Dr Dean.

65. The inquiry into this limb may inevitably involve some overlap with the first limb, where a personal factor may be relevant to both gravity and personal circumstances. However, it is more likely to capture cases where it is the second stage of the *Moses* assessment that leads to an MPI out of step with that required by s 103. Hence, It is in this step that a comparison with the nominal MPI will be the most relevant.

66. Two factors commonly recognised as having the ability to reduce culpability are age and mental illness.[107] Recently, the Court of Appeal in *Dickey* observed that youth can be a significant consideration capable of overturning the presumption in favour of life imprisonment under s 102. Prior to that, the same Court *in R v Rapira* said that while youth is a factor to be taken into account, it would not be a sufficient reason in itself to render a life sentence manifestly unjust, and carries "little weight".[108] *Dickey* recognised the need for a more flexible approach[109] due to the growing body of scientific research highlighting significant neurological differences between young people and adults which, as accepted in *Churchward v R*, have an impact on higher-order executive functioning.[110]

67. A growing body of authority also reflects the importance of mental illness in a sentencing context.[111] But an offender with poor mental health will not always attract diminished culpability. As this Court has observed, there "will always be connections between the different dimensions of an offender's background and their choice to offend, although the nature and strength of those connections will vary".[112] And returning to the legislative intent behind s 104, the presumptive minimum term is unlikely to be displaced unless there are powerful mitigating circumstances bearing on the offence.[113] Thus, psychological or physiological factors which have limited connection with the offending must be distinguished from those with a compelling, causative nexus.

68. Where the contribution from mental illness is contributory, rather than causative, that will typically sound in this stage of the test. In *Berkland* the Court accepted that some reduction may be appropriate even if cases of causative contribution, [114] but in these cases the effect of mental illness will be to reduce the nominal sentence that might apply, increasing the chance that the mandatory sentence will be grossly disproportionate.

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[107] *Berkland v R*, above n 61 at [91].

[108] *R v Rapira* [2003] 3 NZLR 794, (2003) 20 CRNZ 396 (CA) at 828.

[109] At [171].

[110] See *Dickey*, above n 30 at [86], citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446.

[111] For example *L v R* [2019] NZCA 676; *E (CA689/10) v R* [2011] NZCA 13, (2011) 25 CRNZ 411; *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412.

[112] *Berkland v R*, above n 61 at [107].

[113] *R* v *Williams*, above n 7 at [66], citing *Parrish*, above n 56 at [21].

[114] At [109].

69. Even where mental illness is not a proximate cause in s 104(1A)(h) being triggered and does not substantially alter culpability, there may be cases which nevertheless result in a finding that a particular sentence is manifestly unjust. However, in these cases the comparison to a nominal sentence that would apply without s 104 is likely to be significantly more important. The higher the absolute difference, the more indicative it is that the presumptive term should give way.[115]

Third Limb: Is a 17 year MPI Necessary to Meet the Purposes and Principles of Sentencing?

70. The third and final inquiry is whether the 17 year MPI is necessary to meet all relevant purposes and principles of sentencing. This is a question of individualised justice.

71. This step is required because another consequence of the approach taken under s 104 has been to focus the Court's assessment on the factors included in s 103(2) of the Act (which emphasises the seriousness of the offending)[116] to the exclusion of broader purposes and principles generally. This is notwithstanding the requirement that manifest injustice be assessed with reference to "the full register" of sentencing purposes and principles under ss 7, 8 and 9 of the Act – a directive that has been repeatedly emphasised by the Court of Appeal.[117]

72. Section 7 of the Act contains a list of sentencing purposes with no particular priority.[118] Often, these purposes can pull in different directions.[119]

73. Section 8 provides a list of mandatory relevant principles of sentencing for the court, including specific directives in relation to the application of maximum penalties,[120] and conversely, to impose the "least restrictive" outcome.[121] Under s 8(1)(a), the Court "must take into account the gravity of the offending in the

[115] This is consistent with the process of identifying whether imposition of the maximum penalty for a third strike offence under (the former) s 86D would be 'disproportionately severe' under s 9 of the NZBORA – see for example: *Phillips v R* [2021] NZCA 651. At [22]-[28], one of the relevant factors identified by the Court of Appeal was "The difference between any prison sentence that would have been imposed but for the three strikes regime and the prison sentence imposed pursuant to s 86D(2). This may involve more than the multiplicative difference between the two sentences. It may also be necessary to take into account the actual difference in years between the sentence imposed and that which would otherwise have been adopted but for the three strikes regime." See also *Sheers v R* [2022] NZCA 618, where in light of the "degree of disparity in the sentence" and the defendant's FASD, the Court considered that the 11 year disparity in the sentence that would have otherwise been imposed but for the three strikes regime resulted in a disproportionately severe outcome. The sentence of 14 years' imprisonment was substituted with a sentence of 3 years' imprisonment.

[116] Court of Appeal judgment at [26]: SC p 16.

[117] See *R v Rapira*, above n 108 at [121]; *Dickey v R,* above n 30 at [103].

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

[119] *Berkland v R*, above n 61 at [19].

[120] Section 8(1)(b)-(d).

[121] Section 8(1)(g).

particular case, including the degree of culpability of the offender". The principle of consistency is also emphasised by s 8(1)(e), but this must be balanced against a full evaluation of the circumstances "to achieve justice in the individual case".[122]

74. A review of sentencing decisions carried out by the Appellant demonstrates that judges do not always weigh up competing purposes and principles. The importance of doing so becomes especially pertinent when dealing with cases under s 104(1A)(h), especially as they relate to children. Murders of children are frequently driven by circumstance, rather than propensity. Offenders within this category can often trigger different sentencing objectives and present with different risk profiles compared to the average convicted murderer.

75. In cases like the Appellant's involving causative mental illness, the need for the standard purposes of accountability, denunciation, deterrence, and community protection are often reduced.[123] On the other hand, a sentence which promotes the offender's rehabilitation and reintegration may become a more pressing objective.[124] The relative hierarchy of sentencing purposes will vary on a case by case basis.

76. Although appellate courts have continually reinforced the importance of taking into account "the full register of sentencing principles, purposes and factors",[125] in practice this has not been strictly adhered to as an absolute rule. Cases examined by the Appellant demonstrate that where purposes and principles beyond those specified under s 103 of the Act are expressly factored into the consideration, sentencing judges are more willing to arrive at a conclusion that a 17 year minimum term is manifestly unjust under s 104(1A)(h).

77. In *R v Smith*,[126] the offender strangled her 13 year old granddaughter using a cable tie after luring her into a sleepout on the property. Ms Smith was severely depressed. On the day in question, she reached a tipping point.[127] Ms Smith had no previous convictions. Ms Smith was the sole carer for her three grandchildren, all whom suffered behavioural and psychological issues. Up until the offending she had been a committed grandmother. She posed a low risk of reoffending.[128]

78. Notwithstanding the deliberate and distressing nature of the killing, the Court of Appeal was sympathetic towards Ms Smith's personal circumstances, recognising

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[122] *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [38].
[123] *Orchard v R* [2019] NZCA 529, [2020] 2 NZLR 37 at [46] and [48].
[124] Sentencing Act 2002, s 7(1)(h).
[125] *R v Rapira*, above n 108 at [121]; *Dickey v R,* above n 30 at [195]; *Van Hemert v R*, above n 111 at [62] and [80].
[126] *R v Smith* [2021] NZCA 318.
[127] At [4].
[128] At [49].

the vulnerable psychological state[129] she was in at the time undermined her ability to respond appropriately when challenged by the victim.[130] The Court considered that such personal circumstances warranted a "compassionate response",[131] and had no hesitation in concluding that a minimum term of 17 years would be manifestly unjust.[132] A key consideration was the fact that Ms Smith did not pose any risk to others in society (s 7(1)(g)).[133] The other was her profound remorse (s 9(2)(f)).[134] She received a sentence of life imprisonment with an MPI of 10 years.[135]

79. A similar conclusion, albeit different outcome,[136] was arrived at in *Dickason*.[137] Relevant purposes and principles in this case included Ms Dickason's rehabilitation and reintegration, the gravity of the offending, her degree of culpability, imposition of the least restrictive outcome, and her particular circumstances."[138] In concluding it would be manifestly unjust to impose a minimum term of 17 years, Mander J observed that the purposes listed in s 103 were less relevant due to the overwhelming effect of her mental illness.[139]

80. Other examples of this can be gleaned from *R v Wilson*,[140] *R v Ellery*[141] and *R v Wakefield*.[142] On each occasion a MPI of less than 17 years was imposed where specific regard was had to the offender's rehabilitative needs.

81. In contrast, Ms Lee who killed her two children was sentenced without reference to countervailing sentencing considerations.[143] Her personal circumstances were exceptional. Like Ms Smith, she had been a good mother up until the offending, was a pro-social member of society with no previous convictions, and posed

[129] At [56].
[130] At [49].
[131] At [50].
[132] At [49].
[133] At [49(b)].
[134] At [49(c)].
[135] At [60].
[136] Finite sentence of 18 years with no MPI. Contrasted with *R v Smith*, above n 126 which resulted in life imprisonment and a MPI of 10 years.
[137] *R v Dickason*, above n 85..
[138] At [34].
[139] At [56].
[140] *R v Wilson* [2023] NZHC 2640. The Court recognised that the sentence imposed must "denounce your conduct; deter you and others from committing similar offending; but also assist in your rehabilitation and reintegration" – at [41]. In finding it would be manifestly unjust to impose the 17 year MPI, the Court noted the defendant had "relatively good" prospects for rehabilitation notwithstanding his continued denials of the offending. Nominal MPI of 15 years imposed.
[141] *R v Ellery* [2013] NZHC 2609. Relevant purposes of sentencing not only to hold the offender accountable, denounce her conduct, serve as a deterrence, and protect the community, but also to assist in her rehabilitation and re-integration. Judge also careful not to impose a crushing sentence at [20]. MPI of 13 years 6 months.
[142] *R v Wakefield* [2019] NZHC 1629. An MPI of 14 years 9 months was imposed where the community interests towards Mr Wakefield's rehabilitation was specifically recognised at [35].
[143] *R v Lee,* above n 79.

virtually no risk of re-offending. Notwithstanding all this, and a recognition by the sentencing Judge that Ms Lee presented with "an enduring sense of hopelessness",[144] a crushing sentence of life imprisonment with a minimum term of 17 years was imposed. There was no reference to other broader purposes and principles.

82. It is respectfully submitted that failure to consider all relevant sentencing objectives and principles can result in manifestly unjust outcomes. Hence, it should be expressly considered as part of the s 104 assessment.

83. The critical question under this limb is whether the purposes and principles of sentencing can be met by the nominal MPI identified at the first stage of the *Williams* methodology.[145] Extending an offender's non-parole period where doing so does not serve any utility in furthering the principles and purposes of sentencing is an unjustified response, contrary to the requirement to impose the least restrictive outcome as mandated by s 8(g) of the Act. Arguably, it would also be in breach of s 9 of the New Zealand Bill of Rights Act 1990, which guarantees against disproportionately severe treatment.

84. This final step involving a need to examine the full range of sentencing objectives ensures the final MPI remains proportionate and justified under the Sentencing Act more broadly.

Conclusion on Revised Approach to 'Manifest Injustice'

85. As said in *Dickey,* the sentencing analysis should always begin with the gravity of the offending and culpability of the offender.[146] Expanding the current approach under *Williams* to expressly consider the ways in which gravity, personal circumstances and overall sentencing objectives can lead to manifest injustice means that the approach to sentencing serious murder will more closely align with sentencing generally.

86. Separating these factors out in this way maintains the purpose of s 104 in addressing the most serious cases of murder, while avoiding disproportionate outcomes. It is similar to the approach under *Taueki*[147] and *Moses*,[148] which provides a structure to determinate sentencing and ensures that outcomes can be consistent and can properly reflect what justice requires in a particular case.

[144] At [21].
[145] *R v Williams*, above n 7.
[146] *Dickey v R*, above n 30 at [171].
[147] *R v Taueki* [2005] 3 NZLR 372 (CA).
[148] *Moses v R* [2020] NZCA 296.

More importantly, it ensures that both personal and offence characteristics are considered fully. [149] .

The Present Appeal

87. A correct application of the reformulated tripartite approach endorsed by the Appellant will reveal that the Court of Appeal erred in dismissing Ms Thompson's sentence appeal.

Errors in the Court of Appeal

88. At the core of the Court of Appeal's decision was rejection of the submission that the Appellant's offending was fundamentally driven by her mitigating background, in particular her mental state at the time of the offending.[150] Although the Court accepted some causal nexus between the Appellant's background and the culpability of her offending, it considered "the linkage is not as strong as in some other cases".[151]

89. This was contrary to the a pre-sentence psychological report prepared by Dr Ingalise Jensen dated 18 April 2022,[152] which casted the offending in a completely different light. Dr Jensen, in reference to an earlier psychiatric evaluation carried out by Dr Peter Dean in November 2020, noted that the Appellant had been diagnosed with a persistent depressive disorder and PTSD.[153] Although the Appellant had struggled with intermittent periods of low mood as an adolescent and adult,[154] it was not until the birth of her third child that her symptoms dramatically plummeted. Prior to that, the Appellant recalled that "everything was good… [Comfort] was fed, she was clean, I never hit her… I never struggled with her for first year of life".[155]

90. In terms of the causal relationship with the Appellant's background and mental health, Dr Jensen considered that while she could not definitively point to a directly causative role, the Appellant's mental health difficulties "had a significant impact":[156]

[149] See *Van Hemert v R*, above n 111 at [57].
[150] Court of Appeal judgment at [27]-[37]: SC Casebook p 16-17.
[151] At [30]: SC Casebook p 17.
[152] Psychological Report of Dr Jensen: CA Casebook p 197.
[153] At [36]: CA Casebook p 202, referring to a psychiatric review conducted by Dr Peter Dean in November 2020 – see SC Casebook p 40-47.
[154] At [34]: CA Casebook p 201.
[155] At [48]: CA Casebook p 203.
[156] At [114]-[115]: CA Casebook p 214-215.

> 114. This childhood also had a significant impact on Ms Thompson's mental health and by adulthood, she was experiencing symptoms of PTSD and episodic episodes of low mood. Her own description suggests that she was dependent on alcohol and she was also abusing other substances. While her alcohol abuse would have to some extent masked her other mental health issues, it appears that that she was experiencing symptoms of depression at the time of the index offending. It's also likely that her complex PTSD impacted on her day-to-day functioning as well.
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> 115. While it's unclear if her mental health difficulties had a causative role in her offending, in my opinion they had a significant impact. Ms Thompson described irritability, feeling overwhelmed, withdrawal from others, impaired decision making and fatigue. All of these were significant destabilisers with regards to how she interacted with others including her own children and in particular Comfort. Over time, her ability to reality test diminished as did her judgment with regards to seeking help and providing her children with a safe and loving family environment.

91. Despite the extent of her mental impairment, the Court of Appeal did not refer to this at any stage throughout its judgment, and instead, focused primarily on the "violent, cruel and brutal" nature of the crime.[157]

92. Further, the Court of Appeal observed that Ms Thompson's offending did not involve a one-off incident, and demonstrated a prior ongoing course of conduct.[158] Additionally, the Court relied on the disparity in treatment received by Comfort in comparison to her siblings. Significant emphasis was placed on this aspect of the offending, taken as evidence of a "higher degree of agency" exercised by the Appellant,[159] compared to a homicide "resulting from a one-off angry outburst by an offender with poor impulse control."[160] But again, this was at odds with the medical evidence which provided a psychological explanation for her conduct.

93. As noted by Dr Jensen, Ms Thompson was less bonded to Comfort in comparison to her other children.[161] Moreover, Comfort fell victim to most of the abuse due to her developmental stage in combination with the Appellant's psychological want to exert control over her child,[162] stemming in part from her perception that other adults within the household may have been sexually abusing her children.[163] This psychological link, which in fact pointed towards diminished agency and freedom of rational choice, was similarly overlooked by the Court of Appeal.

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[157] Court of Appeal judgment at [36], citing *R v Leuta* [2002] 1 NZLR 215 (CA): SC Casebook p 19.
[158] At [27]: SC Casebook p 16.
[159] At [30]: SC Casebook p 17.
[160] Ibid.
[161] Psychological Report of Dr Jensen at [117]: CA Casebook p 215.
[162] Ibid.
[163] At [118]: CA Casebook p 215.

Fresh Evidence – Psychiatric Report of Dr Peter Dean

94. In support of her appeal, Ms Thompson seeks leave to adduce a further report from forensic psychiatrist Dr Peter Dean dated 2 November 2025.[164] Dr Dean was originally consulted prior to trial and asked to consider whether the Appellant met the criteria for a defence of infanticide.[165] Whilst he diagnosed her with PTSD and a persistent depressive disorder,[166] Dr Dean could not attribute her mental disorder and psychological responses to the effects of childbirth or lactation.[167] Therefore, in his opinion, the partial defence of infanticide would not be available.[168]

95. For the purposes of this appeal, Dr Dean was asked to consider any additional mental health matters that might be relevant and of assistance to the Court.[169]

96. His report provides further insight into Ms Thompson's mental state at the time of the offending. Even now, Ms Thompson still struggled to understand why she had been abusive towards Comfort. She recalled a time where she loved her daughter and was not physically abusing her.[170] She felt she had done well with childcare duties other than with her daughter up until the birth of her son.[171] This was consistent with what she had previously told both Dr Dean and Dr Jensen. But everything changed after her son was born. As Ms Thompson described to Dr Dean:[172]

> 30. After her son was born, her attitude toward Comfort changed. She noted that Comfort was quite intrusive toward the baby and had inadvertently scratched him. She did not want her to be near the baby and tried to keep them separated. She became focused on keeping a constant eye on her son. She felt this got in the way of basic self-care, such as showering and keeping the home clean. She had been low in mood, but her low mood intensified after the birth of her son. She was struggling to sleep. She felt exhausted and was lacking in motivation. She described smoking cannabis in an attempt to calm her mood. She was providing care to her siblings' children and trying to keep her daughter from them too. There was family conflict, and she was struggling financially.
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> 31. Ms Thompson said she first started pushing her daughter away to protect her baby and the other children. She could not recall when the physical abuse began to escalate. She reported she had hit her eldest son on a few occasions, although generally pushed him away rather than struck him. She said that she had begun to slap Comfort. She did not feel anything when she hit Comfort and felt disconnected from her emotional response. She did not feel

[164] Psychiatric Report of Dr Peter Dean, 2 November 2025.
[165] See Psychiatric Report of Dr Peter Dean dated 16 December 2020: SC Casebook p 40-47.
[166] SC Casebook p 46.
[167] SC Casebook p 46.
[168] SC Casebook p 46.
[169] Psychiatric Report of Dr Peter Dean, 2 November 2025 at [2].
[170] At [28].
[171] At [28] and [30].
[172] At [30]-[32].

> compelled to comfort her when she was distressed. Her daughter rarely cried, and Ms Thompson felt this was evidence of her being deliberately defiant.
>
> 32. Ms Thompson reported she was in shock and disbelief when her daughter passed away. Comfort's passing did not hit her until she attended her funeral. She said she felt overwhelmed and "maybe delusional", as she tried to believe she was still alive and would come home from hospital.

97. Dr Dean's opinions did not materially differ from his original conclusions, nor the earlier findings of Dr Jensen. Dr Dean now considered that in conjunction with PTSD and a persistent depressive disorder, Ms Thompson also exhibited features of alcohol dependence and cannabis and methamphetamine use disorder at the time of the offending.[173] Her description of experiencing bio-vegetative symptoms of depression around the birth of her third child was "consistent with major depressive disorder superimposed on persistent depressive disorder, in the perinatal period".[174]

98. At the time of the first assessment, Dr Dean considered Ms Thompson may have "underplayed" the extent of her increased depressive symptoms following pregnancy and delivery.[175] Now, Dr Dean opined that it was "possible, if not likely, Ms Thompson's depressive disorder was exacerbated by childbirth." To that end, Dr Dean went further than Dr Jensen in drawing a correlation between Ms Thompson's psychiatric decline and the birth of her son.

99. As for the question of agency, again, in light of the supplementary information provided by Ms Thompson, Dr Dean has gone further than Dr Jensen and opined that Ms Thompson's selective offending against one child could be traced back to her abnormal psychological functioning at the time:[176]

> "…. She struggled to form a strong bond, being separated during a period of early maternal bonding, and she could not breastfeed Comfort. This lack of bonding likely resulted in her misinterpreting Comfort's behaviour as being deliberate and wilful, and in need of punishment. She believed Comfort was targeting her other children and reinforced her cognitive distortion…"

<u>Admissibility</u>

100. Section 335 of the Criminal Procedure Act 2011 (**the CPA**) provides a special power for appellate courts hearing appeals against sentence or conviction to accept further evidence on appeal. As the Privy Council confirmed in *Lundy v R*, the evidence must be fresh, credible and cogent to be admitted.[177]

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[173] At [38].
[174] At [40].
[175] At [45].
[176] At [47].
[177] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at 120.

101. The provenance of Dr Dean's report, and the freshness of it, is captured in the evidence itself. As Dr Dean records, Ms Thompson continues to struggle to understand her own behaviour.[178] Her account has changed over time, and it appears her earlier reports 'underplayed' the impact of her mental state.[179] The evidence could not reasonably have been provided earlier – because Ms Thompson's ability to engage with the clinical process has changed over time.

102. The evidence is cogent in that it provides the Court with the most detailed insight into Ms Thompson's condition at the time of the offending and the manner in which it may have contributed to what occurred. It expands on and assists in the understanding of Dr Dean's earlier report and is based on disclosures and self-reflection that Ms Thompson has recently been able to provide. To determine the question of manifest injustice without reference to this report would result in a miscarriage of justice. Accordingly, it should be received.

Is a 17 Year MPI Manifestly Unjust for Ms Thompson?

Williams Step One: What is the notional MPI?

103. In the High Court, Lang J took a notional starting point of 18 and a half years' imprisonment for Ms Thompson's offending having regard to the aggravating features present. An effective 12% discount was then applied, comprising of 9 months for Ms Thompson's guilty pleas, 12 months for her background factors, and 6 months for remorse, bringing the nominal MPI under s 103 to 16 years and 3 months' imprisonment. These figures were undisturbed on appeal.[180]

104. The Appellant submits this notional MPI did not adequately reflect her reduced culpability in the face of serious mental illness, which was causative of the offending. The medical evidence of both Dr Jensen and Dr Dean makes clear that Ms Thompson's psychiatric disorder played a clear role behind her offending.

105. Whilst it is true that the Appellant displayed other characteristics (eg. alcohol and methamphetamine abuse) in addition to mental health difficulties, it is possible to attribute her offending directly to her psychiatric deterioration because this represented the only factor which materially changed between Ms Thompson being a good mother, and her subsequent (and somewhat unexplained) transformation into a short-tempered, emotionally dysregulated parent. Indeed, as Dr Dean considers, it is possible a partial defence of infanticide might have been available to Ms Thompson, had she not had pre-existing symptoms of a

[178] Psychiatric Report of Dr Peter Dean, 2 November 2025 at [28].
[179] At [45].
[180] Court of Appeal judgment at [31]: SC Casebook p 17.

mental disorder prior to childbirth.[181] Although precluded from relying on the defence, it serves as cogent evidence of heavily diminished responsibility.

106. Thus, the Court of Appeal was wrong in finding that the Appellant did not demonstrate impaired agency. Her major depressive disorder and symptoms of PTSD operated together as "significant destabilisers" with regards to her interactions with her children, diminishing her ability to reality test, and reducing her judgment.[182]

107. Like the offenders in *R v Harrison-Taylor*[183] and *Smith,*[184] the Appellant's mental illness made her more vulnerable to stress and less able to cope in stressful situations. Ms Thompson was already highly disadvantaged by her deprived upbringing, leaving her ill-equipped and inadequately supported in her role as a parent. [185] From an early age, she developed maladaptive coping mechanisms and struggled with emotional regulation.[186] The final layer of complex mental illness was then superimposed upon those existing vulnerabilities.

108. But for the steep downturn in her mental state around the beginning of 2018 (which coincides with the start of the offending period), the mistreatment against Comfort ultimately resulting in her tragic death would not have occurred. Had the extent of Ms Thompson's diminished culpability been properly factored into both the nominal starting point under s 103, and the appropriate discounts from that figure for personal mitigating factors, the Appellant respectfully submits the Court would have arrived at a nominal MPI of 12 to 13 years.

109. This places the gravity of the offending and culpability of Ms Thompson: slightly higher than the first-time offender in *R v Smith*[187] (10 year MPI) who, whilst suffering from a mental breakdown that placed her "in a vulnerable psychological state",[188] deliberately killed her 13 year old granddaughter; but lower than the "harsh disciplinarian"[189] in *R v Cooper*[190] (14 year 6 month MPI) who recklessly murdered her almost 3-year-old grandson against "mounting stress levels, frustration and anger" by throwing him down a hallway, causing a non-survivable brain injury.[191]

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[181] Psychiatric Report of Dr Peter Dean, 2 November 2025 at [45]-[46].
[182] Psychological Report of Dr Jensen at [115]: CA Casebook p 215.
[183] *R v Harrison-Taylor* HC Auckland CRI-2004-092-001510, 12 September 2005.
[184] *R v Smith,* above n 126.
[185] Psychological Report of Dr Jensen at [109]: CA Casebook p 214.
[186] At [108]: CA Casebook p 214.
[187] *R v Smith,* above n 126.
[188] At [56].
[189] *R v Cooper* [2017] NZHC 2498 at [31] and [37].
[190] Ibid.
[191] At [24].

110. A nominal 12 year MPI reflects both the objectively appalling circumstances of the offending itself, whilst simultaneously acknowledging that Ms Thompson's mental illness was at the heart of her inexplicable behaviour towards Comfort.

Williams Step Two: Is a 17 year MPI Manifestly Unjust?

(a) Does this case fall within the category of murders contemplated by s 104?

111. Ms Thompson's diminished culpability does not make this one of the most serious murders contemplated through the enactment of s 104. There is no suggestion that Comfort's murder was anything but abhorrent in nature. There were a myriad of aggravating features, identified in the High Court as including the seriousness of the charge, the abuse and neglect taking place over several months, the gross breach of trust, Comfort's particular vulnerability, and the "devastating" impact of the offending on the family.[192] But the overall gravity must be assessed with reference to culpability.

112. Ms Thompson's reduced agency is relevant to this part of the inquiry as her actions are heavily mitigated by the mental impairment she was suffering at the time. The Court of Appeal wrongly emphasised the "sustained pattern of neglect and abuse"[193] when assessing culpability with insufficient attention paid to why or how the extended period of offending came to be. In particular, the Court ignored the fact that underlying all offences was the same mental impairment. The fact that Ms Thompson's offending was not limited to a single incident cannot automatically render her more culpable in such circumstances, and this was a notable error in the lower Court's reasonings.

113. Similarly, the Court placed undue (and unwarranted) emphasis on the fact that the Appellant was only abusive towards Comfort. As both Dr Jensen and Dr Dean have explained, the reasons behind the differential treatment can be explained by other factors. Again, this should not have been interpreted as increasing agency.[194]

114. Notwithstanding the adversities and deprivation Ms Thompson experienced in her childhood and adolescence, she was in all respects a good parent to her children up until the birth of her son in January 2018. Her mental health rapidly plummeted following childbirth, and against a history of depression and PTSD, her psychiatric symptoms worsened considerably. The offending against Comfort coincided with this deterioration, therefore pointing to a clear causative link capable of meeting the "operative" or "proximate" standard. But for the extent

[192] High Court sentencing notes at [11]-[13]: SC Casebook p 22-23.
[193] Court of Appeal judgment at [30]: SC Casebook p 17.
[194] Court of Appeal judgment at [30]: SC Casebook p 17.

of Ms Thompson's mental impairment, which must be considered against her deprived background, this offending would not have occurred.

115. The reality is that the whole of the offending – and the aggravating characteristics it displays – were direct consequences of her mental illness. The case is not one Parliament would have anticipated being one of the most serious kinds of murder. To treat it as so is manifestly unjust.

(b) Does a 17 year MPI sufficiently account for personal mitigating factors?

116. For largely the same reasons, even if mental illness is considered only by way of a discount to the applicable MPI, the disconnect between the nominal MPI that should be imposed (12 years, not 17) demonstrates that the sentence itself is so disproportionate as to be manifestly unjust. A 17 year MPI fails to recognise Ms Thompson's personal mitigating factors, in particular her mental health.

(c) Is a 17 year MPI necessary to meet the purposes and principles of sentencing?

117. Relevant purposes of sentencing in this case include the standard purposes of denunciation, deterrence, accountability and community protection – the four considerations expressly listed under s 103(2) of the Act. But additionally, the sentence should, where possible, assist in Ms Thompson's rehabilitation and reintegration.[195] Important principles of sentencing include the need to take into account the gravity of the offending (including the offender's culpability), the general desirability of consistency with similar cases, and the need to impose the least restrictive outcome appropriate in the circumstances.

118. In the Court of Appeal, none of these countervailing considerations were considered. The Court instead focused on s 103(2), which it considered "signal[ed] Parliament's intention that the seriousness of the offending is to be the focus when setting an MPI for murder".[196] This constituted a significant omission.

119. In the present case, the need for deterrence and denunciation is substantially diminished by Ms Thompson's complete acceptance of responsibility for her offending and her palpable, demonstrable expressions of regret and remorse. Even at the most recent assessment with Dr Dean some seven years after Comfort's death, Ms Thompson was at times tearful and "expressed considerable remorse for the events leading to her imprisonment".[197] Additionally, the offending occurred against a very unique set of circumstances where mental

[195] Sentencing Act, s 7(1)(h).
[196] At [26]: SC Casebook p 16.
[197] Psychiatric Report of Dr Peter Dean, 2 November 2025 at [27].

health played a primary role. This substantially reduces the need for a lengthy minimum term.

120. Additionally, Ms Thompson does not realistically pose a safety risk to the community. Whilst she does have some previous violence-related convictions, they are of a lower level and predominantly historic, dating back to offending in the Youth Court.[198] Whilst Dr Jensen considered that Ms Thompson posed "a moderate risk of future violent offending in the community",[199] her likelihood of reoffending against children is limited by the fact she has no access to her children.[200] The pre-sentence report reached a similar conclusion: Ms Thompson's likelihood of re-offending is "low".[201]

121. In circumstances where many of the purposes of sentencing are substantially qualified, if not entirely displaced, by Ms Thompson's personal circumstances, the imposition of a lengthy minimum term is neither necessary nor desirable. The relevant sentencing objectives can be adequately met by a lesser term that better promotes her long-term rehabilitation and reintegration. Given that a sentence of life imprisonment is unavoidable, it is important that the MPI does not become crushing.

122. In this case, the nominal MPI of 12 years is sufficient to satisfy the purposes and principles of sentencing, and represents the least restrictive outcome for Ms Thompson. The ultimate sentence remains one of life imprisonment. These considerations all lead to the same conclusion: that a 17 year MPI is manifestly unjust for Ms Thompson.

Conclusion

123. The 17 year MPI upheld by the Court of Appeal was manifestly unjust, and fails to reflect the extent to which Ms Thompson's mental illness, falling short of the legal standard of infanticide, led to the offending. The sentence appeal ought to be allowed and the MPI reduced to 12 years' imprisonment.

Dated 5 June 2026

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[198] Criminal and Traffic History: CA Casebook p 171.
[199] Psychological Report of Dr Jensen at [121]: CA Casebook p 216.
[200] Ibid.
[201] PAC report at p 2: CA Casebook p 166.