IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA **SC76/2024**

BETWEEN	**SOUTHERN CHEYENNE THOMPSON**
	Appellant
AND	**THE KING**
	Respondent

RESPONDENT'S SUBMISSIONS ON APPEAL AGAINST SENTENCE

19 June 2026

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COUNSEL FOR THE RESPONDENT CERTIFIES THAT, TO THE BEST OF THEIR KNOWLEDGE,
THESE SUBMISSIONS CONTAIN NO SUPPRESSED INFORMATION AND ARE SUITABLE FOR PUBLICATION.

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SUMMARY OF CROWN SUBMISSIONS

1. Ms Thompson has committed a grave murder. She fatally assaulted her vulnerable and defenceless 18-month-old daughter, Comfort,[1] who was born with a serious medical condition.[2] This followed a sustained pattern of physical abuse and neglect of Comfort in the seven months leading up to her death. Ms Thompson failed considerably in her parental responsibilities to ensure Comfort was well cared for. Instead, she repeatedly hit and scratched Comfort, confined her to designated areas, failed to feed her properly, failed to clean her up,[3] and failed to treat her visibly fractured clavicle[4] and promptly take her to the hospital when she appeared unwell after the fatal assault.[5] By the time of death, she was severely malnourished, weighing just eight kilograms,[6] her brain and eyes were bleeding,[7] and her body was extensively covered with bruises and scratches.[8] Eventually, Ms Thompson pleaded guilty to charges of murder, ill-treatment of a child and injuring with intent to injure.[9]

2. Given this murder involved a particularly vulnerable victim (because of her age and medical condition at birth) and a high level of cruelty and callousness, ss 104(1)(g) and (1)(e) of the Sentencing Act 2002 were engaged, mandating the Court to order a minimum period of imprisonment (**MPI**) of at least 17 years unless doing so would be manifestly unjust. After taking into account all relevant aggravating and mitigating factors, the sentencing Judge imposed the presumptive 17-year

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1 Although the sentencing decision refers to the victim as "Comfort-Jay", she is referred to as "Comfort" in both the Court of Appeal judgment and the appellant's submissions.

2 Agreed Summary of Facts **[[CA COA 29]]**.

3 *R v Thompson* [2022] NZHC 1038 ("Sentencing Decision") at [4] **[[SC COA 21]]**.

4 Agreed Summary of Facts **[[CA COA 34]]**.

5 Sentencing Decision at [14] **[[SC COA 23]]**.

6 Sentencing Decision at [7] **[[SC COA 22]]**.

7 Sentencing Decision at [10] **[[SC COA 22]]**.

8 Sentencing Decision at [5] **[[SC COA 21]]**.

9 Sentencing decision at [24] **[[SC COA 26]]**.

minimum term.[10] On a first appeal, the Court of Appeal upheld the Judge's decision.[11]

3. The Court of Appeal's 2004 decision in *R v Williams* remains the leading authority on the application of s 104, in which a two-step methodology was suggested.[12] The first step is to determine the appropriate MPI in all the circumstances.[13] This is achieved by assessing the degree of culpability of the offending in the instant case against the "standard range of murders", taking into account the relevant aggravating and mitigating factors and the legislative policy underlying s 104.[14] If the first step leads to an MPI of at least 17 years, that is the MPI to be imposed.[15] However, if it indicates a lesser MPI is appropriate, the second step is to determine whether it would be manifestly unjust to impose a 17-year MPI in the circumstances.[16]

4. As an alternative, Ms Thompson's proposed approach suggests a three-step process when addressing the manifest injustice test.[17] Step one asks whether a s 104 category applies to the instant case.[18] Step two asks whether a 17-year MPI would be a grossly disproportionate sentence, taking into account the personal mitigating factors of the offender.[19] Step three enquires whether a 17-year MPI would be unnecessary, having regard to the principles and purposes in ss 7 and 8 of the Sentencing Act.[20]

5. Ms Thompson's proposed approach is unhelpful. Its reference to the s 104 categories is unobjectionable, as is the reference to ss 7 and 8 of the Sentencing Act. But overall, it elides the statutory test which prescribes

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[10] Sentencing Decision at [34] **[[SC COA 28–29]]**.

[11] *Thompson v R* [2024] NZCA 266 ("Court of Appeal Judgment") at [37] **[[SC COA 19]]**.

[12] *R v Williams* [2005] 2 NZLR 506 (CA) at [52] **[[Appellant's bundle 20]]**.

[13] At [53] **[[Appellant's bundle 20]]**.

[14] At [52] **[[Appellant's bundle 20]]**.

[15] At [54] **[[Appellant's bundle 20]].**

[16] At [54] **[[Appellant's bundle 20]]**.

[17] Appellant's submissions at [49].

[18] Appellant's submissions at [49(i)].

[19] Appellant's submissions at [49(ii)].

[20] Appellant's submissions at [49(iii)].

that a 17-year non-parole period is mandatory in the absence of manifest injustice.

6. Ms Thompson accepts s 104 was engaged in her case. But she contends her mental health vulnerabilities meant she should have avoided the presumptive 17-year MPI and, instead, she should have received a much lower MPI of 12 years.[21] She seeks to adduce a psychiatric report by Dr Peter Dean in support of her position.[22]

7. The Crown opposes admission of Dr Dean's report on the appeal. It is neither fresh nor cogent. Importantly, Dr Dean's report does not substantively add to the materials that were before the sentencing Judge and therefore its admission would not have resulted in a more favourable sentencing outcome for Ms Thompson.

8. This Court should uphold the end sentence imposed. The sentencing Judge applied s 104 correctly and there is no material error in the sentencing exercise to warrant this Court's intervention. Ms Thompson's offending was grave and prolonged. It engaged not one, but two, of the serious aggravating factors under s 104. On this basis, a starting point MPI of 18 and a half years[23] was available. The Judge considered a discount of 27 months would be appropriate to recognise Ms Thompson's background, mental health vulnerabilities, belated guilty pleas and remorse, if s 104 had not applied.[24] Ultimately, the Judge correctly concluded the imposition of the 17-year presumptive minimum term was required to mark the seriousness of the offending and was not manifestly unjust.[25]

SUPPRESSION ORDERS

9. The names of Ms Thompson's two other children are suppressed.[26]

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[21] Appellant's submissions at [11].

[22] Psychiatric report completed by Dr Peter Dean, dated 2 November 2025 ("Dr Dean's report"), annexed to the appellant's leave submissions.

[23] Sentencing Decision at [21] **[[SC COA 25]]**.

[24] Sentencing Decision at [26] and [33] **[[SC COA 27–28]]**.

[25] Sentencing Decision at [34] **[[SC COA 28–29]]**.

[26] *R v Thompson* [2022] NZHC 1039 at [15] **[[CA COA 239]]**.

VIOLENCE AGAINST CHILDREN IN NEW ZEALAND

10. Baby and child murders often occur in "complex relational and domestic situations" which "frequently evoke sympathy and mitigate the offending".[27] But, as the Court observed in *R v Leuta*, "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".[28]

11. In New Zealand, on average, one child dies every six and a half weeks from abuse or family violence.[29] Between 2009 and 2012, for example, there were 37 child abuse and neglect deaths.[30] Of those, 78 per cent of the victims were under five years of age. In all but two cases,[31] the offender was either a parental figure or a caregiver.[32] This is "a real blight on the way we live and it should not happen in a caring society".[33]

12. Violence against a baby or a child is worse than that inflicted on an adult.[34] Babies and children are more vulnerable because of their fragility (particularly for babies and infants) and defencelessness.[35] Further, it is a common feature of child abuse that, to avoid exposure of their conduct, the offending caregivers often do not provide their victims with proper

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27 *R v Leuta* [2002] 1 NZLR 215 (CA) at [80] **[[Respondent's bundle 43]]**.

28 *R v Leuta*, above n 27, at [80] **[[Respondent's bundle 43]]**.

29 Child Matters <www.childmatters.org.nz/statistics> **[[Respondent's bundle 500]]**.

30 Family Violence Death Review Committee *Fourth Annual Report: January 2013 to December 2013* (Health Quality & Safety Commission New Zealand, June 2014) at 53 **[[Respondent's bundle 561]]**. This figure included: 19 cases of fatally inflicted injury; four cases of neonaticide; three cases of neglectful parental supervision; and eight cases of filicide with parental suicide. Of the eight cases of filicide, five cases involved the death of one child, three cases resulted in the death of two children, and in one case the mother was also pregnant when she committed suicide.

31 Family Violence Death Review Committee, above n 30, at 53 **[[Respondent's bundle 561]]**. The identity of the offenders in these cases was unknown.

32 Family Violence Death Review Committee, above n 30, at 53 **[[Respondent's bundle 561]]**. Of the 32 cases with a known offender, the offender was the mother in 13 cases, the father in seven cases, the stepfather in nine cases and a female caregiver in three cases.

33 *R v Wakefield* [2019] NZHC 1629 at [11] **[[Appellant's bundle 643]]**.

34 *R v Leuta*, above n 27, at [77] **[[Respondent's bundle 43]]**.

35 *R v Leuta*, above n 27, at [77] **[[Respondent's bundle 43]]**.

medical care even when required.[36] This means victims are left to suffer in pain.

13. Children are a gift and a treasure. They have the right to be kept safe from harm, and parents and others entrusted with their care must be held accountable for their failure to meet the considerable trust and responsibility attached to that role.[37] When a child is harmed, the community as a whole is hurt.[38]

VICTIM IMPACT IN THIS CASE

14. Comfort was extremely vulnerable. She was born with a medical condition which required her to undergo numerous surgeries following birth.[39] As her mother, Ms Thompson did not look after Comfort properly. She did not feed her properly, did not change her dirty nappies,[40] and did not provide her with medical assistance when she needed it the most.[41] She also subjected Comfort to ongoing physical abuse in the seven months leading up to her death.[42] Comfort died of head injuries caused by blunt force trauma.[43] She was 18 months old at the time of death, weighing just eight kilograms.[44]

MURDER SENTENCING - STATUTORY FRAMEWORK

15. Murder is the gravest crime on our statute books. Historically in the common law jurisdictions, and almost continuously in New Zealand up until

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36 *R v Leuta*, above n 27, at [79] **[[Respondent's bundle 43]]**.

37 *R v Ellery* [2013] NZHC 2609 at [28] **[[Appellant's bundle 638]]**.

38 *R v Ellery*, above n 37, at [28] **[[Appellant's bundle 638]]**.

39 Agreed Summary of Facts **[[CA COA 29]]**.

40 *R v Thompson* [2022] NZHC 1038 ("Sentencing Decision") at [4] **[[SC COA 21]]**.

41 Sentencing Decision at [14] **[[SC COA 23]]**.

42 Sentencing Decision at [4] **[[SC COA 21]]**.

43 Sentencing Decision at [10] **[[SC COA 22]]**.

44 Sentencing Decision at [3] and [7] **[[SC COA 21–22]]**.

1961, the mandatory penalty was death.[45] From 1961 until 2002, the mandatory penalty was life imprisonment.[46]

16. In 2002, s 102 of the Sentencing Act 2002 made life imprisonment a presumption. It requires an offender who is convicted of murder to be sentenced to life imprisonment unless, given the circumstances of the offence and the offender, life imprisonment would be manifestly unjust.[47] This section confers an element of sentencing discretion for murder cases at the lowest end of the range of culpability.[48] However, the regime presumes still that the sentence for murder will be life. That presumption is "a long-standing and strong one, reflecting the sanctity accorded to human life in our society and its associated abhorrence of the crime of murder".[49]

17. The statutory minimum non-parole period for murder has varied over time.[50] By 1987, that period was 10 years.[51] In 1993, a court could order an MPI exceeding 10 years where it was "satisfied the circumstances of the offence [were] so exceptional that a minimum period of imprisonment of more than 10 years" was justified.[52] In 1999, that threshold was lowered to capture cases where the circumstances of the offence were "sufficiently serious to justify a minimum period of imprisonment of more than 10 years".[53]

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45 Although the Executive Council determined whether execution would actually be carried out. After the Labour Party took office in 1935 it commuted all death sentences to life in prison and abolished the death penalty for murder in 1941. The National government restored it in 1950, but when Labour returned to office it again made the death penalty inoperative in 1958. In 1961, under a National Government, Parliament voted to abolish the death penalty for murder.

46 Crimes Act 1961, s 172.

47 Sentencing Act 2002, s 102(1) **[[Respondent's bundle 10]]**.

48 *R v Williams*, above n 12, at [30] **[[Appellant's bundle 13]]**.

49 *R v Williams*, above n 12, at [57] **[[Appellant's bundle 21–22]]**.

50 Until 1993, the non-parole period for offenders sentenced to life imprisonment for murder was between five to 10 years. Pursuant to s 33(2)(c) of the Criminal Justice Act 1954, parole was available after five years for an offender undergoing imprisonment for life. This was amended to 10 years by s 26(1) of the Criminal Justice Amendment Act 1962 and, subsequently, to seven years by s 15(2) of the Criminal Justice Amendment Act 1975. Under s 93(1)(b) of the Criminal Justice Act 1985, the non-parole period of seven years was retained. And finally, s 9 of the Criminal Justice Amendment Act (No 3) 1987 set the non-parole period at 10 years for offenders serving a life sentence.

51 Criminal Justice Amendment Act (No 3) 1987, s 9.

52 Criminal Justice Act 1985, s 80(2), as amended by the Criminal Justice Amendment Act 1993, s 39(1) **[[Respondent's bundle 5]]**.

53 Criminal Justice Amendment Act (No 2) 1999, s 2(1) **[[Respondent's bundle 7]]**, amending the Criminal

18. Initially, this standard remained when the Sentencing Act was introduced, and s 103 originally stipulated that the court could increase an MPI above the 10-year minimum if the circumstances of the offence were "sufficiently serious to justify doing so".[54] In 2004, this was amended to reflect the current statutory wording – that the MPI imposed may not be less than 10 years, and must be the minimum term the court considers necessary to satisfy the applicable sentencing purposes of offender accountability, denunciation, deterrence and community protection.[55] Notably, the sentencing objectives listed in s 103 do not include the offender's need for rehabilitation and reintegration.

19. Section 103 is subject to s 104,[56] which has the effect of restricting sentencing discretion.[57] Under s 104, the court must impose an MPI of at least 17 years if one or more of the specified aggravating circumstances are present unless it would be manifestly unjust to do so.[58]

20. The purpose of s 104 was to substantially raise the minimum non-parole period imposed for "the worst murders".[59] Interestingly, though, when introducing the bill to the House at the beginning of each reading, the Minister of Justice and the Acting Minister of Justice did not expressly state that s 104 was designed to capture the "worst murders" or the "worst murderers".[60] In enacting this provision, Parliament had intended that life

Justice Act 1985, s 80(2).

54 Sentencing Act 2002, s 103(3) **[[Respondent's bundle 10]]**. Under s 103(5), "sufficiently serious" was defined as circumstances of the offence which the court was satisfied took the offence out of the ordinary range of offending of the particular kind **[[Respondent's bundle 11]]**.

55 Sentencing Act 2002, s 103(2) **[[Respondent's bundle 13]]**, as amended by the Sentencing Amendment Act 2004, s 12.

56 Sentencing Act 2002, s 103(7) **[[Respondent's bundle 22]]**.

57 *Malik v R* [2015] NZCA 597 at [29] **[[Respondent's bundle 63]]**.

58 Sentencing Act 2002, s 104(1) **[[Respondent's bundle 22]]**.

59 Sentencing and Parole Reform Bill 2002 (148-2) (select committee report) at 9 **[[Appellant's bundle 750]]**.

60 At the commencement of the first reading, the Minister of Justice stated: "At the other end of the offending scale for murder, where there are serious aggravating factors, such as murder involving torture and abuse, murder involving home invasion, or a cold-blooded execution, the minimum period of imprisonment a judge must consider is extended from 10 years to 17 years": (14 August 2001) 594 NZPD 10911 **[[Respondent's bundle 492]]**. In his commencing speech at the second reading, the Minister of Justice said: "… where there are serious aggravating factors, much tougher penalties will apply, with a starting point of a minimum period of at least 17 years before parole can even be considered. Murders that involve factors such as home invasion or a high level of brutality or cruelty, multiple murders, or where the victim was particularly vulnerable because of age or health, will attract

imprisonment with a 17-year MPI will be the starting point for murders with serious aggravating features (as specified in the provision), in line with the principle that the worst types of an offence should attract a sentence near the maximum penalty.[61]

21. Contrary to the appellant's submissions,[62] s 104 was never intended by Parliament to capture "the worst of the worst murders". This phrase was never used in during the bill introduction or amendment process nor the Parliamentary debates on the proposed changes to sentencing for murder. In cases of the "worst of the worst murders", s 103(2A) would very likely apply, enabling the court to order that the offender serve the life sentence without parole.[63] The mass killing during the Christchurch mosque terrorist attack is a prime example of the "worst of the worst murder" and the offender in that case was sentenced to life imprisonment without parole.[64]

22. It is no surprise, therefore, that the qualifying circumstances triggering s 104 are "features of the offence … that the legislature considered especially worthy of accountability and denunciation".[65] Only some of the s 104 criteria involve evaluative judgements. Others are prescriptive in

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a minimum sentence of at least 17 years: (28 March 2002) 599 NZPD 15451 **[[Respondent's bundle 494]]**. During his speech at the beginning of the third reading, the Acting Minister of Justice remarked: "Murders committed in circumstances with significant aggravating factors—such as lengthy planning, extreme brutality, a home invasion, or more than one murder victim—will generally now receive a sentence of life imprisonment, with a minimum term of at least 17 years. That is just the starting point, and those terms can, and should, on occasions be much longer": (1 May 2002) 600 NZPD 15908 **[[Respondent's bundle 497]]**.

61 Warren Young *Sentencing and Parole Reform Bill – Report of the Ministry of Justice, Department of Corrections and Department for Courts (5)* (16 January 2002) at 80 **[[Respondent's bundle at 738]]**, in which the Deputy Secretary of the Crime Prevention and Criminal Justice Department noted that "[l]ife imprisonment with a minimum non-parole period of 17 years will be the starting point for the worst types of murder. This will allow judges to impose much longer minimum periods before parole in line with the statutory guidelines that a worst offence should attract a sentence close to the maximum sentence available".

62 Appellant's submissions at [25], citing the Select Committee Report, above n 59, at 8 **[[Appellant's bundle 749]]**. Only the terms "the worst murders" and "the worst murderers" were used at page 8 of the Select Committee Report.

63 Section 103(2A) of the Sentencing Act 2002 provides that if the court is satisfied that no minimum term of imprisonment would be sufficient to satisfy one or more of the purposes of offender accountability, denunciation, deterrence and community protection, the court may order that the offender serve the sentence without parole **[[Respondent's bundle 21]]**.

64 *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15 at [187].

65 *Malik v R*, above n 57, at [29] **[[Respondent's bundle 63]]**. See also, *Gottermeyer v R* [2014] NZCA 205, at [77].

their operation.[66] Relevantly, these qualifying circumstances include if the deceased was particularly vulnerable because of their age, health or any other factor,[67] and if the murder was committed with a high level of brutality, cruelty, depravity or callousness.[68] If s 104 is engaged in several distinct respects, an MPI starting point above 17 years may well be appropriate.[69]

23. The list of serious aggravating factors was initially set out in s 104 when the Sentencing Act was enacted, and subsequently they appeared in s 104(1) after the insertion of s 104(2).[70] Following amendments to the provision in 2025,[71] the list is now incorporated in s 104(1A). This means that, prior to the 2025 amendment, s 104(g) or s 104(1)(g) was engaged where the deceased was particularly vulnerable because of their age, health and any other factor. But after the 2025 amendment, that aggravating factor is now recognised in s 104(1A)(h). The other relevant aggravating factor to this case is s 104(1A)(e) – the murder was committed with a high level of brutality, cruelty, depravity, or callousness. For ease of reference, these two serious aggravating factors will consistently be referred to as ss 104(1A)(h) and 104(1A)(e) in these submissions.

The courts' approach to s 104

The two-step methodology in R v Williams

24. In 2004, the Court of Appeal delivered its judgment in *R v Williams*, in which the Court suggested a two-step methodology when applying s 104.[72]

25. The first step is for the sentencing judge to consider the degree of culpability of the instant case against the "standard range of murders", taking into account the applicable aggravating and mitigating factors and the legislative policy that the presence of one or more s 104 factors

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66 *R v Green* CA461/04, 2 June 2005 at [25].

67 Sentencing Act 2002, s 104(1A)(h) **[[Respondent's bundle 23]]**.

68 Sentencing Act 2002, s 104(1A)(e) **[[Respondent's bundle 23]]**.

69 *R v Baker* [2007] NZCA 277 at [23] **[[Respondent's bundle 76]]**; *Skilling v R* [2011] NZCA 462 at [7] **[[Respondent's bundle 81]]**; and *Momisea v R* [2019] NZCA 528 at [19] **[[Respondent's bundle 90]]**.

70 Sentencing and Parole Reform Act 2010, s 11 **[[Respondent's bundle 15]]**.

71 Sentencing (Reinstating Three Strikes) Amendment Act 2024, s 10(1) **[[Respondent's bundle 18]]**.

72 *R v Williams*, above n 12, at [52] **[[Appellant's bundle 20]]**.

establishes the murder is sufficiently serious to warrant an MPI of not less than 17 years.[73] Then, the sentencing judge would determine what MPI is justified in all of the circumstances.[74]

26. Where the first step indicates the appropriate MPI is 17 years or more, that is the MPI to be imposed.[75] If, however, it points to a lesser MPI being justified, the court would proceed to the second step and consider whether it would be manifestly unjust to impose a 17-year MPI in the circumstances.[76] If it is, the minimum term must be adjusted to what the court considers appropriate.[77]

27. The assessment in the second step must be approached in a "principled way"[78] and the presumption of a 17-year MPI "may not be departed from lightly".[79] As the statutory wording indicates, the injustice must be clearly demonstrated.[80] The principles set out in ss 7, 8 and 9 of the Sentencing Act are relevant considerations.[81] But, as the rationale that underlies Parliament's enactment of s 104 must be given effect, the mere presence of personal mitigating factors identified under s 9(2) of the Act would rarely be sufficient to establish manifest injustice.[82] Powerful mitigating circumstances bearing on the offence are usually required,[83] and judges must guard against allowing discounts based on favourable subjective views of the case.[84] This means exceptional circumstances are required; but those cases need not be rare.[85]

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73 *R v Williams*, above n 12, at [52] **[[Appellant's bundle 20]]**.

74 *R v Williams*, above n 12, at [53] **[[Appellant's bundle 20]]**.

75 *R v Williams*, above n 12, at [54] **[[Appellant's bundle 20]]**.

76 *R v Williams*, above n 12, at [54] **[[Appellant's bundle 20]]**.

77 *R v Williams*, above n 12, at [54] **[[Appellant's bundle 20]]**.

78 *R v Williams*, above n 12, at [54] **[[Appellant's bundle 20**]].

79 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

80 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

81 *R v Williams*, above n 12, at [65] **[[Appellant's bundle 24]]**.

82 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

83 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

84 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

85 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

28. Ultimately, a finding of manifest injustice is only made if, as a matter of overall impression, the Court decides the case falls outside the scope of the legislative policy.[86] In other words, to displace the presumption, the circumstances of the offence and the offender must be such that the case does not fall within the band of culpability of a qualifying murder.[87]

29. Two examples where the Court indicated the 17-year presumptive term may be displaced are: (a) when the offending factor triggering s 104 is only of peripheral significance; and (b) where the culpability of the offending is relatively low when compared to the range of cases caught by s 104 and the circumstances of the offender may make the sentence manifestly unjust.[88]

Difficulties arising from the Williams methodology in the early days

30. In a judgment delivered 19 months after *Williams*, the Court of Appeal in *R v Paul*[89] highlighted the difficulties in applying the *Williams* two-step methodology:

    30.1 First, the concept of the "standard range of murders"—against which the sentencing judge is required to benchmark the case at step one—was an elusive one at best.[90]

    30.2 Second, it was difficult for a sentencing judge to disregard the 17-year "road marker" indicated by s 104 when setting the nominal MPI required in step one.[91]

    30.3 Third, the standard against which the test of manifest injustice is to be assessed was unclear, noting that the Court in *Williams* remarked that "what level of disparity amounts to manifest

86 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

87 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

88 *R v Williams*, above n 12, at [68] **[[Appellant's bundle 24–25]]**.

89 *R v Paul* CA496/05, 1 August 2006 **[[Respondent's bundle 96]]**.

90 *R v Paul*, above n 89, at [27] **[[Respondent's bundle 102]]**.

91 *R v Paul*, above n 89, at [28] **[[Respondent's bundle 102]]**.

> injustice remains a matter of sound sentencing judgement that is not capable of precise determination”.[92]

31. However, 20 years on from *Williams*, the difficulties identified in *Paul* have fallen away. Section 104 is no longer a new provision.[93] As the *Williams* Court had envisaged,[94] there is now a substantial body of s 104 cases available to sentencing judges as comparators,[95] and the comparator methodology could essentially provide an answer on whether s 104 applied in a case and, if so, what the MPI should be.[96]

Alternative approaches to s 104

32. Recent cases confirm sentencing judges are not rigidly bound by the two-step methodology discussed in *Williams*. It is not “prescribed” as Ms Thompson suggests.[97] That is because *Williams* did not require sentencing judges to always explicitly articulate their reasoning when applying the suggested methodology but, rather, indicated that judges would be assisted by direct comparison between the case at hand and other s 104 cases.[98]

33. In *Davis v R*, the Court of Appeal highlighted that in the leading decisions on sentencing methodology for murder, including *Williams*, the Court has endeavoured to implement evolving legislative policy for serious murders, to reconcile that policy as best it can with the sentencing principles contained in ss 7 to 9 of the Sentencing Act and the prohibition in s 9 of the New Zealand Bill of Rights 1990 (**NZBORA**) against disproportionately severe punishment, and to achieve “reasonably consistency of outcome” in sentencing.[99]

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92 *R v Paul*, above n 89, at [29] **[[Respondent’s bundle 103]]**, citing *R v Williams*, above n 12, at [68] **[[Appellant’s bundle 24]]**.

93 *Davis v R* [2019] NZCA 40, [2019] 3 NZLR 43 at [27] **[[Respondent’s bundle 117–118]]**.

94 *R v Williams*, above n 12, at [53] **[[Appellant’s bundle 20]]**.

95 *Davis v R*, above n 93, at [27] **[[Respondent’s bundle 117–118]]**.

96 *Frost v R* [2023] NZCA 294 at [36] **[[Respondent’s bundle 133–134]]**.

97 Appellant submissions at [48].

98 *Davis v R*, above n 93, at [27] **[[Respondent’s bundle 117]]**, citing *R v Williams*, above n 12, at [50]–[51] **[[Appellant’s bundle 19]]**.

99 *Davis v R*, above n 93, at [23] **[[Respondent’s bundle 116]]**.

34. In that case, the Court described the s 104 sentencing exercise as a three-step methodology, requiring the courts to decide "(a) what notional MPI would apply under s 103 and (b) whether a s 104 category applies. If the s 104 applies but the notional MPI would be less than 17 years the judge must (c) address manifest injustice".[100] That said, the Court also recognised it is "unobjectionable" for sentencing judges to refer to s 104 cases without expressly applying the three-step methodology, provided the judge addressed the applicable sentencing principles and purposes and the reference comparator case or cases were consistent with *R v Howse*[101] (a case which addressed MPIs fixed under s 103) and *Williams*.[102] These comments were subsequently endorsed by the Court of Appeal in cases such as *Webby v R*[103] and *Frost v R*.[104]

35. Given that *Williams* does not set out a prescribed approach there is nothing objectionable about taking another view of s 104 sentencing as Ms Thompson has in her "tripartite" approach.[105]

36. Ms Thompson's first proposed step is simply to ask whether a s 104 category applies.[106] That is unobjectionable. If no category applies then that will be end of it. Similarly, it is unobjectionable in its reference to ss 7 and 8 although there are reservations about how the proposed approach suggests they might be used.[107] The principles set out in ss 7, 8 and 9 of the Sentencing Act are relevant considerations.[108]

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100 *Davis v R*, above n 93, at [25] **[[Respondent's bundle 117]]**. *Davis v R* was a case about murder sentencing where the three-strikes regime applied. The Court noted that the first two steps need not be followed in that order but, rather, the sequence may depend on the applicable s 104 category and the circumstances.

101 *R v Howse* [2003] 3 NZLR 767 (CA).

102 *Davis v R*, above n 93, at [27] **[[Respondent's bundle 117–118]]**. The Court of Appeal in *Webby v R* [2021] NZCA 234 (at [26]) endorsed this approach **[[Respondent's bundle 162]]**.

103 *Webby v R*, above n 102 **[[Respondent's bundle 162]]**.

104 *Frost v R*, above n 96 **[[Respondent's bundle 133–134]]**.

105 Appellant's submissions at [49].

106 Appellant's submissions at [49(i)].

107 Appellant's submissions at [49(iii)].

108 *R v Williams*, above n 12, at [65] **[[Appellant's bundle 24]]**.

37. But the questions in Ms Thompson's proposed approach about whether a 17-year MPI reflects personal mitigating factors[109] and whether such an MPI is unnecessary as against ss 7 and 8,[110] tend to elide the statutory test which prescribes 17 years in the absence of manifest injustice.

38. A necessity test measured against ss 7 and 8 undermines the Sentencing Act's prioritisation in s 103 of the purposes of offender accountability, denunciation, deterrence and community protection.[111] Ms Thompson's proposed approach equalises the s 7 purposes contrary to the statutory scheme.

39. Both personal mitigating factors and ones relating to the offence are relevant to the s 104 exercise. But, as explained below, the mere presence of personal mitigating factors identified under s 9(2) of the Sentencing Act would rarely be sufficient to establish manifest injustice.[112]

40. In the end, Ms Thompson's proposed approach is unhelpful. The s 7 purposes are not equivalent when considering an MPI and personal mitigating factors are often restricted in their effect in the s 104 context. Ms Thompson's proposed approach equates s 104 sentencing with the exercise involved where an offender is being considered for a finite, substantive sentence. The Court of Appeal noted this in its judgment observing that discounts are not applied to the notional MPI in the same way as for determinate sentences.[113]

Section 104 constrains discretion in sentencing child murderers but does not remove it

41. Personal mitigating factors do not play the same role for the setting of an MPI under s 104 as they do for setting substantive, finite sentences. This is true of all MPIs for murder. This reflects Parliament's intention that the seriousness of the offending is to be the focus when setting an MPI for

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109 Appellant's submissions at [49(ii)].

110 Appellant's submissions at [49(iii)].

111 Sentencing Act 2002, s 103(2), as amended by the Sentencing Amendment Act 2004, s 12 **[[Respondent's bundle 21]]**.

112 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

113 Court of Appeal Judgment at [25] **[[SC COA 15–16]]**.

murder.[114] The MPI imposed may not be less than 10 years, and must be the minimum term the court considers necessary to satisfy the applicable sentencing purposes of offender accountability, denunciation, deterrence and community protection.[115] Notably, the sentencing objectives listed in s 103 do not include the offender's need for rehabilitation and reintegration.

42. But there is an additional condition where s 104 applies – the manifest injustice test. As discussed above, the mere presence of personal mitigating factors identified under s 9(2) of the Act would rarely be sufficient to establish manifest injustice.[116] Powerful mitigating circumstances bearing on the offence are usually required.[117] The circumstances of the offence and the offender must be such that the case does not fall within the band of culpability of a qualifying murder.[118]

43. Specifically in relation to the issues raised in the present case, the degree to which the psychiatric condition of offenders can be recognised is circumscribed by the "manifest injustice" test. It has the consequence that only significant discounts will sound in an MPI of less than 17 years. And significant discounts depend on the quality of the causal connection between the mental health factor and the offence.

44. This was explained by the Court of Appeal in *Shailer v R*: "As we have noted already, mental health disorders may reduce offender culpability. As this Court noted in *R v Nelson*, sentencing has a moral base: `As such, mental disorder may mitigate moral fault and, accordingly, criminal culpability.' Criminal legal responsibility is a juridical response to an offender's willed choice to offend. Mental health disorders diminishing that willed choice may also diminish the extent of the sentencing response. But a mental

114 *Frost v R*, above n 96, at [83] **[[Respondent's bundle 147]]**, citing Simon France (ed) *Adams on Criminal Law - Sentencing* (online looseleaf ed, Thomson Reuters) at [SA103.03] referring to *R v Brown* [2002] 3 NZLR 670 (CA). See also *Webber v R* [2021] NZCA 133 at [33] **[[Respondent's bundle 176]]**.

115 Sentencing Act 2002, s 103(2), as amended by the Sentencing Amendment Act 2004, s 12 **[[Respondent's bundle 21]]**.

116 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

117 *R v Williams*, above n 12, at [66] **[[Appellant's bundle 24]]**.

118 *R v Williams*, above n 12, at [67] **[[Appellant's bundle 24]]**.

disorder without more cannot logically justify a reduction in the starting point of a sentence, based on diminished culpability, unless there is evidence of its causative impact on that culpability."[119]

45. Where there is a strong causal connection, the Courts have been able to sentence child murderers to less than 17 years as an MPI. Of the 40 cases that have triggered s 104(1A)(h) because of the murder of children, 13[120] have avoided the 17-year minimum term. The manifest injustice "safety valve" is deployed about 30 per cent of the time.

46. Accordingly, s 104 is not failing to "achieve individualised justice" as suggested by Ms Thompson.[121] In terms of cases of adult offenders[122] with psychiatric conditions (a subset of the 13 cases noted above) the following offenders received less than a 17-year MPI:

46.1 *R v Dickason* where Mander J found that there was a "direct causal connection" between Mrs Dickason's mental illness and the murder.[123] Mrs Dickason was suffering from a major depressive disorder at the time of the offending[124] and three of the health assessors believed there was a "psychotic component" to her presentation.[125]

46.2 *R v Smith* where the Court of Appeal found that the offending was "strongly influenced by her deteriorating mental health".[126] She

119 *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [50] **[[Respondent's bundle 191]]**.

120 *R v Wilson* [2023] NZHC 2640; *R v Brown* [2023] NZHC 1267; *R v Wakefield* [2019] NZHC 1629; *R v Cooper* [2017] NZHC 2498; *Lackner v R* [2016] NZCA 29; *R v Ellery* [2013] NZHC 2609; *R v Li* HC Auckland T024483, 15 December 2003; *R v Dickason* [2024] NZHC 1704; *R v Smith* [2021] NZCA 318, (2021) 29 CRNZ 830; *R v Savage* [2020] NZHC 2553; *R v McIsaac* [2016] NZHC 1544; *R v Harrison-Taylor* HC Auckland CRI 2004-092-1510, 12 September 2005; and *R v MS* [2017] NZHC 2066.

121 Appellant's submissions at [48].

122 *R v Ellery*, above n 120, was sentenced to less than 17 years but he was 21 years old at the time of the offending and had no psychiatric illness although he did have "vulnerable psychological traits" (at [17]) **[[Appellant's bundle 634]]**.

123 *R v Dickason*, above n 120, at [50] **[[Appellant's bundle 314–315]]**.

124 At [17] **[[Appellant's bundle 305]]**.

125 At [17] **[[Appellant's bundle 305]]**.

126 *R v Smith*, above n 120, at [49] **[[Appellant's bundle 607]]**.

had made "suicidal gestures" and was suffering significant depression.[127]

46.3 *R v Savage* where the High Court found that Mr Savage's mental state was "a significant contributing factor" in the offending.[128] He had a history of manic depression manifesting itself in "hypomania".[129] The Judge noted that Mr Savage had taken his clothes off beside the river and "danced naked in front of your daughter to express humility".[130] The Judge found that his behaviour bore the hallmarks "of some sort of religious cleansing".[131]

46.4 *R v McIsaac*. In this case the Judge was wary of disclosing Mr McIsaac's mental health so it is difficult to assess as a comparator. The conclusion was that Mr McIsaac had "clear mental health problems" and it was "open to conclude that these problems contributed to your offending."[132]

47. Notably none of the above cases in which a less than 17-year MPI was imposed concerned an additional s 104 factor as Ms Thompson's does in terms of the callousness of her murder of Comfort under s 104(1A)(e) (although in *Dickason* three children were killed).

MS THOMPSON'S APPEAL

48. Ms Thompson asserts the imposition of a 17-year MPI was manifestly unjust in her case due to her mental health vulnerabilities.[133] She contends that if proper weight had been given to those considerations, she should have received a minimum non-parole period of 12 years instead.[134]

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127 At [26] **[[Appellant's bundle 601]]**.

128 *R v Savage*, above n 120, at [80] **[[Respondent's bundle 219]]**.

129 At [71] **[[Respondent's bundle 217]]**.

130 At [76] **[[Respondent's bundle 218]]**.

131 At [76] **[[Respondent's bundle 218]]**.

132 *R v McIsaac*, above n 120, at [15] **[[Respondent's bundle 224]]**.

133 Appellant's submissions at [11].

134 Appellant's submissions at [123].

49. No error arises from the sentence imposed. The Judge correctly identified that both ss 104(1A)(h) and 104(1A)(e) applied in this case.[135] After taking into account all applicable aggravating and mitigating factors, the Judge properly concluded that, as a matter of overall impression, Ms Thompson's offending was a case that Parliament contemplated was sufficiently serious to warrant at least the presumptive term of 17 years.[136] As such, the Judge correctly decided it would not be manifestly unjust to impose a 17-year MPI.

Background facts

50. Comfort was born on 12 January 2017 with gastroschisis, a medical condition which meant her intestines developed outside of her abdomen.[137] As a result, she spent the first four months of her life at the hospital undergoing numerous operations.[138]

51. In the seven months leading up to Comfort's death, Ms Thompson persistently ill-treated and physical abused her.[139] She repeatedly slapped and hit Comfort's head, face and body.[140] Comfort was seen by others with two black eyes and a cut lip,[141] and Ms Thompson admitted she had given Comfort swollen lips and a bleeding mouth by assaulting her.[142] She regularly scratched Comfort all over her body and grabbed her with excessive force.[143] She confined Comfort to her cot and a couch for extended periods.[144] If Comfort got off the couch or moved, she would assault her.[145] She also failed to feed Comfort properly, change her dirty

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135 Sentencing Decision at [18] **[[SC COA 24–25]]**.
136 Sentencing Decision at [34] **[[SC COA 28–29]]**.
137 Agreed Summary of Facts **[[CA COA 29]]**.
138 Agreed Summary of Facts **[[CA COA 29]]**.
139 Sentencing Decision at [4] **[[SC COA 21]]**.
140 Sentencing Decision at [4] **[[SC COA 21]]**.
141 Agreed Summary of Facts **[[CA COA 32]]**.
142 Sentencing Decision at [8] **[[SC COA 22]]**.
143 Sentencing Decision at [4] **[[SC COA 21]]**.
144 Sentencing Decision at [4] **[[SC COA 21]]**.
145 Agreed Summary of Facts **[[CA COA 32–33]]**.

nappies, keep her clean and warm,[146] and seek medical care for her visible, fractured clavicle.[147]

52. On 23 July 2018, hours after Ms Thompson inflicted the fatal injuries on Comfort, she called Healthline who told her Comfort needed urgent medical attention and twice offered to call an ambulance for her (which she declined) and then she delayed calling an ambulance for Comfort for at least another two hours.[148] Upon arrival, ambulance staff observed Comfort was dressed only in a small skivvy in a house that was very cold.[149] Comfort's body was so cold that ambulance staff were unable to get any body temperature reading from her.[150]

53. At the time of her death, Comfort was 18 months old, and plainly malnourished as she weighed just eight kilograms.[151] The mechanism that ultimately caused her death is unknown, but the pathologist opined she died of head injuries caused by blunt force trauma.[152]

54. Postmortem inquiries revealed Comfort had significant head injuries (including brain and retinal haemorrhages, and extensive bruising across her scalp),[153] extensive soft tissue bruising to almost every part of her body,[154] extensive scratch marks all over her body (and particularly on her neck and chest),[155] a torn frenulum[156] (from significant and/or repeated force),[157] missing and loosened teeth[158] (most likely caused by blunt force

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146 Sentencing Decision at [4] **[[SC COA 21]]**.

147 Agreed Summary of Facts **[[CA COA 34]]**.

148 Sentencing Decision at [14] **[[SC COA 23]]**.

149 Agreed Summary of Facts **[[CA COA 31]]**.

150 Agreed Summary of Facts **[[CA COA 31]]**.

151 Sentencing Decision at [3] and [7] **[[SC COA 21–22]]**.

152 Sentencing Decision at [10] **[[SC COA 22]]**.

153 Sentencing Decision at [10] **[[SC COA 22]]**.

154 Sentencing Decision at [5] **[[SC COA 21]]**.

155 Sentencing Decision at [5] **[[SC COA 21]]**.

156 This is the thin membrane of skin in the centre of the top of the month. The assault that caused this injury likely occurred within two weeks prior to Comfort's death: see Sentencing Decision at [8] **[[SC COA 22]]**.

157 Agreed Summary of Facts **[[CA COA 33]]**.

158 Sentencing Decision at [8] **[[SC COA 22]]**.

trauma),[159] a healing fracture on her left clavicle,[160] a severe nappy rash (with large parts of her skin peeling off parts of her buttocks),[161] a deep-crusted fissure in the area where her nappy would sit (due to long-term exposure to wet nappies),[162] and a large ulcer under her chin (most likely caused by her dribbling and Ms Thompson's persistent failure to clean her up).[163]

55. Ms Thompson initially entered not guilty pleas to one charge of murder, two charges of ill-treating a child and one charge of injuring with intent to injure.[164] Subsequently, she absconded from electronically monitored bail the week prior to her scheduled jury trial on 9 February 2021.[165] On 30 July 2021, she pleaded guilty to the charges of ill-treating a child.[166] On 8 April 2022, one month prior to her second scheduled trial date, she pleaded guilty to the remaining charges.[167]

Procedural history

Sentencing

Materials before the sentencing Judge

56. The Judge had the benefit of the Provision of Advice to Courts (**PAC**) report prepared by the Department of Corrections,[168] a cultural report by Shelley Turner,[169] and a psychological report by Ingalise Jensen.[170]

57. The reports detailed a background which included exposure to family violence perpetrated by her father, early parental separation, childhood

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159 Agreed Summary of Facts **[[CA COA 34]]**.

160 The fracture was visible as a protrusion under the skin and would have been noticeable by Ms Thompson: see Sentencing Decision at [9] **[[SC COA 22]]**.

161 Sentencing Decision at [6] **[[SC COA 21]]**.

162 Sentencing Decision at [6] **[[SC COA 21]]**.

163 Sentencing Decision at [6] **[[SC COA 22]]**.

164 See Crown Charge Notice **[[CA COA 18–20]]**.

165 Sentencing Decision at [24] **[[SC COA 26]]**.

166 Sentencing Decision at [24] **[[SC COA 26]]**.

167 Sentencing Decision at [24] **[[SC COA 26]]**.

168 Provision of Advice to Courts prepared by the Department of Corrections, dated 20 April 2022 **[[CA COA 165–170]]**.

169 Section 27 report prepared by Shelley Turner, dated 6 May 2022 **[[CA COA 174–196]]**.

170 Psychological Assessment completed by Ingalise Jensen, dated 18 April 2022 ("Ms Jensen's report") **[[CA COA 197–216]]**.

sexual abuse, poor educational outcomes, substance use, intimate partner violence, relationship difficulties, mental health vulnerabilities, and childcare and financial burdens.

58. Referring to a previous report prepared by Dr Peter Dean, Ms Jensen noted Ms Thompson had a history of persistent depressive disorder and post-traumatic stress disorder (**PTSD**), resulting from her childhood traumas, and a history of significant substance abuse. [171] Ms Jensen's report noted Ms Thompson past attitudes and behaviour are indicative of antisocial personality disorder traits.[172] Ms Jensen recorded Ms Thompson's self-report of experiencing intermittent low mood as an adolescent and adult, which worsened after the birth of her third child (Comfort's younger brother).[173] Ms Thompson reported she felt overwhelmed with the burdens of childcare, low in mood, irritable, tearful, and having poor self-care, poor appetite and angry outbursts.[174] Ms Thompson described she was prioritising alcohol over her children.[175] Ms Jensen noted it appeared Ms Thompson was experiencing symptoms of depression at the time of the offending and that it was likely her complex PTSD impacted her day-to-day functioning.[176]

59. In her report, Ms Jensen recorded that Ms Thompson described having less of a bond with Comfort.[177] While Ms Thompson observed, when Comfort was older, she tended to seek out her father, particularly when she was upset, Ms Thompson acknowledged she also ignored Comfort or pushed Comfort away when she tried to approach her.[178] Ms Thompson recalled not allowing Comfort to move away from the couch or the playpen both for her own convenience[179] and to allegedly keep her safe from abuse by

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171 Ms Jensen's report at [36] and [103] **[[CA COA 202 and 213]]**.

172 Ms Jensen's report at [103] **[[CA COA 213]]**.

173 Ms Jensen's report at [34] **[[CA COA 201]]**.

174 Ms Jensen's report at [34] **[[CA COA 201–202]]**.

175 Ms Jensen's report at [57] **[[CA COA 205]]**.

176 Ms Jensen's report at [114] **[[CA COA 215]]**.

177 Ms Jensen's report at [51] **[[CA COA 204]]**.

178 Ms Jensen's report at [51], **[[CA COA 204]]**.

179 Ms Jensen's report at [54] **[[CA COA 205]]**.

others.[180] Ms Thompson told Ms Jensen that, on the day of the offending, she was angry Comfort had moved off the couch, so she hit her on the head a few times, despite knowing the head was "not a good place to hit somebody".[181] Ms Jensen opined Ms Thompson wanted to exert control over Comfort and, given she felt she had so little control over many aspects of her life, she appeared to have become over-controlling of Comfort and over-reactive when she did not comply.[182]

60. Overall, Ms Jansen observed Ms Thompson's childhood traumas led to behavioural difficulties, substance abuse, complex PTSD, and maladaptive coping mechanisms, resulting in her being frequently angry and emotionally dysregulated.[183] Ms Jensen opined Ms Thompson's troubled childhood significantly impacted her mental health[184] which, together with her alcohol addiction, had a "significant impact" on her offending.[185] Ms Jensen noted Ms Thompson described she felt irritable, tired, overwhelmed, withdrawn from others and had impaired decision making abilities, which were significant destabilisers in her interactions with her children.[186] Ms Jensen observed that, given her frequent alcohol use, when Ms Thompson was intoxicated, she would likely have been more disinhibited and prone to lashing out when she was angry.[187] Ms Jensen considered Ms Thompson was remorseful and demonstrated insight into her offending,[188] and she assessed Ms Thompson as being at a moderate risk of further violent offending in the community.[189]

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180 Ms Jensen's report at [59] and [62] **[[CA COA 205–206]]**.

181 Ms Jensen's report at [95] **[[CA COA 211]]**.

182 Ms Jensen's report at [117] **[[CA COA 215]]**.

183 Ms Jensen's report at [108]–[109] and [113] **[[CA COA 214–215]]**.

184 Ms Jensen's report at [114] **[[CA COA 215]]**.

185 Ms Jensen's report at [115]–[116] **[[CA COA 215]]**.

186 Ms Jensen's report at [115] **[[CA COA 215]]**.

187 Ms Jensen's report at [116] **[[CA COA 215]]**.

188 Ms Jensen's report at [120] **[[CA COA 216]]**.

189 Ms Jensen's report at [121] **[[CA COA 216]]**.

Sentencing decision

61. At sentencing, the parties accepted life imprisonment was the "only available sentence",[190] and agreed Ms Thompson's offending fell within the scope of s 104.[191]

62. Justice Lang considered both ss 104(1A)(h) and 104(1A)(e) applied in this case because Comfort was a particularly vulnerable victim and the murder was committed with a high level of cruelty and callousness.[192] Although the Judge acknowledged it was unknown how the fatal blows were inflicted on Comfort, his Honour emphasised the infliction of the types of physical violence Comfort sustained must have involved elements of cruelty and callousness to some degree, particularly given Ms Thompson made no effort to obtain medical assistance for the resulting injuries.[193]

63. The Judge applied the *Williams* two-step methodology.[194] His Honour considered that, but for the engagement of s 104, the notional MPI required under s 103 was 16 years and three months' imprisonment.[195] This included a 27-month reduction (from the starting point MPI of 18 and a half years)[196] to reflect Ms Thompson's belated guilty pleas (nine months),[197] disadvantaged upbringing and fragile mental health (12 months),[198] and remorse and determination to rehabilitate (six months).[199]

64. Ultimately, the Judge decided an MPI of 17 years would not be manifestly unjust.[200] Rather, his Honour considered it was necessary to mark Ms Thompson's "systematic physical abuse and neglect" of Comfort over

190 Sentencing Decision at [16] **[[SC COA 24]]**.

191 Sentencing Decision at [17] **[[SC COA 24]]**.

192 Sentencing Decision at [18] **[[SC COA 24–25]]**.

193 Sentencing Decision at [18] **[[SC COA 24–25]]**.

194 Sentencing Decision at [19] **[[SC COA 25]]**.

195 Sentencing Decision at [33] **[[SC COA 28]]**.

196 Sentencing Decision at [21] **[[SC COA 25]]**.

197 Sentencing Decision at [26] **[[SC COA 27]]**.

198 Sentencing Decision at [33] **[[SC COA 28]]**.

199 Sentencing Decision at [33] **[[SC COA 28]]**.

200 Sentencing Decision at [34] **[[SC COA 28–29]]**.

an extended period of time, cumulating in her eventual death, which is plainly offending that Parliament envisaged would be captured by s 104.[201]

First appeal

65. Ms Thompson appealed her sentence on the ground that the 17-year MPI was manifestly unjust given her background and remorse.[202] She did not challenge the starting point MPI of 18 and a half years,[203] but she contended she should have received a discount of 20 per cent[204] (by her calculation, around three years and nine months[205]) for her personal factors, in addition to the nine-month reduction allowed for guilty pleas.[206] On her analysis, this would lead to a nominal MPI of 14 years,[207] which she contended meant a 17-year MPI would be manifestly unjust so a 14-year MPI should have been imposed instead.[208]

66. The Court of Appeal disagreed:

66.1 The Court highlighted that, in murder cases where the end sentence is life imprisonment, discounts are not applied to the notional MPI in the same way as for determinate sentences.[209] Rather, as s 103(2) signals, the seriousness of the offending should be the focus when fixing an MPI in murder sentencing and personal mitigating factors carry less weight in that assessment.[210]

66.2 The Court considered the 18-month discount allowed sufficiently accounted for Ms Thompson's background (as canvassed in the cultural report and Ms Jensen's psychological report) and remorse.[211] Although the Court acknowledged there was a casual

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201 Sentencing Decision at [34] **[[SC COA 28–29]]**.
202 Court of Appeal Judgment at [2] **[[SC COA 8]]**.
203 Court of Appeal Judgment at [16] **[[SC COA 12]]**.
204 Court of Appeal Judgment at [21] **[[SC COA 14]]**.
205 Court of Appeal Judgment at [22] **[[SC COA 14]]**.
206 Court of Appeal Judgment at [22] **[[SC COA 14]]**.
207 Court of Appeal Judgment at [22] **[[SC COA 14]]**.
208 Court of Appeal Judgment at [33] **[[SC COA 18]]**.
209 Court of Appeal Judgment at [25] **[[SC COA 15–16]]**.
210 Court of Appeal Judgment at [26] **[[SC COA 16]]**.
211 Court of Appeal Judgment at [27] **[[SC COA 16]]**.

nexus between Ms Thompson's background and her offending, the linkage was not as strong as in other cases.[212] The Court noted that the persistent nature of Ms Thompson's offending against Comfort over an extended period, in circumstances where her other children showed no signs of neglect or abuse, demonstrated a high degree of agency.[213]

66.3 The Court agreed with the sentencing Judge that the imposition of a 17-year MPI would not be manifestly unjust in the circumstances.[214] As the Judge determined, this was not a case where s 104 was engaged only peripherally or where Ms Thompson's culpability was at the lower end of the range of cases captured by s 104.[215]

Fresh evidence application

67. Ms Thompson seeks to adduce a (more recent) psychiatric report by Dr Dean, to support her second sentence appeal to this Court. This report was completed on 2 November 2025, seven years after the offending.

68. Dr Dean's report largely covers the same background factors traversed in the PAC report, cultural report and Ms Jensen's psychological report which were before the Court at sentencing.

69. Dr Dean considered Ms Thompson's self-report of exhaustion, insomnia, lack of motivation and increased irritability around the time her third child was born was consistent with major depressive disorder superimposed on persistent depressive disorder in the perinatal period.[216] He concluded it is possible, if not likely, Ms Thompson's depressive disorder (which was experienced in the context of difficult interpersonal relationships,

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212 Court of Appeal Judgment at [30] **[[SC COA 17]]**.

213 Court of Appeal Judgment at [30] **[[SC COA 17]]**.

214 Court of Appeal Judgment at [37] **[[SC COA 19]]**.

215 Court of Appeal Judgment at [36] **[[SC COA 19]]**.

216 Dr Dean's report at [40].

substance use and dysfunctional personality) was exacerbated by childbirth.[217]

70. Dr Dean observed Ms Thompson has maladaptive coping, which results in anger and affective instability.[218] He noted she has "modelled physical abuse as a means to parent and to respond to anger", which was complicated by her abusive relationship with her partner at the time and her substance use.[219] Dr Dean stated this would be consistent with personality disorder of antisocial and borderline types.[220]

71. Dr Dean's report noted Ms Thompson's (different) explanation that she first started to push Comfort away to protect her newborn baby (Comfort's younger brother) and the other children because Comfort had been quite intrusive towards the baby and had inadvertently scratched him.[221] Ms Thompson narrated to Dr Dean she did not feel anything emotionally when she hit Comfort, nor feel compelled to comfort her when she was distressed.[222] Ms Thompson stated Comfort rarely cried, which she thought was indicative of Comfort's deliberate defiance.[223] In Dr Dean's opinion, Ms Thompson's lack of bonding with Comfort in the early days post-birth resulted in her "misinterpreting Comfort's behaviour as being deliberate and wilful, and in need of punishment", noting her cognitive distortion was reinforced by her belief that Comfort was targeting her other children.[224]

72. Ms Thompson asserts she could not have obtained Dr Dean's report for sentencing because her account of events has changed over time.[225] She contends that because she has now expanded on her previous self-report

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217 Dr Dean's report at [45].

218 Dr Dean's report at [41].

219 Dr Dean's report at [41].

220 Dr Dean's report at [41].

221 Dr Dean's report at [30]–[31].

222 Dr Dean's report at [31].

223 Dr Dean's report at [31].

224 Dr Dean's report at [47].

225 Appellant's submissions at [101].

to Dr Dean about her mental state around the time of the offending[226] and has proffered a different explanation for mistreating Comfort (to the one she described to Ms Jensen prior to sentencing),[227] Dr Dean's report therefore provides "further insight" into her mental state at the time of the offending.[228]

73. The Crown opposes admission of Dr Dean's report.

74. First, Dr Dean's proposed evidence as to why he considers Ms Thompson treated Comfort differently (set out at [71] above) is inadmissible under s 25(3) of the Evidence Act.[229] It is based on assumed facts provided by Ms Thompson that have not been proven. Ms Thompson has not filed an affidavit to provide an evidential foundation for Dr Dean's opinion and the Crown has not had the opportunity to test her account under cross-examination in the usual way.

75. Second, Dr Dean's proposed evidence on that topic is based on an account of events that is inconsistent with the narrative Ms Thompson had described to Ms Jensen in 2022.[230] Ms Thompson's varying self-reports affects her credibility.[231]

76. Third, Dr Dean's report is not fresh. As will become apparent below, Ms Thompson is essentially seeking to adduce "a report by another expert in the same field supporting the same finding" about her mental state in

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226 Appellant's submissions at [101].

227 See appellant's submissions at [99].

228 Appellant's submissions at [96]–[97].

229 Section 25(3) of the Evidence Act 2006 stipulates that "[i]f an opinion by an expert is based on a fact that is outside the general body of knowledge that makes up the expertise of the expert, the opinion may be relied on by the fact-finder only if that fact is or will be proved or judicially noticed in the proceeding **[[Respondent's bundle 25]]**.

230 See *Reddy v R* [2020] NZCA 16 at [21] **[[Respondent's bundle 240]]**.

231 See Dr Erin Eggleston's report dated 24 November 2020 at [25] **[[SC COA 35]]**, in which he noted that when completing the Personality Assessment Inventory Ms Thompson "endorsed a level of negative bias in respect of her evaluation of herself that was so high relative to normative data that the remainder of the profile was invalid and could not be interpreted. This suggests that it will be difficult to gather accurate information about her mental health and personality on self-report only". See also, Ingalise Jensen's neuropsychological assessment dated 24 February 2025 at [64] **[[SC COA 57]]**, which recorded that the embedded validity scales for an attention-related test Ms Thompson completed indicated she "had a tendency to over-report some symptoms".

the lead up to her offending.[232] But as held in *Yad-Elohim v R*, that is insufficient to satisfy the freshness criteria, even if that finding is at times expressed in "more certain language" in the proposed new evidence.[233]

77. Fourth, Dr Dean's report is not sufficiently cogent. It does not add anything substantive to the comprehensive materials available to the sentencing Judge. Fundamentally, nothing said in the report materially strengthens Ms Jensen's opinion on the impact Ms Thompson's background factors and mental health vulnerabilities had on her offending:

 77.1 Both expert reports refer to Ms Thompson's history of persistent depressive disorder and PTSD.[234] While Dr Dean says Ms Thompson has personality disorder of antisocial and borderline types,[235] Ms Jensen considered Ms Thompson's past attitude and behaviour indicated antisocial personality disorder traits.[236]

 77.2 Dr Dean says Ms Thompson described feeling exhausted, irritable, sleepless, and lacking in motivation around the time her third child was born.[237] But, as he notes, those symptoms are consistent with what Ms Thompson had told Ms Jensen[238] and recorded in Ms Jensen's report.[239] In their report, both experts note Ms Thompson's alcohol dependence.[240]

 77.3 Although Dr Dean goes one step further and says the reported symptoms are consistent with major depressive disorder superimposed on persistent depressive disorder in the perinatal period and it is likely her depressive disorder was exacerbated by

232 *Yad-Elohim v R* [2023] NZCA 136 at [76] **[[Respondent's bundle 272]]**.

233 *Yad-Elohim v R*, above n 232, at [76] **[[Respondent's bundle 272]]**.

234 Ms Jensen's report at [36] **[[CA COA 202]]**; Dr Dean's report at [1].

235 Dr Dean's report at [41].

236 Ms Jensen's report at [103] **[[CA COA 213]]**.

237 Dr Dean's report at [40].

238 Dr Dean's report at [45].

239 Ms Jensen's report at [34] **[[CA COA 201–202]]**.

240 Ms Jensen's report at [116] **[[CA COA 215]]**; Dr Dean's report at [38].

childbirth,[241] that does not substantively add to Ms Jensen's opinion that Ms Thompson appeared to be suffering from depressive symptoms at the time of the offending,[242] which was after the birth of her third child.

77.4 Further, while Dr Dean talks about Ms Thompson's maladaptive coping, resulting in anger and affective instability, and that she modelled physical abuse as a means to parent and to respond to anger,[243] Ms Jensen had similarly noted in her report that Ms Thompson's maladaptive coping mechanisms, she was frequently angry and emotionally dysregulated, and she was ill-equipped to care for her own young family.[244]

78. Thus, Dr Dean's report could not reasonably have led to a more favourable sentencing outcome for Ms Thompson.

There is no error in the sentence imposed requiring correction by this Court

79. In this Court, Ms Thompson does not challenge the starting point MPI the Judge adopted of 18 and a half years, nor the 15-month discount given for her belated guilty pleas and remorse. But she contends she should have received a considerably greater reduction for her mental health issues. In that regard, she asserts she was entitled to a total reduction of six and a half years for her personal mitigating circumstances.[245] This would have led to a notional MPI of 12 years[246] (rather than the 14-year MPI she was seeking in the Court of Appeal),[247] which she says indicates that a 17-year MPI would be manifestly unjust, particularly given her mental health

241 Dr Dean's report at [40] and [45].

242 Ms Jensen's report at [114] **[[CA COA 215]]**.

243 Dr Dean's report at [41].

244 Ms Jensen's report at [108]–[109] **[[CA COA 214]]**.

245 Appellant's submissions at [110], where it is said a nominal 12-year MPI would be appropriate, although at [108] appellant counsel gave a range of 12 to 13 years.

246 Appellant's submissions at [110].

247 Court of Appeal Judgment at [2] **[[SC COA 8]]**.

difficulties, the need to impose the least restrictive outcome, and the desire to promote her long-term rehabilitation and reintegration.[248]

80. In fact, the sentencing Judge correctly applied s 104 in this case and properly concluded it would not be manifestly unjust to impose the mandatory 17-year MPI in the circumstances.

It is not unfair or anomalous that this case qualifies under s 104

81. Before considering the starting point taken by the Judge, we submit that Ms Thompson's position that the murder of a vulnerable child is a "technicality" that brings it within s 104(1A)(h)[249] is unreal. Aside from the fact Ms Thompson ignores that her offending also fell to be considered under s 104 because of its callousness under s104(1A)(e), an assessment of the gravity and seriousness of the offending and the degree of culpability of the offender is central to sentencing:

81.1 It is orthodox for the identity of the victim to aggravate offending. In terms of ordinary sentencing, courts may treat as aggravating the fact that the victim was "particularly vulnerable because of his or her age" in s 9(1)(g). In cases of violence or neglect of children, under s 9A of the Sentencing Act, a further range of aggravating factors becomes relevant including threats to prevent reporting and concealment of the offending from authorities. Section 9A signalled a sterner view of the ill-treatment of children[250] with the explanatory note to the Bill stating that "The new section obliges the court to take into account the defencelessness of children, who cannot fight back or permanently escape the offender. It requires the Court to consider the serious or long-term harm that can result from offending against children, and the breach of the special relationship of trust that children are entitled to enjoy with adults."[251] And even before the enactment of the Sentencing Act,

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248 Appellant's submissions at [114]–[117].

249 Appellant's submissions at [54].

250 *Shailer v R*, above n 119, at [65] **[[Respondent's bundle 193–194]]**.

251 *R v Pene* [2010] NZCA 387 at [14] **[[Respondent's bundle 290–291]]**.

judges have recognised that violence against, and neglect of, children is an aggravating factor in sentencing.[252]

81.2 Section 104 sets out that murders of particularly vulnerable people are, usually, "the most serious murder cases".[253] Eighteen-month-old infants are "particularly vulnerable", and it is not surprising that murders of children that young will be classified as the "most serious". It is not a circumstance that, somehow, unfairly sneaks into the category. *Williams* allows for the situation where the qualifying circumstance is "peripheral"[254] but that cannot be said of the current offence. As in *R v Little* "if [s 104(1A)(h)] does not apply to a 7-month-old baby, it is difficult to imagine when it would apply".[255] That Comfort was 18 months old is a "striking and crucial feature of the offending".[256]

81.3 More than vulnerability is required before the offence qualifies under s 104. A threshold is incorporated in s 104 and the victim has to be "particularly" vulnerable. As the Learned Authors of *Adams* note, the mere presence of a factor will not automatically give rise to the 17-year minimum term in every case. Unless the threshold is triggered in specifically defined circumstances the presence of the aggravating factor must reflect a clear margin above the extent to which the feature would be likely to ordinarily arise in the course of a murder.[257]

The starting point MPI was appropriate

82. The starting point MPI of 18 and a half years is unimpeachable. It appropriately took into account the applicable aggravating factors:

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252 See, for example, *R v Leuta*, above n 27, at [77]–[79] **[[Respondent's bundle 43]]**.

253 *R v Williams*, above n 12, at [66]–[67] **[[Appellant's bundle 24]]**.

254 At [68] **[[Appellant's bundle 24–25]]**.

255 *R v Little* [2007] NZCA 491 at [49] **[[Respondent's bundle 306]]**.

256 *R v Little*, above n 255, at [49] **[[Respondent's bundle 306]]**.

257 Mathew Downs (ed) *Adams on Criminal Law - Sentencing* (online looseleaf ed, Thomson Reuters) at [SA104.01].

82.1 Comfort was particularly vulnerable not only because of her age, but also because of her medical condition.

82.2 As Comfort's mother, Ms Thompson's persistent abuse and neglect of her constituted a gross breach of trust.

82.3 The offending also involved a high level of cruelty and callousness and engaged another s 104 factor - s 104(1A)(e). Ms Thompson failed to feed her properly, failed to keep her warm and clean,[258] and failed to treat her visibly fractured clavicle[259] and promptly take her to the hospital when she appeared unwell after the fatal assault.[260] Comfort would have been left in considerable discomfort and pain in the weeks and months leading up to her death. Particularly, on the day of the fatal attack, it took Ms Thompson nearly six hours to contact Healthline and seek medical advice.[261] Despite Healthline staff pleading with her that Comfort required urgent medical attention, she twice rejected their offers to call an ambulance, and then took another two hours or so before calling an ambulance herself.[262]

83. As demonstrated by cases such as *Sio v R*,[263] *R v Kapea*,[264] *R v Curran*[265] and *R v Loffley*,[266] the killing and repeated ill-treatment of a child which also involved a high level of brutality, cruelty or callousness justifies a starting point MPI in the range of 18 and 19 years. This is consistent with cases indicating that where more than one, or several, s 104 aggravating factors

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258 Sentencing Decision at [4] **[[SC COA 21]]**.

259 Agreed Summary of Facts **[[CA COA 34]]**.

260 Agreed Summary of Facts **[[CA COA 29–31]]**.

261 Agreed Summary of Facts **[[CA COA 29–31]]**.

262 Sentencing Decision at [14] **[[SC COA 23]]**.

263 *Sio v R* [2022] NZCA 337 **[[Respondent's bundle 307]]**: the Court of Appeal agreed that a starting point MPI of 18 years and three months was appropriate**.**

264 *R v Kapea* HC Auckland CRI-2007-092-16885, 25 November 2008 **[[Respondent's bundle 330]]**: the Court accepted the Crown's proposed starting point MPI of 18 and a half years.

265 *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008 **[[Respondent's bundle 338]]**: the Court indicated a starting point MPI of not less than 18 and a half years and 19 years was warranted.

266 *R v Loffley* [2013] NZHC 201 **[[Respondent's bundle 354]]**: a 19-year starting point MPI was adopted and ultimately imposed.

are engaged, a starting point MPI above 17 years may be appropriate.[267] As the Judge found in this case, both ss 104(1A)(h) and 104(1A)(e) applied in this case.[268]

The discount allowed for mental health issues was adequate

84. The 12-month reduction the Judge allowed for Ms Thompson's background (including her mental health issues) was adequate.

85. There is no dispute Ms Thompson's upbringing and childhood traumas contributed to her mental health issues and there was some causal nexus between her mental health struggles and her offending. However, as the Court of Appeal found, that linkage is "not as strong as in some other cases".[269] Ms Thompson's mental health vulnerabilities were not so predominant in the offending that they reduced her culpability to the point where it fell outside the band of culpability of a qualifying murder.[270] Unlike in *R v Dickason*, the offending in the present case was not committed by "a mother who was afflicted with a disease of the mind that was causative of her actions".[271]

86. As Ms Jensen opined, Ms Thompson treated Comfort differently not only because she felt less bonded to her, but also because Comfort was at a developmental stage where she was starting to explore her surroundings but was cognitively less amendable to following verbal instructions and unable to escape her mother's "wrath" due to her age.[272] In this context, Ms Jensen was of the view that given Ms Thompson felt "she had so little control over many aspects of her life" she became "overcontrolling of Comfort and over-reactive when Comfort did not comply".[273] On her own

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267 *R v Baker*, above n 69, at [23] **[[Respondent's bundle 76]]**; *Skilling v R*, above n 69, at [7] **[[Respondent's bundle 81]]**; and *Momisea v R*, above n 69, at [19] **[[Respondent's bundle 90]]**.

268 Sentencing Decision at [18] **[[SC COA 24–25]]**.

269 Court of Appeal Judgment at [30] **[[SC COA 17]]**.

270 *R v Williams*, above n 48, at [67] **[[Appellant's bundle 24]]**.

271 *R v Dickason*, above n 120, at [66] **[[Appellant's bundle 320]]**. In this case, after the High Court determined it would be manifestly unjust to impose a 17-MPI given the offender's psychiatric condition was so predominant to, and essentially drove, her offending, the Court sentenced her to 18 years' imprisonment.

272 Ms Jensen's report at [117] **[[CA COA 215]]**.

273 Ms Jensen's report at [117] **[[CA COA 215]]**.

account, Ms Thompson delivered the fatal blows to Comfort's head despite knowing the head is "not a good place to hit somebody", because she was angry she had moved off the couch that morning.[274]

87. Ms Thompson's maladaptive coping, anger, low mood, fatigue, heavy drinking, relationship difficulties and the stress of her childcare responsibilities all contributed to her offending. But, as Ms Jensen stated, although her mental health issues (and alcohol use) had a "significant impact" on her offending, it is unclear if her mental health vulnerabilities had a causative role in her offending.[275] And Dr Dean's report does not take this point any further in his latest report. The high point of his report is simply that it is possible, if not likely, Ms Thompson's depressive disorder was exacerbated by childbirth.[276]

88. The strength of the nexus between her personal vulnerabilities and her offending is also tempered by the high degree of agency involved in her repeated offending against Comfort. At the time of the offending, Ms Thompson was caring for her three children and her sister's young daughter.[277] Yet she only targeted Comfort. As the Court of Appeal highlighted, Ms Thompson's abuse and neglect of Comfort was not an isolated case of an "angry outburst by a parent with poor coping skills, resulting in catastrophic and fatal consequences".[278] Rather, it spanned an extended period, culminating in a final fatal assault.[279] Although she claimed she was also abusive towards her eldest son, none of her other children exhibited any signs of neglect or abuse.[280] This demonstrates Ms Thompson had the ability to exercise care and restraint in her otherwise

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274 Ms Jensen's report at [95] **[[CA COA 211]]**.

275 Ms Jensen concluded that "Ms Thompson's volatile relationships, lifestyle and associated stressors, substance use, poor mental health and limited coping skills all contributed to her daughter's mistreatment and ultimate death": see Ms Jensen's report at [109] **[[CA COA 214]]**.

276 Dr Dean's report at [45].

277 Ms Jensen's report at [34] **[[CA COA 201–202]]**.

278 Court of Appeal Judgment at [30] **[[SC COA 17]]**.

279 Court of Appeal Judgment at [30] **[[SC COA 17]]**.

280 Court of Appeal Judgment at [30] **[[SC COA 17]]**. Albeit, on her own account, Ms Thompson asserts she was also abusive towards her other children: see Ms Jensen's report at [57] and [117] **[[CA COA 205 and 215]]** and Dr Dean's report at [31].

chaotic life, and her agency was not so impaired by her mental health vulnerabilities as she claims.

89. The 12-month reduction allowed in recognition of Ms Thompson's personal circumstances and mental health issues was within range. It is not out of step with authorities including *Izett v R* (12-month discount for his destabilised upbringing, drug addiction and mental health issues)[281] *R v McIssac*[282] (18-month discount for clear lifelong mental health problems that contributed to his offending), *R v Ellery*[283] (two-year discount for youth, psychological issues and expressions of remorse) and *R v Savage*[284] (two-year discount for significant mental disturbance in the days and hours leading up to the offending). On the other hand, the cases Ms Thompson relies on – *R v Cooper*,[285] *R v Harrison-Taylor*[286] and *Smith v R*[287] – are not helpful comparators. In those cases, the starting point MPI has not been identified nor the quantum of discounts given articulated.

The 17-year MPI was not a disproportionately severe sentence

90. Ms Thompson asserts that the sentence is "disproportionately severe".

91. As explained by this Court in *Fitzgerald v R* disproportionately severe treatment has two meanings in the sentencing context:[288]

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281 *Izett v R* [2024] NZCA 64 **[[Respondent's bundle 363]]**.

282 *R v McIsaac*, above n 120, where the mental health issues were manifested by his fixation on the idea that his deceased 10-year-old half-brother was being abused and he had terminal cancer (at [15]) **[[Respondent's bundle 224]]**.

283 *R v Ellery*, above n 120. In this case, the offender's childhood and adolescent years were marked by emotional distance and detachment; he was diagnosed with ADHD at a young age and had a number of vulnerable psychological traits, including low self-esteem, a lack of assertiveness and poor self-confidence; the medical experts variously described him as immature, having low to average neuro-cognitive functioning, and being seriously impaired in his personality functioning; and one of the psychiatrists suggested he had suffered from post-traumatic stress disorder in the past (at [17]) **[[Appellant's bundle 634]]**.

284 *R v Savage*, above n 120. According to the one medical expert, the offender in this case had a history of mental illness, dating back to his teenage years; he had experienced periods of elevated and abnormal moods on a number of prior occasions which were often associated with disturbance and inter-personal disturbance; he had a history of manic depression (which is an incurable mental illness that sometimes manifests as depression, a mania or hypomania); and he was suffering from a mental illness in the lead up to the offending (at [69]–[72]) **[[Respondent's bundle 216–217]]**. Another psychiatric expert stated he was suffering from a relapse in his bipolar affective disorder (at [73]) **[[Respondent's bundle 217]]**.

285 *R v Cooper*, above n 120 **[[Appellant's bundle 664]]**.

286 *R v Harrison-Taylor*, above n 120 **[[Appellant' bundle 654]]**.

287 *R v Smith*, above n 120 **[[Appellant's bundle 595]]**.

288 *Fitzgerald v R* [2021] 1 NZLR 551 at [230] **[[Respondent's bundle 464]]**.

> As *Taunoa* emphasises, the phrase "disproportionately severe" in s 9 is coloured by its association with "torture", "inhuman" and "degrading" and sets a high threshold. As *Taunoa* also indicates, sentences that are considered to be excessive in a sentence appeal context will generally not meet the high threshold of being "disproportionately severe" for s 9 purposes. There are numerous examples of sentence appeals being allowed wholly or partly on the basis of the s 8(h) "disproportionately severe" standard where the original sentence could not be said to meet the high threshold in s 9. In short, despite the identity of language, the concepts in s 8(h) of the Sentencing Act and s 9 of the Bill of Rights are not identical in scope.

92. Neither the NZBORA s 9 nor the Sentencing Act s 8(h) change the interpretation of s 104 in this case. In terms of s 9, sentencing offenders who murder children to 17-year MPIs[289] is proportionate where the life of the child is taken by the those trusted to look after them. Such an outcome does not meet the high threshold of "so severe as to shock the national conscience."[290]

93. As for the Sentencing Act, the paradigm cases of disproportionate treatment are where foreign nationals or offenders with disabilities are sentenced to imprisonment such that prison presents a particular burden for them.[291]

The imposition of a 17-year MPI was not manifestly unjust

94. The Judge was correct to conclude the imposition of a 17-year MPI would not be manifestly unjust in this case. As a matter of overall impression, this is distinctly a case which Parliament contemplated as a serious murder which s 104 was designed to capture and therefore justifying at least the presumptive term of 17 years.

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[289] *R v Lee* [2025] NZHC 3630; *Izett v R*, above n 281; *R v Te Ahuru* [2024] NZHC 1851; *R v Topp* [2024] NZHC 1958; *R v Sopo* [2024] NZHC 1015; *Sio v R* [2022] NZCA 337; *R v Barriball* [2022] NZHC 1555; *R v Sinclair* [2021] NZHC 569; *R v Clancy [*2021] NZHC 1021; *Duff v R* [2020] NZCA 116; *R v Taylor* [2017] NZHC 1257; *R v Solomon* [2016] NZHC 1653; *Filihia v R* [2014] NZCA 401 (leave declined in [2014] NZSC 154); *R v Loffley*, above n 266; *R v Hemana* [2012] NZHC 376; *Ngatai-Check v R* [2011] NZCA 543; *Mahomed v R* [2010] NZCA 419; *R v Pickering* HC Auckland CRI-2008-055-001273, 30 July 2010; *R v Curtis* HC Rotorua CRI-2007-063-4149, 4 February 2009; *R v Kapea*, above n 264; *R v Joachim* HC Nelson CRI-2008-042-2437, 29 October 2008; *R v Curran* HC Tauranga CRI-2005-070-6292, 1 February 2008; *R v Little*, above n 255 (leave to appeal refused: [2008] NZSC 7); *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006; *R v Paul*, above n 89; and *R v Mackness* HC Hamilton T023921, 14 April 2003.

[290] *Fitzgerald v R*, above n 288, at [163] **[[Respondent's bundle 443]]**.

[291] *Fitzgerald v R*, above n 288, fn 330 **[[Respondent's bundle 464]]**.

95. Here, s 104 was not just peripherally engaged. Ms Thompson's culpability was high because her offending engaged two of the aggravating factors listed in s 104.[292]

95.1 As an 18-month-old infant born with a serious medical condition requiring numerous surgeries following birth,[293] Comfort was extremely vulnerable and highly dependent on Ms Thompson to care and provide for her. However, in gross breach of her parental responsibilities, Ms Thompson mistreated and physically abused Comfort in the seven months leading up to her death, causing her considerable discomfort and pain. By the time of her death, her brain and eyes were bleeding,[294] almost every part of her body was bruised,[295] there were extensive scratch marks all over her body,[296] her frenulum was torn,[297] a tooth was knocked out,[298] her left clavicle was fractured,[299] large parts of her skin was peeling off parts of her buttocks,[300] she had a large ulcer developed under her chin,[301] and she was so malnourished she weighed just eight kilograms.[302]

95.2 Comfort's vulnerability was aggravated by the high level of cruelty and callousness involved in Ms Thompson's sustained offending. Ms Thompson failed to seek medical assistance for Comfort when her clavicle was visibly fractured so she was left to heal in pain without medical intervention.[303] And on the day of the fatal attack, it took Ms Thompson nearly six hours to call Healthline for

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292 See *Sio v R*, above n 263, at [72] **[[Respondent's bundle 324]]**, where the Court of Appeal confirmed this is relevant to the manifest injustice inquiry.

293 Agreed Summary of Facts **[[CA COA 29]]**.

294 Sentencing Decision at [10] **[[SC COA 22]]**.

295 Sentencing Decision at [5] **[[SC COA 21]]**.

296 Sentencing Decision at [5] **[[SC COA 21]]**.

297 Sentencing Decision at [8] **[[SC COA 22]]**.

298 Sentencing Decision at [8] **[[SC COA 22]]**.

299 Sentencing Decision at [9] **[[SC COA 22]]**.

300 Sentencing Decision at [6] **[[SC COA 21]]**.

301 Sentencing Decision at [6] **[[SC COA 21–22]]**.

302 Sentencing Decision at [7] **[[SC COA 22]]**.

303 Agreed Summary of Facts **[[CA COA 34]]**.

advice and then another two hours before she called an ambulance even though Healthline staff had impressed on her that Comfort was in need of immediate medical attention.[304]

96. While her background and mental health struggles contributed to her offending, they were not sufficiently powerful to displace the 17-year presumption. Her mental state was unstable at the time of the offending, but it was not significantly disordered or disturbed. At the time of the fatal attack, Ms Thompson knew that delivering blows to an infant's head would cause serious consequences, but she did it anyway because she was angry that Comfort disobeyed her instruction to remain on the couch.[305]

97. Ms Thompson's offending is more culpable than in the cases she relies on where the offenders avoided the 17-year presumptive minimum term:

97.1 *Smith* involved the strangulation of a 13-year-old granddaughter by her 61-year-old grandmother who had a longstanding psychiatric history.[306] Unlike the present case, there was no suggestion Ms Smith had previously assaulted or neglected the victim; the killing did not involve another s 104 aggravating factor; substance use was not a feature of the offending;[307] Ms Smith had no prior criminal convictions;[308] and she was only considered a risk to herself but not to others.[309] On a Crown appeal, Ms Smith's finite 12-year imprisonment sentence was quashed and substituted with a life imprisonment sentence with a minimum non-parole term of 10 years.[310]

97.2 In *Harrison-Taylor*, the offending mother received a life sentence with a 12-year MPI for the killing of her eight-month-old son.[311]

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304 Sentencing Decision at [14] **[[SC COA 23]]**.

305 Ms Jensen's report at [95] **[[CA COA 211]]**.

306 *R v Smith,* above n 120, at [3] and [23] **[[Appellant's bundle 596 and 600]]**.

307 At [8] **[[Appellant's bundle 597]]**.

308 At [8] **[[Appellant's bundle 597]]**.

309 At [49(b)] **[[Appellant's bundle 607]]**.

310 At [60] **[[Appellant's bundle 609]]**.

311 *R v Harrison*-Taylor, above n 120, at [1] and [47] **[[Appellant's bundle 655 and 663]]**.

Unlike Ms Thompson, Ms Harrison-Taylor did not subject the victim to any prior episodes of physical assault nor any form of child neglect;[312] the defence medical evidence supported her contention that the killing was "a spur of the moment thing";[313] victim vulnerability was the only s 104 factor engaged; and she posed "no future risk to public safety".[314]

97.3 In *Cooper*, a 62-year-old grandmother threw her grandson, aged two years and seven months, in the hallway.[315] At the time, she was stressed and struggling to cope as the sole carer of four high-needs grandchildren under five with minimal support from her family over an extended period of time.[316] Although she was a "harsh disciplinarian" and there was some suggestion of verbal abuse and minor physical abuse against the children,[317] she did not neglect them. In fact, she looked after the physical aspects of the children well, decorating their rooms nicely and provided them with clothes and toys.[318] Unlike Ms Thompson's case, Mrs Cooper's offending against the victim was fleeting;[319] did not engage another serious aggravating factor under s 104; and there was no indication the victim had previously suffered any broken bones.[320] In imposing an MPI of 14 and a half years, the Judge took into account Mrs Cooper's advanced age which meant there was a reduced likelihood she will live long enough to be eligible for parole.[321]

98. In Ms Thompson's case, the mandatory MPI of 17 years is the least restrictive outcome. Given the sustained nature of the offending against a

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312 At [37] **[[Appellant's bundle 661]]**.

313 At [43] **[[Appellant's bundle 662]]**.

314 At [43] **[[Appellant's bundle 662]]**.

315 *R v Cooper*, above n 120, at [6] and [9] **[[Appellant's bundle 666–667]]**.

316 At [10]–[11] and [39] **[Appellant's bundle 667 and 673]]**.

317 At [13] **[[Appellant's bundle 667–668]]**.

318 At [12] **[[Appellant's bundle 667]]**.

319 At [38] **[[Appellant's bundle 673]]**.

320 At [13] **[[Appellant's bundle 667–668]]**.

321 At [40] and [43] **[[Appellant's bundle 674]]**.

defenceless infant, and Ms Thompson's moderate risk of future violent reoffending,[322] the sentencing purposes of offender accountability, denunciation, deterrence, community protection, as stipulated in s 103(2) of the Sentencing Act, have to assume prominence over Ms Thompson's personal desire for an earlier reintegration back to society.

99. All of this illustrates the 17-year MPI imposed was plainly available to the Judge, and not manifestly unjust.

19 June 2026

M J Lillico | B So
Counsel for the respondent

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

AND TO: The appellant.

[322] Ms Jensen's report at [121] **[[CA COA 216]]**.