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# **Fitting the Time to the Crime: Sentencing for Homicide**

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## *Introduction*

“[M]urder is widely thought to be the gravest of crimes”,<sup>1</sup> whereas manslaughter is known to reflect a lesser degree of culpability. “The taking of a human life, even for the highest and best motives, is not permitted under [New Zealand] law”.<sup>2</sup> Despite the total abhorrence that the community attaches to the killing of a person by another, a homicide<sup>3</sup> that is not culpable (i.e., blameworthy) is not an offence.<sup>4</sup> The killing must amount to a culpable homicide, as defined in s 160 of the Crimes Act 1961.<sup>5</sup> If convicted the offender will be guilty of either murder or manslaughter,<sup>6</sup> with the exception of infanticide.<sup>7</sup>

The law in New Zealand defines murder quite extensively in ss 167 and 168 of the Crimes Act 1961.<sup>8</sup> The offence encompasses a wide range of circumstances, whereby a desire or intent to kill is not necessarily required, and includes an element of recklessness as to whether death ensues or not.<sup>9</sup> Furthermore, the Act provides that a culpable homicide not amounting to murder is manslaughter.<sup>10</sup> However, as a result of the Crimes (Provocation Repeal) Amendment Act 2009, murder can no longer be reduced to manslaughter by reason of provocation.<sup>11</sup>

Both offences share the maximum penalty of life imprisonment,<sup>12</sup> however, the actual sentences imposed for either offence differ considerably, notwithstanding the common characteristic – the taking of a human life. Needless to say, the approach to sentencing within the area, although well established, lacks a certain degree of

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<sup>1</sup> *Attorney-General's Reference No 3 of 1994* [1998] 1 Cr App Rep 91 at 93 per Lord Mustill.

<sup>2</sup> *R v Law* HC Hamilton T021094, 29 August 2002 at [62].

<sup>3</sup> As defined by the Crimes Act 1961, s 158.

<sup>4</sup> Crimes Act 1961, s 160(4). See Appendix 4.

<sup>5</sup> *Ibid*, s 160(2)(a) - (e). See Appendix 4.

<sup>6</sup> *Ibid*, ss 167, 168 and 171. See Appendix 4.

<sup>7</sup> *Ibid*, s 178.

<sup>8</sup> Contrast with the law in England where proof of an intent to kill or cause serious bodily injury remains a primary requirement for the offence, although the definition has not yet been set out in statutory form: See *R v Moloney* [1985] AC 905; [1985] 1 All ER 1025 (HL); *R v Woollin* [1999] 1 AC 82; [1998] 4 All ER 103 (HL); *R v Cunningham* [1982] AC 566, [1981] 2 All ER 863.

<sup>9</sup> Crimes Act 1961, ss 167 and 168.

<sup>10</sup> *Ibid*, s 171.

<sup>11</sup> Ss 169 and 170 of the Crimes Act 1961 were repealed as from 8 December 2009. The issue of provocation is now dealt with at sentencing as a mitigating factor: Sentencing Act 2002, s 9(2)(c) (discussed in Chapter Two and Four in regards to murder and manslaughter respectively).

<sup>12</sup> Crimes Act 1961, ss 172 & 177. See Appendix 4.

uniformity which ultimately has an effect on the consistency of sentencing levels for murder and manslaughter alike.

Before setting out the manner in which the sentences are fixed for each offence it is important to note that the sentencing judge, in any given case, is vested with a discretion to determine the appropriate penalty. It has often been acknowledged that judicial discretion within sentencing should be preserved irrespective of the seriousness of the crime. As Richardson J said in *Fisheries Inspector v Turner*:<sup>13</sup>

It is only by allowing the sentencing authorities a wide discretion that they are enabled to take account of the innumerable factors affecting the nature of the offence, the circumstances of the offence, and the circumstances of the offender, all of which should ordinarily be weighed in determining the appropriate sentence in the particular case.

The above comment was approved more recently in *Hessell v R* by the Supreme Court after acknowledging that consistency of sentencing levels, while desirable, is only one factor to be considered, and “the proper application of punishment for offending remains... an evaluative task for sentencing judges”.<sup>14</sup> Essentially the punishment should “fit the crime” (i.e., be proportionate to the gravity of the offending), in accordance with the principles and purposes of sentencing.<sup>15</sup>

The penalty for murder is no longer mandatory. The sentence is now governed by a distinct regime in the Sentencing Act 2002.<sup>16</sup> Section 102 confers a limited discretion to the court not to impose a sentence of life imprisonment, when the murder is committed as a stage-1 offence, if appropriate in all the circumstances of the case.<sup>17</sup> If a life sentence is not imposed the full range of sentencing alternatives becomes available.<sup>18</sup> However, the presumption in favour of life imprisonment is well

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<sup>13</sup> *Fisheries Inspector v Turner* [1978] 2 NZLR 233 at 237.

<sup>14</sup> *Hessell v R* [2010] NZSC 135 at [27] and [43].

<sup>15</sup> In particular ss 7,8 & 9 of the Sentencing Act 2002.

<sup>16</sup> Crimes Act 1961, s 172. The sentence was mandatory until the enactment of the Sentencing Act 2002. The history relating to the punishment for murder will be discussed below in Chapter One.

<sup>17</sup> Sentencing Act 2002, s 102(1). See Appendix 2.

<sup>18</sup> *R v Law*, above n 2, at [42]. See also Sentencing Act 2002, s 10A for the hierarchy of sentences and orders.

established and strong,<sup>19</sup> and must be imposed unless the court is satisfied that it would be “manifestly unjust” to do so.<sup>20</sup> This exception does not apply to murders committed as a stage-2 or stage-3 offence.<sup>21</sup>

If life imprisonment is imposed for murder, s 103 requires the court, if the offence is not committed as a stage-2 or stage-3 offence,<sup>22</sup> to order that the offender serve a minimum period of imprisonment<sup>23</sup> not less than ten years, or longer if is necessary to satisfy all or any of the purposes set out in s 103(2).<sup>24</sup> Section 103 is subject to s 104, which requires the imposition of a 17-year minimum term in specified circumstances – those usually described to be the ‘worst murders’.<sup>25</sup>

By contrast, the approach to sentencing for manslaughter is more flexible, which for the most part, is due to the variance of circumstances that may result in a conviction. The punishment is to be determined in accordance with either the modern methodology of sentencing,<sup>26</sup> or by comparisons with similar cases. Therefore, the sentence is left to the discretion of the court, in accordance with legislation, and, more recently, appellate guidance.<sup>27</sup> The maximum penalty of life imprisonment is rarely, if at all, imposed, and is reserved for the most serious case of offending of the particular kind.<sup>28</sup> However, the sentence imposed is subject to the “3 strikes” legislation.<sup>29</sup>

Recent amendments to the Sentencing Act 2002 have further fettered any discretion that the courts once previously enjoyed. The Sentencing and Parole Reform Act 2010

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<sup>19</sup> *R v Williams* [2005] 2 NZLR 506 at [57].

<sup>20</sup> Sentencing Act 2002, s 102(1).

<sup>21</sup> *Ibid*, s 102(3).

<sup>22</sup> A different regime applies in accordance with s 86E, as inserted by the Sentencing and Parole Reform Act 2010 (discussed in more detail below).

<sup>23</sup> Also referred to as the non-parole period, or the minimum term of imprisonment.

<sup>24</sup> Sentencing Act 2002, s 103(1). The purposes include accountability, denunciation, deterrence and protection of the community. See Appendix 2.

<sup>25</sup> *Ibid*, s 104(1)(a) to (i). See Appendix 2.

<sup>26</sup> See *R v Taueki* [2005] NZLR 372 at [8]: The court first determines an appropriate starting point taking into account the aggravating and mitigating factors of the offending. The starting point is then adjusted for the aggravating and mitigating factors of the offender. See discussion in Chapter Four in regards to sentencing for manslaughter.

<sup>27</sup> See *R v Jamieson* [2009] NZCA 555 at [34]; *R v Tai* [2010] NZCA 598 at [11]: discussed in more detail in Chapter Four.

<sup>28</sup> Sentencing Act 2002, s 8(c).

<sup>29</sup> When manslaughter is committed as a stage-3 offence, the maximum penalty of life imprisonment must be imposed with a minimum period of 20 years unless it would be manifestly unjust to do so: s 86D. See Appendix 3.

inserted ss 86A to 86I into the principal Act.<sup>30</sup> The provisions, which are often referred to as the “3 strikes legislation”, came into force on 1 June 2010,<sup>31</sup> and do not apply retrospectively.<sup>32</sup> The primary purposes of the amendments are to deny parole to recidivist offenders who commit serious violent crimes,<sup>33</sup> including murder and manslaughter,<sup>34</sup> and to impose maximum terms of imprisonment upon those who continue to commit violent offences.<sup>35</sup> Effectively the regime provides a hierarchical *mandatory* framework that the courts must apply when sentencing offenders convicted of one or more of the 40 specified offences.<sup>36</sup> The provisions set up a warning system, premised upon stage-1, stage-2 and stage-3 offences and a sentencing structure markedly different to the usual methodology followed by the courts.

The major sanction available for dangerous violent offenders<sup>37</sup> prior to the amendments was preventive detention.<sup>38</sup> Furthermore, the discretion of the sentencing judge, with respect to murder, was preserved within the “manifestly unjust” rubric.<sup>39</sup> Under the “3 strikes” legislation the phrase “manifestly unjust” provides limited discretion to the courts, and despite the evident difficulties in relation to the expression within the area of murder, the provisions give no legislative guidance as to the way in which it should be interpreted in the particular context.

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<sup>30</sup> Under the heading: “Additional consequences for repeated serious violent offending”.

<sup>31</sup> Sentencing and Parole Reform Act 2010, s 2(1).

<sup>32</sup> Ibid, s 12(1).

<sup>33</sup> A list of 40 offences specified in s 86A, including murder, attempted murder, counseling or attempting to procure murder, conspiracy to murder, manslaughter but excludes infanticide. See Appendix 2.

<sup>34</sup> Crimes Act 1961, ss 172 & 177.

<sup>35</sup> Sentencing and Parole Reform Act 2010, s 3.

<sup>36</sup> Sentencing Act 2002, s 86A: The majority of the offences are punishable by a maximum of either ten or 14 years imprisonment, with only a few attracting a lesser maximum of seven years: Sentencing Act, 2002, s 86A.

<sup>37</sup> Including those convicted of manslaughter, but not those convicted of murder: Sentencing Act, s 87(5).

<sup>38</sup> Sentencing Act 2002, s 87. An indeterminate sentence similar to that of life imprisonment. The purpose of the sentence is to protect the community from those who pose a significant and ongoing risk to the safety of its members: s 87(1). To impose the sentence the court must be satisfied that three qualifying factors exist – that the offender is convicted of a qualifying offence, he or she was at the time of the offending 18 years or over, and is likely to commit another qualifying offence if released at the sentence expiry date: s 87(2)(a) to (c). There are two further requirements that must be met before the sentence can be imposed: see s 88(1)(a) and (b). If the court does impose a sentence of preventive detention it must order that the offender serve a minimum period of imprisonment of at least five years: s 89(1).

<sup>39</sup> The phrase ‘manifestly unjust’ is not defined in the Act; instead the courts have attempted to interpret the expression without legislative assistance. See Chapters Two and Three as to the meaning of the phrase in regards to murder.

This paper will consider the issue of whether the current approach to sentencing for culpable homicide, be it murder or manslaughter, is providing a principled response to the taking of a human life, as well as consistency in sentencing levels within the area. Chapter One will outline the history and developments of the sentencing framework for murder. Chapters Two and Three will focus primarily on the extent of the courts' discretion in relation to sentencing for murder and the issue of manifest injustice. Chapter Four will discuss the flexibility of the approach to sentencing for manslaughter, and the consequences thereof. Lastly, in Chapter Five the paper will conclude with a forward-looking examination of the interpretation of the term "manifestly unjust", especially in light of the recent amendments to the Sentencing Act, thereby focusing on the implications of the regime enacted by the "3 strikes" legislation. Throughout the paper particular emphasis will be placed upon the nature and extent of the discretion of the courts.

## *I The History and Developments of the Sentencing Framework for Homicide*

The history and developments of the sentencing framework for homicide, in particular the change in penalty for murder and the subsequent release of the offender, provide an important background to the current provisions and specifically the more recent amendments of the Sentencing Act 2002. It is significant to note that those convicted of murder have spent differing times in prison before parole eligibility throughout the years. The role of the courts in determining either the sentence or the length thereof to be served has changed considerably, notwithstanding the importance placed upon judicial discretion within this area.

### *A The Death Penalty*

At common law the mandatory sanction for murder was the death penalty (i.e., capital punishment). The English common law remained the law in New Zealand in relation to murder until 1893, when the New Zealand Criminal Code Act was enacted. It provided that all offences were to be prosecuted under legislation rather than at common law.<sup>40</sup> The Act defined homicide, culpable homicide, and the distinction between murder and manslaughter in statutory form.<sup>41</sup> Every one convicted of murder was to be sentenced to death.<sup>42</sup> Manslaughter carried a lesser sentence of imprisonment with hard labour for life.<sup>43</sup>

The Crimes Act 1908 was a substantial re-enactment of the Criminal Code Act, and capital punishment remained the mandatory penalty for murder.<sup>44</sup> Similarly life imprisonment continued to be the maximum sentence for manslaughter.<sup>45</sup> However, the Crimes Amendment Act 1941 amended the principal Act to provide that every one

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<sup>40</sup> Criminal Code Act 1893, s 6; subsequently re-enacted in the Crimes Act 1908, s 5.

<sup>41</sup> Criminal Code Act 1893, Part XVI and XVII (ss 154-174). The definitions are very similar to those that remain today under the Crimes Act 1961, and provide the circumstances in which culpable homicide is murder.

<sup>42</sup> *Ibid*, s 167. The punishment was to be carried out in accordance with the Criminals Execution Act 1883: s 12.

<sup>43</sup> *Ibid*, s 171. The discretion of the court to impose a lesser sentence (i.e., a shorter term) was preserved under s 16 of the Act; see also Criminal Justice Act 1954, s 44, which has the same effect.

<sup>44</sup> Crimes Act 1908, s 187.

<sup>45</sup> *Ibid*, s 191.

convicted of murder was to be sentenced to imprisonment with hard labour for life.<sup>46</sup> Thus the death penalty was abolished. However, it was revived by the Capital Punishment Act 1950.<sup>47</sup> The death penalty could not be imposed upon an offender under the age of 18.<sup>48</sup> In all other respects the courts had no discretion as the sentence was mandatory.

A sentence of life imprisonment was imposed for offenders convicted of murder with respect of which the death penalty was reprieved or those who were sentenced prior to the reinstatement of capital punishment. The ‘true form’ of the indeterminate sentence was originally contained in the Habitual Criminals and Offenders Act 1906.<sup>49</sup> Although the Act did not apply to those convicted of murder or manslaughter, it is important to note that the release of the offender was dependant upon an application made to the Supreme Court as to whether or not he or she had “sufficiently reformed”.<sup>50</sup>

The Crimes Amendment Act 1910 significantly changed the law with regard to the release of offenders, including those convicted of murder and for whom the death penalty had been commuted to life imprisonment. The task of determining the duration of the sentence prior to release on probation was removed from the Supreme Court and transferred to a newly established body – the Prisons Board.<sup>51</sup> This was a significant development in the law as the sentence was no longer fixed at the point of conviction, but rather the duration of the term depended upon the conduct of the offender while in prison.<sup>52</sup>

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<sup>46</sup> Ibid, s 2.

<sup>47</sup> Capital Punishment Act 1950, s 2; as to the form of the punishment see s 9.

<sup>48</sup> Ibid, s 5. A youth convicted of murder was to be sentenced to detention during His Majesty’s pleasure: see (2) to (5) for an explanation of that punishment.

<sup>49</sup> Hall, G *The New Penology in New Zealand. The Crimes Amendment Act 1910* at 117. Those to whom the Act applied could be detained for an indefinite period at the Governor’s pleasure: s 6(1). The Act provided for the detention, control and discharge of habitual criminals and habitual offenders. As to definition of habitual criminals and habitual offenders see ss 2 to 4.

<sup>50</sup> Habitual Criminals and Offenders Act 1906, s 6(1) & (2).

<sup>51</sup> Crimes Amendment Act 1910, s 9. As to the functions of the Board see s 12.

<sup>52</sup> The Minister of Justice, Sir John Findlay “Statement by the Minister of Justice” *Ashburton Guardian* (New Zealand, 14 February 1911) at 2. Despite the duty of the Board to inquire as to whether the offender had been reformed and should be released on probation or discharged, a close and considered examination of each individual offender did not necessarily take place. Nor was the release of an offender automatically considered within the required time frame. Therefore, the Prisons Board were unsuccessful in ensuring that offenders were released in a timely manner: Hall, above n 49, at 167.

## *1 The Criminal Justice Act 1954*

The Criminal Justice Act 1954 subsequently amended the appropriate release date of offenders sentenced to life imprisonment for murder. Significantly, the Act stipulated for the first time the number of years an offender had to serve before consideration of parole. The Parole Board (i.e., the Board constituted under the Crimes Amendment Act 1910)<sup>53</sup> were to consider the case of an offender undergoing a life sentence “as soon as may be practicable after the expiry of five years from the date of his reception in the prison”.<sup>54</sup> While the death penalty remained the mandatory sentence for murder, the sentence was frequently reduced to life imprisonment.<sup>55</sup> The issue of whether capital punishment was the most appropriate penalty for murder called for a consideration by the Government of the day, as it was not being used consistently.

## ***B The Crimes Act 1961 and Life Imprisonment***

The Crimes Bill, introduced initially in 1957,<sup>56</sup> came before the House of Representatives in 1960 with the object of revising the criminal code of New Zealand.<sup>57</sup> At the forefront of the bill was the issue of capital punishment.<sup>58</sup> As a result the law in New Zealand, at least in regards to the appropriate penalty for murder, was changed significantly by the Crimes Act 1961.<sup>59</sup> The definitions relating to homicide remained predominantly the same.<sup>60</sup> However the punishment for murder

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<sup>53</sup> Criminal Justice Act 1954, s 31.

<sup>54</sup> *Ibid*, s 33(2)(c): If denied release, the offender was to be considered at least once every 12 months thereafter. Refer to Table 1 in Appendix 5. Where any person convicted of murder was either previously sentenced to death and the sentence had been commuted to life imprisonment, or was sentenced to life imprisonment, he or she were not to be released on probation (now known as parole) or discharged under the Act prior to the approval of the Governor-General: Criminal Justice Act 1954, s 34(2).

<sup>55</sup> See comments of Geoffrey Palmer, the then Deputy Prime Minister, on the introduction of the Abolition of the Death Penalty Bill (for treason): (22 February 1989) 496 NZPD 9216 at 9217.

<sup>56</sup> First introduced by the National Administration in 1957: see (13 September 1960) 328 NZPD 2205; (19 July 1960) 322 659.

<sup>57</sup> *Ibid*.

<sup>58</sup> See comments of the Hon J. R. Hanan, the then Minister of Justice: (13 September 1960) 328 NZPD 2206, at the first reading of the Bill. The third reading of took place on 1 November 1961 – the date of assent.

<sup>59</sup> The Act repealed the Crimes Act 1908, and came into force on 1 January 1962: Crimes Act 1961, s 1(2).

<sup>60</sup> See Crimes Act 1961, ss 158 to 181. Compare Crimes Act 1908, ss 173 to 194.

was amended to a mandatory sentence of life imprisonment.<sup>61</sup> The death penalty was abolished and has never been reintroduced.<sup>62</sup>

As the sentence of life imprisonment was mandatory, the sole issue related to the appropriate non-parole period for those convicted of murder. Previously the Parole Board considered the offender for release on parole after serving five years of his or her sentence.<sup>63</sup> This term was subsequently amended by the Criminal Justice Amendment Act 1962 to one of ten years<sup>64</sup> and further reduced to seven years by the Criminal Justice Amendment Act 1975.<sup>65</sup>

### *1 The Criminal Justice Act 1985*

As a result of a developing concern surrounding the criminal justice system in New Zealand, the Penal Policy Review Committee was established in 1981 to review the area.<sup>66</sup> A report was submitted to the Minister of Justice that provided the basis of the new Criminal Justice Act of 1985.<sup>67</sup> Eligibility for parole was provided for in s 93 of the Act. The status quo was initially preserved, thus where an offender was serving a life sentence he or she was to be considered for release by the Parole Board after the expiry of 7 years,<sup>68</sup> although it was once again amended to ten years in 1987.<sup>69</sup>

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<sup>61</sup> Crimes Act 1961, s 172. Section 187 of the Crimes Act 1908 was repealed by s 2 of the Crimes Amendment Act 1941. The court could not sentence any person under the age of 21 years to a sentence of imprisonment: Criminal Justice Act 1954, s 14.

<sup>62</sup> For a more comprehensive discussion on the abolition of the death penalty see Engel, P *The Abolition of Capital Punishment in New Zealand: 1935 – 1961*; New Zealand Department of Justice *Crime in New Zealand*.

<sup>63</sup> Criminal Justice Act 1954, s 33.

<sup>64</sup> Criminal Justice Amendment Act 1962, s 26(1). See Table 1 in Appendix 5.

<sup>65</sup> Criminal Justice Amendment Act 1975 (No. 47), s 15(2). See Table 1 in Appendix 5.

<sup>66</sup> Hall, Geoff *Hall's Sentencing* (online looseleaf ed, LexisNexis) at SA1.3.

<sup>67</sup> See *Report of the Penal Policy Review Committee* (24 December 1981).

<sup>68</sup> Criminal Justice Act 1985, s 93(1)(b).

<sup>69</sup> Criminal Justice Amendment Act 1987, s 9. Refer to Table 1 in Appendix 5. The Act was further amended with respect to specified violent offences. Those sentenced to a term of imprisonment of more than two years were not to be released on parole, regardless of the length of the finite sentence that had been served: s 9(2A). The list included, for example, the following offences of the Crimes Act 1961: manslaughter (s 171), attempted murder (s 173), and wounding with intent to cause grievous bodily harm (s 188(1)). Nonetheless, the provision did not outlast subsequent amendments: repealed by the Criminal Justice Amendment Act 1993, s 49.

The principal Act was significantly amended in 1993.<sup>70</sup> Notably s 80 was repealed and substituted with an alternative provision. The court could, where an offender was sentenced to life imprisonment, impose a minimum period of imprisonment longer than ten years, if satisfied that the circumstances of the offence were ‘so exceptional’ that such a minimum term was justified.<sup>71</sup> This represented a major change in sentencing within New Zealand, in particular to parole eligibility and the sentence of life imprisonment for murder.<sup>72</sup> The discretion of the court was preserved to impose a sentence that it saw fit, rather than the length of the term served primarily determined by the Parole Board.

The Criminal Justice Amendment Act 1999 amended the threshold required under s 80. Rather than necessitating exceptional circumstances, the Act provided that the court had to be satisfied that the circumstances of the offence were ‘sufficiently serious’ to justify a longer term than the ten-year norm.<sup>73</sup> A definition of ‘sufficiently serious’ was provided in the Act. The circumstances had to be regarded as taking the offence out of the ‘ordinary range’ of offending of the particular kind.<sup>74</sup> The jurisdiction relating to minimum periods of imprisonment, for both indeterminate and finite terms, was effectively widened.<sup>75</sup> Due to the upsurge of home invasions at the time, if the murder involved such an aggravating factor, the court was required to impose a minimum term of not less than 13 years, or more if satisfied that the circumstances of the offence were sufficiently serious to justify doing so.<sup>76</sup>

The Criminal Justice Act 1985, in particular s 80, provided an important step to preserving the discretion of the court, especially with regard to the imposition of a sentence proportionate to all the circumstances of the offence. Despite the mandatory nature of life imprisonment for murder, the Act recognised the differing levels of

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<sup>70</sup> Criminal Justice Amendment Act 1993.

<sup>71</sup> *Ibid*, s 39(1). Consideration was to be given to both the circumstances of the offence and the offender, when determining the duration of that minimum period: Criminal Justice Act 1985, s 80(3). See *R v Wilson* [1996] 1 NZLR 147; *R v Parsons* [1996] 3 NZLR 129 for the correct approach to the section. See also *R v Smith* CA315-96, 19 December 1996; *R v Bain* HC Dunedin T1-95, 21 June 1995 for cases where the court imposed a longer term than 10 years.

<sup>72</sup> The Criminal Justice Amendment Act 1993 also provided for a minimum period of imprisonment to be imposed upon those sentenced to a finite term of more than 2 years (which may have been relevant to cases of manslaughter, but not murder): s 39; s 80(4) of the amended Act.

<sup>73</sup> Criminal Justice Act 1985, s 80(5A).

<sup>74</sup> *Ibid*.

<sup>75</sup> See *R v Lundy* CA106/02, CA 137/02, 31 July 2002 at [28] per Tipping J.

<sup>76</sup> Criminal Justice Act 1985, s 80 (amended by the Criminal Justice Amendment Act 1999, s 2).

culpability that were associated with the crime by allowing for parole eligibility and a minimum period of imprisonment.

### ***C The Sentencing Act 2002***

The Sentencing Act 2002<sup>77</sup> significantly changed the law relating to sentencing in New Zealand,<sup>78</sup> in particular the sentencing framework for murder. The principles and purposes of sentencing were set out, in ss 7 and 8, for the first time in statutory form.<sup>79</sup> Section 9 now provides a non-exhaustive list of aggravating and mitigating factors.<sup>80</sup> Although the provisions indicate a desire for consistency, the Act does not suggest that it should be achieved by curtailing the discretion of the court by the use of a more structured approach as opposed to that applied at common law.<sup>81</sup>

#### *1 The Current Sentencing Framework for Murder*

The Act, prior to the amendments, provided a more flexible regime for murder, and allowed for all aggravating and mitigating factors to be taken into account when determining the appropriate sentence.<sup>82</sup> While strong presumption in favour of life imprisonment was retained, the sentence was no longer mandatory and the court could, in a small number of cases, consider a lesser sentence.<sup>83</sup> The Act was further intended to restrict the discretionary nature of the sentence with regard to the most serious cases of murder, and in particular the minimum period of imprisonment.<sup>84</sup>

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<sup>77</sup> For ease of reference the Sentencing Act will hereto after be referred to as the Act.

<sup>78</sup> Hall “*Hall’s Sentencing*”, above n 66, at SA1.7.

<sup>79</sup> *Hessell v R* [2010] NZSC 135 at [35]; *R v Rawiri & Ors* HC Auckland T014047, 16 September 2002 at [24].

<sup>80</sup> See Appendix 1. The court must take the factors into account to the extent that they are applicable in the case.

<sup>81</sup> *Hessell v R* (SC), above n 79, at [41].

<sup>82</sup> Hon Phil Goff MP, (2001) 53 NZPD (Hansard) p 10911.

<sup>83</sup> *Ibid.* See discussion of s 102 in Chapter Two. Prior to the Sentencing Act 2002 there was a presumption in favour of a sentence of imprisonment for violent offenders: see s 5 of the Criminal Justice Act 1985. “The court shall impose a full-time custodial sentence on the offender unless the court is satisfied that, because of the special circumstances of the offence or of the offender, the offender should not be so sentenced” (now repealed).

<sup>84</sup> *Ibid.*, s 104. There were also significant changes to the Act made as a result of the Sentencing Amendment Act 2007: See *Hall’s Sentencing* (online) at SA1.13.

The current sentencing framework for murder is primarily governed by ss 102, 103 and 104 of the Act.<sup>85</sup> The Act creates a tier-based sentencing structure,<sup>86</sup> and if the murder is not committed as a stage-2 or stage-3 offence, preserves the discretion of the courts to ensure that the sentence reflects both the circumstances of the offence and the offender. The court may when appropriate in all the circumstances impose a lesser sentence than life imprisonment.<sup>87</sup>

The first tier concerns the small group of offenders who are sentenced to a term of imprisonment less than life under the “manifestly unjust” rubric of s 102.<sup>88</sup> The majority of offenders are encompassed within the second tier with the imposition of a life sentence and a minimum period of ten years imprisonment.<sup>89</sup> The third tier is comprised of offenders who are ordered to serve a minimum period longer than ten years, usually less than 17 years, whereby the sentencing judge must be satisfied that the circumstances of the case take it out of the ‘standard range of murders’.<sup>90</sup> Offenders who commit the most serious cases of murder are included in the fourth tier, and are ordered to serve a minimum period of 17 years or more.<sup>91</sup> The final tier includes offenders who are sentenced to serve life imprisonment without *any* possibility of on parole.<sup>92</sup>

## *2 The Sentencing and Parole Reform Act 2010*

The Sentencing and Parole Reform Bill 2009 was introduced into the House of Representatives on 18 February 2009 as part of the ACT Party’s “three strikes and you’re out” policy.<sup>93</sup> It was intended to “enhance the integrity of the parole system

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<sup>85</sup> See also Sentencing Act 2002, s 86E for when murder is committed as either a stage-2 or stage-3 offence. The provisions are to be read in conjunction with s 172 of the Crimes Act 1961: Which has the effect that life imprisonment is no longer the mandatory sentence for murder.

<sup>86</sup> Hall, Geoff *Sentencing: 2007 Reforms in Context* at 102.1.

<sup>87</sup> Sentencing Act 2002, s 102(1). See discussion in Chapter Two.

<sup>88</sup> Hall “2007 Reforms”, above n 86 at 102.1.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> Sentencing Act 2002, s 103(2A) ((2A) does not apply to any murder committed, whether in whole or in part, before 1 June 2010: Sentencing and Parole Reform Act 2010, s 12).

<sup>93</sup> Act and National reached an agreement on the ‘3 strikes’ policy, and was part of National’s election promise to hold serious repeat offenders to account. Both parties campaigned heavily on law and order in the election: <http://www.beehive.govt.nz/release/national-and-act-agree-three-strikes-regime>.

and to protect the public from the worst repeat offenders”.<sup>94</sup> The bill as introduced changed significantly throughout the stages in the House, and the Act now provides a much broader scheme than first proposed.<sup>95</sup>

The threshold for the regime initially was that an offender had to be sentenced to either a determinate sentence of five years or more, or an indeterminate sentence of imprisonment.<sup>96</sup> The regime is now based on a conviction for one of the 40 qualifying serious violent offences that are listed in the Act.<sup>97</sup> The mandatory sentence for a conviction for a qualifying offence at stage-3 was changed from a sentence of life imprisonment with a minimum period of 25 years, to the maximum sentence<sup>98</sup> for that offence without parole, unless it would be manifestly unjust.<sup>99</sup>

The Labour Party, among others, strongly opposed the bill, and argued that the regime was “unworkable, unjust and inequitable”,<sup>100</sup> and that it would result in disproportionate sentences at stage-3. Those supporting the “3 strikes” did not apologise for that outcome, as by stage-3 the offender would have been sufficiently warned of the consequences if he or she were to reoffend by committing further serious violent offences.<sup>101</sup> The Hon Rodney Hide, the then leader of the Act Party, recognised that a deliberate escalation of the punishment for those to whom the regime applies was an essential element of the “3 strikes” policy.<sup>102</sup>

The bill came into force on 1 June 2010. The provisions do not apply retrospectively.<sup>103</sup> The regime sets up a three-stage sentencing system, whereby the offender is punished for recidivism in relation to serious violent offences. Therefore

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<sup>94</sup> (18 February 2009) 652 NZPD 1420 at 1421 per Simon Power (the then Minister of Justice).

<sup>95</sup> See introduction and the first reading of the bill: (18 February 2009) 652 NZPD 1420; contrast with the third reading of the bill: (25 May 2010) 663 NZPD 11226.

<sup>96</sup> See introduction of the bill: (18 February 2009) 652 NZPD 1420).

<sup>97</sup> Sentencing Act 2002, s 86A: includes murder (s 172), attempted murder (s 173), counseling or attempting to procure murder (s 147), conspiracy to murder (s 175) and manslaughter (s 177).

<sup>98</sup> As provided in the Crimes Act 1961.

<sup>99</sup> The exception of ‘manifestly unjust’ only relates to the non-parole order, not the imposition of the maximum sentence prescribed for the offence: Sentencing Act 2002, s 86D. The Minister of Corrections, the Hon Judith Collins, acknowledged that the changes would increase the certainty of the penalty that offenders would receive: (25 May 2010) 663 NZPD 11226.

<sup>100</sup> (25 May 2010) 663 NZPD 11226 per Grant Robertson (Labour – Wellington Central).

<sup>101</sup> (18 February 2009) 652 NZPD 1420 at p 1422 per Simon Power; see also (4 May 2010) 662 NZPD 10673 at 10674 per Judith Collins.

<sup>102</sup> Second reading of the bill: (4 May 2010) 662 NZPD 10673 at 10684.

<sup>103</sup> Sentencing and Parole Reform Act 2010, s 12(1).

the sentence is primarily based on the criminal record of the offender.<sup>104</sup> At the forefront of the scheme is the safety of the community, which, it is claimed, will be achieved by deterring offenders who are aware that repeat offending will attract a higher level of punishment. However, “research is equivocal, at best, as to the effectiveness of deterrence as a sentencing principle”.<sup>105</sup> In addition it was argued that the protection of the public could be achieved through incapacitating those offenders who cannot and will not change their behaviour in prison for a lengthy period of time, thereby preventing them from committing further offences.

The “3 strikes” legislation sets out a hierarchical framework.<sup>106</sup> Manslaughter carries an alternative type of sentence if committed at stage-3. A life sentence must be imposed with a minimum period of imprisonment of not less than 20 years, unless it would be manifestly unjust, in which case, the minimum term must not be less than ten years.<sup>107</sup> Furthermore, a different structure applies in respect to murder if committed as either a stage-2 or stage-3 offence.<sup>108</sup> The court must impose a sentence of life imprisonment without exception,<sup>109</sup> and order that the sentence be served without any possibility of parole, unless it would be manifestly unjust given the circumstances of the offence and the offender.<sup>110</sup> If the court so finds, it must give written reasons for not doing so, and, if the murder is a stage-3 offence, order a minimum period of not less than 20 years, unless it would be manifestly unjust to do

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<sup>104</sup> Sentencing Act 2002, s 9(1)(j). Only one of the many aggravating factors listed in s 9 of the Act. See Appendix 1.

<sup>105</sup> *Hall Hall's Sentencing*, above n 66, at SA86A.3.

<sup>106</sup> Following a conviction for a stage-1 offence the offender is sentenced in the usual manner, but is given a first warning: s 86B. It is unnecessary for the judge to use any particular form or wording, but the offender must be given a written notice that sets out the consequences if he or she were to be convicted of another serious violent offence. If the offender is convicted of a stage-2 offence, other than murder, he or she is again sentenced in the usual manner, and to be given a final warning; however, the full term must be served without parole: s 86C. The same requirements regarding the warning at stage-1 apply. A defendant convicted at stage-3 must be sentenced by the High Court or above, to the maximum term prescribed for the offence, and must be ordered to serve the sentence without parole unless it would be *manifestly unjust* to do so: s 86D. The consequences for a finding of manifest injustice are not set out in the Act, but presumably a minimum period of imprisonment in accordance with s 86 may be imposed, or failing that, an order that the usual parole eligibility apply (i.e., no minimum term). The court may, instead of imposing the maximum penalty for the offence, impose a sentence of preventive detention if the pre-conditions for the sentence are met. The minimum period of imprisonment that the court imposes for the sentence must not be less than the maximum penalty that the court would have imposed, unless it would be manifestly unjust: s 86D(7).

<sup>107</sup> Sentencing Act 2002, s 86D(4).

<sup>108</sup> *Ibid*, s 86E. See Appendix 3.

<sup>109</sup> *Ibid*, s 86E(2)(a).

<sup>110</sup> *Ibid*, s 86E(2)(b).

so.<sup>111</sup> If the murder is a stage-2 offence, or the court finds a minimum period of 20 years manifestly unjust in regards to a stage-3 offence, it must impose a minimum term in accordance with s 103.<sup>112</sup>

### ***D Concluding Comments***

The sentencing framework for homicide had essentially progressed forward over the years to allow the courts to impose a sentence more proportionate to the gravity of the offending. Judicial discretion was preserved, albeit more restrictively with regard to murder as opposed to manslaughter. As a result of the Sentencing and Parole Reform Act the developments have now taken a step backwards preventing the courts from considering all the circumstances of the case when homicide is committed at a certain stage under the provisions. The meaning of the phrase “manifestly unjust” within this area will provide a further understanding of the implications of the “3 strikes” regime.

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<sup>111</sup> Ibid, s 86E(4)(a).

<sup>112</sup> Ibid, s 86E(4)(b). Not less than 10 years: s 103.

## *II Section 102: Life Imprisonment for Murder*

A sentence of life imprisonment for murder, in effect, attempts to uphold the sanctity of life. It must be noted that not all offenders who commit murder possess equal culpability, which is a significant factor that should be reflected in the punishment imposed. The Sentencing Act, at least with regard to a murder committed as a stage-1 offence, provides for a lesser sentence to be imposed when appropriate in all the circumstances of the case. The discretion of the court is maintained, albeit narrowly, under the “manifestly unjust” rubric, an elusive concept at best. It is important to discern the meaning attached to the phrase “manifestly unjust” in the particular context of s 102<sup>113</sup> to further understand the interpretation given to the expression within the context of s 104.

### *A Manifestly Unjust*

When sentencing an offender for murder the court must impose a sentence of life imprisonment unless it is satisfied that it would be “manifestly unjust” to do so.<sup>114</sup> The term “manifestly unjust” is not defined in the Act. The courts have attempted to interpret the words to find the appropriate meaning that should be applied, with reference to the particular statutory context,<sup>115</sup> without any legislative assistance. The correct interpretation and subsequent application has brought about many inconsistencies within the area.

In relation to s 102 the courts have recognised that the injustice must be clear, as demonstrated by the use of the word ‘manifest’,<sup>116</sup> and is only to be found in a small

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<sup>113</sup> See Appendix 2.

<sup>114</sup> Sentencing Act 2002, s 102. Where an offender is convicted of two or more counts of murder, whether or not arising from the same circumstances, he or she is to be sentenced to life imprisonment on each count, with a minimum period of at 17 years unless it would be manifestly unjust: s 104(1)(h). The sentence must be served concurrently as indeterminate sentences cannot be served cumulatively for obvious reasons. See for example, *R v Ying* HC Hamilton T032171, 7 April 2004: a minimum period of imprisonment of 20 years was imposed; *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010: a minimum period of 23 years was imposed; and *R v Ogle* HC Wellington CRI-2009-091-2763, 16 October 2009: a minimum period of 19 years was imposed.

<sup>115</sup> *R v Williams* [2005] 2 NZLR 506; Hall, Geoff *Hall's Sentencing* (online looseleaf ed, LexisNexis) at SA104.1(a).

<sup>116</sup> *R v Rapira* [2003] 3 NZLR 794 at [121]; see also *R v Law* HC Hamilton T021094, 29 August 2002 at [45] per Randerson J.

number of cases,<sup>117</sup> usually consisting of unusual or exceptional circumstances that warrant a sentence of less than life imprisonment. Furthermore, as Priestly J commented in *R v O'Brien*:<sup>118</sup>

“Unjust” can only mean that in the context of a particular murder and a particular offender, the normal sentence of life imprisonment runs counter to both a Judge’s perception of a lawfully just result and also offends against the community’s innate sense of justice.

An overall assessment of the circumstances of the offence and the offender is required, in light of the principles and purposes of sentencing, especially those set out in ss 7, 8 and 9 of the Act.<sup>119</sup> In broad terms, where the culpability related to the offending “is at the lowest end of the range for murder”<sup>120</sup> s 102 confers a limited discretion to the court not to impose a sentence of life imprisonment.<sup>121</sup> If the presumption is displaced there is no guidance as to the appropriate sentence to be imposed, instead the full range of sentencing options is available.<sup>122</sup>

### *1 Life Imprisonment Manifestly Unjust – Examples*

A sentence of less than life for murder is very rare, and the vast majority of cases have received the prescribed maximum penalty. The courts have concluded that life imprisonment would be manifestly unjust in three cases,<sup>123</sup> namely one involving a mercy killing, and two others where the offender suffered mental impairment that strongly mitigated their culpability. One of these is currently under appeal.<sup>124</sup>

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<sup>117</sup> (14 August 2001) 594 NZPD 10911: On the introduction of the Sentencing and Parole Reform Bill 2001, and in direct relation to s 102 of the Act, the Minister of Justice, the Hon Phil Goff, commented accordingly: In a small number of cases, such as those involving mercy killing, or where there is evidence of prolonged and severe abuse, a mandatory life sentence is not appropriate. Under this legislation, the court will be able to consider a lesser sentence.

<sup>118</sup> *R v O'Brien* HC New Plymouth T6/02, 21 February 2003 at [19].

<sup>119</sup> *R v Rapira*, above n 115, at [121].

<sup>120</sup> *R v Williams*, above n 114, at [34].

<sup>121</sup> If the court does not impose life imprisonment it must give reasons for not doing so: s 102(2). See Appendix 2.

<sup>122</sup> *R v Law*, above n 115, at [52]. See Sentencing Act 2002, s 10A for the hierarchy and range of available sentences.

<sup>123</sup> See *R v Law*, above n 115, *R v Wihongi* HC Napier CRI-2009-041-2096, 30 August 2010 (currently under appeal); and *R v Reid* HC Auckland CRI-2008-090-2203, 4 February 2011.

<sup>124</sup> *R v Wihongi*, above n 123.

The courts for the first time considered imposing a sentence of less than life imprisonment for murder in *R v Law*.<sup>125</sup> Randerson J, in recognising the new flexible regime, held that the circumstances of the offence and Law’s own personal circumstances were such that a sentence of life imprisonment would be manifestly unjust.<sup>126</sup> His Honour was satisfied that Law had “reached the end of [his] tether and did not wish [his] own life or that of [his] wife to continue”.<sup>127</sup> He concluded that this case was the “very sort of situation which Parliament had in mind in referring to a small number of cases where sentences less than life imprisonment were appropriate”.<sup>128</sup> A short-term finite sentence of 18 months imprisonment was imposed, primarily for purposes of general deterrence. Leave to apply for home detention was also granted.

By contrast a long-term sentence of imprisonment of eight years was imposed in *R v Wihongi*.<sup>129</sup> Life imprisonment was found to be manifestly unjust due to Wihongi’s culpability being significantly affected by her life history of ‘victimhood’.<sup>130</sup> While it did not rule out Wihongi’s mental impairments as being a causative factor in the offending, Wild J accepted that the murder was not a “sudden, explosive, one-off loss of control which came relatively unexpectedly”.<sup>131</sup> His Honour referred to *R v O’Brien* where the Court of Appeal held that “[l]ow intellectual capacity unrelated to the mental elements of criminal responsibility is seldom likely to justify departure

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<sup>125</sup> *R v Law*, above n 115, Law, a 77-year-old man, hit his 73-year-old wife, who suffered from Alzheimer’s, over the head with a wooden mallet while she was asleep – the couple had agreed that they would “do each other in” if either had Alzheimer’s disease later in life. He then suffocated her with a pillow; her death consequently resulted from asphyxiation. An attempt, by Law, to take his own life following the incident was unsuccessful, however, it provided, along with a previous failed suicide attempt, compelling evidence of the stress and despair that he had been experiencing at the time of the offending. Counsel for the appellant urged the judge “to view [Law’s] actions as honouring an undertaking to [his] wife to act humanely in bringing her life to an end”: at [28].

<sup>126</sup> Law was said to be “a person of unblemished character who [had] led a blameless life,” his age and state of health also contributed as mitigating factors: *Ibid*, at [20].

<sup>127</sup> *Ibid*, at [39].

<sup>128</sup> *Ibid*, at [51].

<sup>129</sup> *R v Wihongi*, above n 123. Wihongi, 33 years of age, was convicted of murdering her partner. A series of arguments between Wihongi and the deceased took place earlier on in the day, which further led to a dispute in the evening; alcohol was a significant contributing factor. Wihongi stabbed the deceased in the chest twice and he later died from blood loss consequent upon the injuries inflicted by Wihongi. Their 11-year-old daughter witnessed the attack.

<sup>130</sup> Her mental health condition was held to be drastically impaired due to a series of traumatic events throughout her life prior to the murder: *Ibid*, at [25]; see discussion at [17]-[26] for more detail. A deterrent sentence was not to be required.

<sup>131</sup> *Ibid*, at [34]. Counsel for the Crown adopted the citation from *R v Mayes* [2003] 1 NZLR 71 at [7].

from the statutory presumption”.<sup>132</sup> The lengthy sentencing remarks of Harrison J in *R v Mikaele*<sup>133</sup> considering the same issue were also mentioned, however neither authority was given much weight.<sup>134</sup> The offender’s mental impairments were therefore held to have played a significant part in the murder.<sup>135</sup> This decision is, however, currently subject to a Solicitor-General appeal to the Court of Appeal.<sup>136</sup>

The case of *R v Reid* provides a more recent example of the courts’ approach to the presumption in s 102.<sup>137</sup> Brewer J held it would be manifestly unjust to impose a sentence of life imprisonment, due in most part to the extent of Reid’s psychotic illness,<sup>138</sup> notwithstanding his clear murderous intent.<sup>139</sup> A finite sentence of ten years imprisonment was found appropriate to hold Reid accountable for his actions, primarily because there was no need to denounce the conduct or deter others from offending in a similar way. No minimum period was imposed. There is no indication in the sentencing notes of Brewer J of how the term of ten years imprisonment was determined.<sup>140</sup> Even though the full sentencing options became available after a finding that life imprisonment would be manifestly unjust, the way in which the

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<sup>132</sup> Ibid, at [35]; *R v O’Brien*, above n 117, at [36].

<sup>133</sup> *R v Mikaele* HC Auckland T013638, 30 August 2002.

<sup>134</sup> Wild J did not think it necessary for detailed comparisons with similar cases to be made, recognising that all murder cases were different: He did compare the case with that of *R v Mayes*, above n 131, in detail, but distinguished it on various grounds: at [37].

<sup>135</sup> Supported by three reports of health assessors at [38]-[40]. Further mitigating factors were her criminal record, her deep and genuine remorse and sadness, the lack of need to protect the public from her in the future and the prospect of her rehabilitation and reintegration into society. Wihongi’s intoxication at the time of the offending was not taken into account as a mitigating factor as the Act does not allow for the court to do so: Sentencing Act 2002, s 9(3). Wild J took it into account as one of her many impairments which operated in a causative manner: *R v Wihongi*, above n 123, at [44].

<sup>136</sup> In the writer’s view Wild J placed too much emphasis on the circumstances personal to the offending, which were not necessarily an operative cause of the offending itself. The assessment under s 102 requires the court to consider *all* the circumstances of the case. But this case does point out the difficult issue of the appropriate penalty for those who commit murder when subjected to abuse or mental impairment prior to the offending.

<sup>137</sup> *R v Reid*, above n 123. Reid, 57 years old, was found guilty of murdering his elderly, 84-year-old neighbour, by strangling her to death. At the time of the offending Reid was suffering from a major psychiatric illness – major depression accompanied by psychotic delusions. He had formed the belief, due to his illness, that the deceased had been spying on him, and further taking photographs to collect evidence against him. The victim was initially thought to have died from natural causes, and if it were not for Reid’s confession, the crime would likely have never been discovered: at [8].

<sup>138</sup> Ibid, at [12].

<sup>139</sup> Ibid, at [15].

<sup>140</sup> See also *R v Carlson* HC Hamilton CRI-2009-019-9995, 6 December 2010 and *R v Heenan* HC Rotorua CRI-2009-063-003966, 3 March 2011, where Brewer J similarly offered no indication as to how the sentence was determined, notwithstanding the importance of such indicators for appellate review (the appellate court will not be able to analyse the sentencing judge’s approach in detail and determine whether the appropriate weight was given to certain factors or not). The sentencing notes for murder cases should show a principled approach, as it allows for an understanding as to how the sentence was determined.

sentence was determined does not seem to follow the modern methodology of sentencing.<sup>141</sup> It appears as though the term was determined by having regard to the general non-parole period attached to a sentence of life imprisonment.<sup>142</sup>

The significance of only three cases having displaced the presumption in s 102 is that the discretion of the court is very much limited within this particular context. For example, in *R v Smail* the offender was sentenced to a finite term of 12 years imprisonment with a minimum period of seven years at first instance.<sup>143</sup> On appeal the sentence was increased to life imprisonment.<sup>144</sup> The interpretation of the phrase “manifestly unjust” is not without difficulties and has resulted in confusion among the sentencing judges as will be apparent from the discussion below.

### ***B Relevance of Mitigating Factors***

Mitigating factors, such as a guilty plea or youth, invariably do not justify a departure from the presumption in favour of life imprisonment. However, if such factors effectively reduce the culpability of the offender they will be considered in the context of the offending to determine whether life imprisonment would be manifestly

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<sup>141</sup> For example there was no indication of a starting point as set out in *R v Taueki* [2005] 3 NZLR 372 at [8]. A starting point is the sentence considered appropriate considering the circumstances, aggravating and mitigating, relating to the offence only, thus it may be used by subsequent cases to compare the culpability of the offender in any given case. The starting point is then altered to give effect to the personal circumstances of the offender, if any are relevant to the assessment. See also *R v Fatu* [2006] 2 NZLR 72 at [21] which confirms the approach taken by the Court of Appeal in *R v Taueki* [2005] 3 NZLR 372 at [8]. See also *Hessell v R* [2010] NZSC 135 at [37] and *R v Clifford* [2011] NZCA 360 at [47], which both reaffirm the approach of guideline judgments and the principle of consistency in the use of starting points.

<sup>142</sup> See *R v Reid*, above n 123, at [20].

<sup>143</sup> *R v Smail* HC Christchurch CRI-2005-009-009464, 12 May 2006: Smail was convicted of killing his friend who was a tetraplegic. While intoxicated, he stabbed the victim in the neck and cut his throat as he sat in his wheelchair watching television. Smail thought he was committing an act of mercy or love. Fogarty J viewed the case as attracting a lesser degree of culpability than the ‘standard range of murders’, and held it manifestly unjust to impose a sentence of life imprisonment.

<sup>144</sup> *R v Smail* CA196/06, 15 September 2006: A minimum period of imprisonment of 13 years was imposed. The Court of Appeal felt that Smail had not been “driven to the depths of despair, not acted with impulsivity, nor with significantly diminished culpability”: at [24]. See also *R v Smail* [2008] NZCA 6: conviction quashed and sentence in High Court set aside; case remitted to the High Court for trial. Smail was convicted. As to re-sentence see *R v Smail* HC Christchurch CRI-2005-009-8464, 11 August 2010: Chisholm J sentenced Smail to life imprisonment with a minimum period of 14 years. See *Smail v R* [2011] NZCA 403: appeal against conviction dismissed; appeal against life imprisonment dismissed; appeal against minimum period allowed and the 14 year term was substituted with 13 years as Smail was unduly delayed through no fault of his own (see [95] for case history).

unjust.<sup>145</sup> It must be remembered that both the circumstances of the offence and the offender must be taken into account when determining the issue of manifest injustice.<sup>146</sup> The discretion of the court should be limited to those cases that warrant a sentence less than life imprisonment, as opposed to giving recognition to every mitigating factor regardless of its significance.

### *1 Youth*

The age of the offender must be taken into account as a mitigating factor, to the extent that it is applicable in the case.<sup>147</sup> If the offender had at the time of the offending, the necessary intent or knowledge of consequences so as to be guilty of murder, youth alone is often insufficient to displace the presumption in favour of life imprisonment.<sup>148</sup> Therefore “[w]here the offending is grave, the scope to take account of youth may be greatly circumscribed”.<sup>149</sup> The courts are not restricted by the Act to impose a life sentence on a young person, nor is youth an unusual feature of serious offending; rather the public interest in denunciation and accountability may outweigh such a factor at sentencing.<sup>150</sup> However, youth appears to justify a finding of manifest injustice in relation to s 104.<sup>151</sup> Consequently, the phrase “manifestly unjust” is inconsistently applied within the same context, albeit different sections of the Act.<sup>152</sup>

### *2 Guilty Plea*

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<sup>145</sup> Sir Bruce Robertson *Adams on Criminal Law – Sentencing* (online looseleaf ed, Brookers) at SA102.02.

<sup>146</sup> The circumstances personal to the offender appear to prevail over, or are given greater weight than any others of the offence, including significant aggravating factors, which would otherwise require a life sentence.

<sup>147</sup> Sentencing Act 2002, s 9(2)(a).

<sup>148</sup> *R v Rawiri & Ors* HC Auckland T014047, 16 September 2002; upheld in *R v Rapira*, above n 115.

<sup>149</sup> *R v Rapira*, above n 115, at [122]. The principles in *Rawiri*, above n 148, and *Rapira*, above n 115, have been expressly applied on numerous occasions in both the High Court and Court of Appeal: see also *R v Trevithick* CRI-2007-244-000009, 19 June 2007; *R v Slade* [2005] 2 NZLR 526 at [22].

<sup>150</sup> *R v Rapira*, above n 115, at [123] and [120]. Therefore in *R v O’Brien*, above n 117, Priestley J acknowledged youth as a mitigating factor (the offender was 14 years 10 months at the time of the offending) but did not find it to justify the imposition of a lesser sentence than life imprisonment. The decision was upheld on appeal: *R v O’Brien* CA107/03, 16 October 2003.

<sup>151</sup> See Chapter Three. Section 104 requires a 17-year minimum period to be imposed in certain murders unless such a sentence would be manifestly unjust.

<sup>152</sup> This is undesirable if consistency in sentencing levels for murder is to be obtained.

The effect of the guilty plea when sentencing an offender for murder remains a complex issue, and will be considered in more detail in Chapter Three in regards to s 104. It is still helpful to consider it within this context. Taking the guilty plea into account as a mitigating factor falls into only one part of the two-part equation required for s 102 as recognised by Harrison J in *Mikaele*, in which a sentence other than life can only be imposed given the circumstances of the offence and the offender.<sup>153</sup> The Court of Appeal in *Hessell v R* considered the relevance of a guilty plea to the phrase “manifestly unjust” in relation to s 102 accordingly:<sup>154</sup>

It would be almost inconceivable that a guilty plea on its own could render life imprisonment ‘manifestly unjust’, although potentially a guilty plea, when combined with other factors could render life imprisonment manifestly unjust. This guideline does not purport to speak to that unusual circumstance.

This suggests that the guilty plea alone would rarely result in a finding that life imprisonment is manifestly unjust. The Supreme Court in *Hessell v R* did not directly address the issue of the guilty plea within the context of murder,<sup>155</sup> and there remains no further guidance as to the appropriate discount to be given in such cases.

### *3 Conduct of the Victim*

As a result of the abolition of the partial defence of provocation the courts are having difficulty determining the appropriate weight to be given to that factor when sentencing the offender for murder.<sup>156</sup> The court is required to take into account the conduct of the victim as a mitigating factor, and it may reduce the culpability of the offender.<sup>157</sup> It has been acknowledged that such a factor may be relevant to the

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<sup>153</sup> *R v Mikaele* HC Auckland T013638, 30 August 2002 at [74]: under s 102 the circumstances of the offending and the offender are to be considered cumulatively: at [40].

<sup>154</sup> *Hessell v R* [2009] NZCA 450 at [63].

<sup>155</sup> *Hessell v R* (SC), above n 141. Discussed in more detail in Chapter Three in relation to s 104.

<sup>156</sup> For example, Courtney J considered the issue thoroughly in the recent case of *R v Hamidzadeh* HC Auckland CRI-2010-004-019352, 25 August 2011 at [16]-[22], notwithstanding that the alleged element of provocation was of a very unusual and low level. The offender had placed a video-recorder in a room to determine whether his ex-wife and friend were having an affair. Once it was proven (i.e., the tape evidenced that they were having a sexual relationship) at 5am in the morning he embarked on a frenzied attack on the friend with two knives, while his wife witnessed the brutal and callous murder.

<sup>157</sup> Sentencing Act 2002, s 9(2)(c).

evaluation of s 102.<sup>158</sup> However, it may be outweighed by the circumstances of the offence.<sup>159</sup> The level of provocation must be assessed and balanced against all other circumstances of the case. Greater emphasis should not be placed on the factor merely because it once could reduce a murder verdict to that of manslaughter. Any other approach would undermine the repeal of the defence.<sup>160</sup>

For example, the appropriate weight to be given to an element of provocation was recently considered by the Court of Appeal in *Gempton v R*.<sup>161</sup> Chisholm J in the High Court noted that while there was an element of provocation there were countervailing factors.<sup>162</sup> Not to impose a life sentence would undermine the purposes of deterrence and denunciation, and would “send the wrong message to the community”.<sup>163</sup> Gempton appealed against his sentence, primarily on the basis that the imposition of the life sentence was manifestly unjust.<sup>164</sup> The Court held it was unnecessary in the case to address the issue of the interaction between s 102 and circumstances that would have amounted to provocation before its abolition as a defence.<sup>165</sup> The

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<sup>158</sup> As the Court of Appeal in *Daken v R* [2010] NZCA 212 said, “excessive self-defence may fall within the second limb of [the section], so that a sentence of life imprisonment would be manifestly unjust”, however the question is one of fact and judgment: at [68]. The offender stabbed his brother, in an uncontrolled burst of anger, several times, in the back, chest and skull after being attacked by him with a fire poker. See also *Gempton v R* [2011] NZCA 349 at [11]; and *R v Hamidzadeh*, above n 156.

<sup>159</sup> While the facts of *Daken*, above n 158, did amount to a sudden and unexpected attack by the victim (the offender’s brother), the level of brutality, which was described as “sustained acts of slaughter” did not justify a finding of manifest injustice, notwithstanding the provocative circumstances and the element of self-defence: at [71]. The decision of the Court of Appeal upheld the sentence imposed in *R v Daken* HC Christchurch CRI-2008-009-009576, 2 October 2009.

<sup>160</sup> *R v Hamidzadeh*, above n 156, at [16].

<sup>161</sup> *Gempton v R*, above n 158. Gempton stabbed the victim four times, one of which severed his aorta, and caused his death: [5]. It was argued, among other things, that the offender was effectively provoked by the actions of the victim, and therefore, the killing was not intentional but rather an accident. It was submitted, on behalf of Gempton, that the case was one in which the court should exercise its discretion and impose a lesser sentence than life imprisonment. Chisholm J, in the High Court, did not agree.

<sup>162</sup> Including premeditation by Gempton arming himself with a knife, threatening the victim, and inflicting stab wounds in addition to the fatal blow: at [11].

<sup>163</sup> *R v Gempton* HC Christchurch CRI-2009-009-13468, 13 October 2010 at [31] as cited in *Gempton v R*, above n 158, at [11]. Moreover youth and remorse were insufficient to displace the presumption: at [12].

<sup>164</sup> *Ibid*, at [1]. At the time of trial provocation was still an available defence to murder, however, it was not raised on behalf of Gempton as the case of *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009 had only recently been tried, and there were concerns as to the public reaction. Gempton’s counsel thought the perception of the defence had been ‘poisoned’, and therefore would be unsuccessful. Rather he relied on the element of provocation being taken into account at sentencing: *Gempton v R*, above n 158, at [14]. See also *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009; *Weatherston v R* [2011] NZCA 276: the defence was not successful. Weatherston sought leave to appeal against the dismissal by the Court of Appeal against his conviction for murder, but his application was dismissed: *Weatherston v R* [2011] NZSC 105.

<sup>165</sup> *Gempton v R*, above n 158, at [18]: an issue that would have to be considered in due course. The Court of Appeal further dismissed the issue that there may be prejudice due to the events relating to the

circumstances of the case, including those of the offending and the offender, did not render a sentence of life imprisonment manifestly unjust.<sup>166</sup>

As a result of the repeal of the defence of provocation it is likely that more offenders will be found guilty of murder as opposed to the lesser offence of manslaughter. Over time, the conduct of the victim and in particular an element of provocation may precipitate a finding of manifest injustice in a larger number of cases. Ultimately, the discretion of the courts may be widened within the context of s 102 to provide for a more proportionate sentence. Nevertheless, the “3 strikes” legislation removes any possibility of the punishment reflecting the individual circumstances of the case in regards to murders committed as either a stage-2 or stage-3 offence, including those where the offender was provoked.<sup>167</sup>

While s 9 provides a non-exhaustive list of mitigating factors, there are a certain few that are being consistently recognised more so than others. The courts are often confused as to the appropriate weight to be given to such factors. The punishment should be proportionate to the offending, which involves a consideration of all the circumstances of the offence. Yet there is little guidance, which of itself is often conflicting, as to the relevance of mitigating factors when sentencing an offender for murder.

### ***C Minimum Periods of Imprisonment***

If a determinate sentence of imprisonment is imposed for murder, following a finding of manifest injustice, an issue arises as to whether or not it is consistent with the Act to impose a minimum period of imprisonment under s 86. The application of s 86 will be discussed in more detail in relation to sentencing for manslaughter,<sup>168</sup> but it is still

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*Weatherston* case, rather “if the defence had been raised, it would have been the Judge’s task to ensure that they jury assessed the defence dispassionately, free from prejudice or misconceptions”: at [19]. Nevertheless the facts of the case were held not to be well suited to the defence for various reasons, including that the circumstances did not amount to an unexpected sudden loss of control: at [20].

<sup>166</sup> *Ibid* at [22]. Instead it was held that the case involved characteristics that are regularly seen in serious assaults of this nature (highly intoxicated youths who as a result of threatening and provocative behaviour caused the death of another through the use of physical violence): at [25].

<sup>167</sup> An undesirable outcome especially considering those to whom the defence of provocation was previously well suited and successful.

<sup>168</sup> See Chapter Four.

helpful to consider it within this context. Prior to the 2004 Amendment Act,<sup>169</sup> a minimum period could only be imposed if the offence was ‘sufficiently serious’ to warrant further punishment. It was unclear whether the wording of the Act would be distorted if the circumstances of the offence “were of sufficiently low culpability to displace the presumption in s 102, but was yet ‘sufficiently serious’ to justify a minimum period of imprisonment under s 86”.<sup>170</sup>

While the culpability of the offender may displace the presumption in s 102, the culpability of the offence may justify a longer minimum period than that which would otherwise apply under the Parole Act. Thus it may be appropriate, and not inconsistent with the Act to impose a minimum period if a determinate sentence of imprisonment were imposed for murder. Nevertheless, the Court of Appeal has noted a further reason that would suggest that it would be inappropriate to impose a minimum term in such cases.<sup>171</sup> Given the provisions of ss 103 and 104<sup>172</sup> the omission of a similar provision for cases that displace the presumption under s 102 must be considered deliberate.<sup>173</sup> Perhaps the power under s 86 will only rarely be invoked in the circumstances where life imprisonment has been found to be manifestly unjust,<sup>174</sup> however, the imposition of a minimum period may be possible if consideration is given to both the circumstances of the offence and the offender at the two different stages.

### ***E Concluding Comments***

While the sentence of life imprisonment for murder is no longer mandatory, it is imposed in the vast majority of cases. The discretion to sentence the offender to a lesser term is afforded only to those cases that warrant such a lenient response. It is important that the penalty imposed is a proportionate response to the gravity of the

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<sup>169</sup> Sentencing Amendment Act 2004, s 7.

<sup>170</sup> *R v Mikaele*, above n 133, at [54].

<sup>171</sup> *R v Mayes*, above n 131.

<sup>172</sup> Sections 103 and 104 provide for the imposition of a minimum period if a life sentence is imposed for murder.

<sup>173</sup> *R v Mayes*, above n 131, at [31]. This may be contradictory to the fact that the full sentencing options become available after a finding of manifestly unjust under s 102. To allow some but not all of the alternatives would be inconsistent with the approach to sentencing for murder and the principles and purposes of the Act.

<sup>174</sup> See also Crown submissions in *R v Law*, above n 115, at [33].

offending in any given case. Any other approach would result in too many injustices. The imposition of a sentence of less than life imprisonment for murder is not the only way in which the culpability of the offender may be reflected in the penalty. The discretion of the court is also preserved in relation to the determination of the appropriate non-parole period when life imprisonment is imposed.

### *III Section 103 and 104: Minimum Periods of Imprisonment for Murder*

When a sentence of life imprisonment is imposed for murder the imposition of a minimum period of imprisonment for murder is important as it allows the differing levels of culpability to be reflected in the punishment. The approach to determining how long an offender should remain in prison before parole eligibility, although well established, does not necessarily result in consistency of sentencing levels.

Section 103 of the Act requires that if a court sentences an offender to life imprisonment for murder, if not committed as a stage-2 or stage-3 offence under the ‘three strikes’ legislation,<sup>175</sup> it must order that the offender serve a minimum period of imprisonment.<sup>176</sup> The minimum term may not be less than ten years, however, and must be the *minimum term* that the court considers necessary to satisfy all or any of the specified purposes, which include accountability, denunciation, deterrence, and public protection.<sup>177</sup> Furthermore, there is now provision for the court to impose a life sentence without *any* possibility for parole, which did not exist prior to the 2010 amendments.<sup>178</sup> Section 103 is subject to s 104, which requires the court to make an order under s 103 imposing a minimum period of *at least 17 years* in specified circumstances unless the court is satisfied that to do so would be manifestly unjust.<sup>179</sup>

#### ***A Section 103***<sup>180</sup>

The Act indicates, under s 103, that the statutory norm of ten years should be imposed in cases falling within the ‘standard range of murders’ – those which may be seen as ordinary offending in the particular kind of offence.<sup>181</sup> This involves comparing the

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<sup>175</sup> See Sentencing Act 2002, ss 86A-I.

<sup>176</sup> Ibid, s 103(1).

<sup>177</sup> Ibid, s 103(2). These four purposes correspond to those included in s 7 of the Act: see Appendix 1. If the murder was committed prior to 7 July 2004 the public protection criterion does not apply for the purposes of determining the length of the minimum term: *R v Walsh* CA281/04, 19 May 2005 at [25].

<sup>178</sup> Sentencing Act 2002, s 103(2A): If the court is satisfied that no minimum period would be sufficient to satisfy one or more of the four purposes in subs (2), or where the murder is committed as either a stage-2 or stage-3 offence: see s 86E. (Note: (2A) does not apply to any murder committed, whether in whole or in part, before 1 June 2010: Sentencing and Parole Reform Act 2010, s 12).

<sup>179</sup> See also Sentencing Act 2002, s 5: provides the right to appeal against the imposition of a minimum term of imprisonment.

<sup>180</sup> See Appendix 2.

<sup>181</sup> *R v Howse* [2003] 3 NZLR 767 at [62]. See for example *R v Harrison* HC Auckland CRI-2003-92-36746, 10 February 2005 where Nicholson J imposed a ten year non-parole period for what he

circumstances of the individual case against the ‘statutory datum point’.<sup>182</sup> The Court of Appeal in *R v Howse* carefully considered the role of relativities within the area and observed:<sup>183</sup>

The primary focus of the sentencing Court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the range of offending which attracts the statutory norm of ten years.

Nevertheless comparisons with other cases, while secondary, should be made and are important for consistency reasons.<sup>184</sup> The task of determining the minimum term is, therefore, of a “particularly fact-specific, evaluative nature”, yet all the relevant statutory purposes must be broadly recognised.<sup>185</sup> The personal circumstances of the offender are only to be taken into account insofar as they are relevant to the four purposes set out in s 103.<sup>186</sup>

### *1 The Statutory Datum Point*

The ‘ordinary range’ of offending in the case of murder is not an easy concept to determine.<sup>187</sup> The guidance offered in *Howse* and *R v Bell* as to how to approach s 103 in this regard came before the 2004 amendments to the Act. The ‘sufficiently serious’ criterion still remained, in particular the requirement that the court had to be satisfied that the circumstances of the case took it out of the ordinary range of offending for murder to impose a longer minimum period than ten years. Nevertheless, the Court of Appeal in the recent case of *Brown v R* reaffirmed the approach taken in *Howse*,<sup>188</sup> and in light of the amendments the Court noted the importance of the wording in s

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described as a “heat of the moment” homicide which did not fall out of the range of the standard murders. This is in line with the presumptive ten-year minimum term as required previously under s 80 of the Criminal Justice Act 1985.

<sup>182</sup> *R v Bell* CA80/03, 7 August 2003, at [9]; *R v Howse*, above 180, at [63].

<sup>183</sup> *R v Howse*, above n 180, at [61].

<sup>184</sup> *R v Bell*, above n 181, at [9]; *Brown v R* [2011] NZCA 95 at [7].

<sup>185</sup> *Brown v R*, above 183, at [6].

<sup>186</sup> *Ibid*, at [7].

<sup>187</sup> *R v M* [2003] 3 NZLR 481.

<sup>188</sup> *Brown v R*, above n 184, at [7].

103(2). The sentencing judge must “fix what he or she considers the minimum term necessary to satisfy [the] four defined purposes”.<sup>189</sup>

Ultimately, the minimum period imposed in any given case should reflect the individual circumstances involved and attract its own starting point.<sup>190</sup> However, as noted by the Court of Appeal in *Howse* and *Bell* the difficulties determining the length of the minimum term are heightened by the fact that there is a statutory floor (i.e., ten years) but no ceiling.<sup>191</sup> The court “can only work from the bottom upwards”;<sup>192</sup> there is no maximum sentence of which the court can use as a check, aside from the offender’s natural life.<sup>193</sup> There is only one reference point, making it is difficult for the court to ignore the ‘benchmark’ of s 104; therefore a minimum period imposed under s 103 rarely exceeds 17 years.<sup>194</sup>

The Court of Appeal in *Howse* further suggested that “[i]n broad terms a minimum period of 20 years implies that the culpability of that offending is twice that of offending within the ordinary range”.<sup>195</sup> However, when assessing the level of punishment it is inappropriate to adopt a strict mathematical approach.<sup>196</sup> To propose that the circumstances of any murder case can be compared against each another in a numerical manner is to give insufficient recognition to the individual victim, the individual offender, and the principles and purposes of the Act. Nevertheless, s 103 provides no other assistance as to how the determination should be made.

## *2 Matters to be Taken into Account*

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<sup>189</sup> Ibid, at [6].

<sup>190</sup> *R v McCullum & Ors* HC Wanganui CRI-2008-083-2794, 12 February 2010 at [28].

<sup>191</sup> *R v Howse*, above n 180, at [64]; *R v Bell*, above n 181, at [7].

<sup>192</sup> *R v Howse*, above n 180, at [64].

<sup>193</sup> *R v Bell*, above n 181, at [7].

<sup>194</sup> The courts appear to have only imposed a minimum period longer than 17 years in cases where s 103 applies, where the offending took place prior to 30 June 2002 when the Sentencing Act came into force. Section 154 of the Act provides that s 103 applies in those circumstances but s 104 does not. See *R v Bell*, above n 181: the minimum period of 33 years imposed in the High Court was quashed and substituted with one of 30 years; *R v Lundy* CA106/02, CA137/02, 31 July 2002: the minimum period of imprisonment of 17 years imposed in the High Court under s 80 of the Criminal Justice Act was quashed and substituted with one of 20 years; *R v Howse*, above n 180: the minimum period of 28 years imposed in the High Court was quashed and substituted with one of 25 years.

<sup>195</sup> *R v Howse*, above n 180, at [62]. Followed in *R v Reihana* HC Rotorua CRI-2005-070-7328, 29 June 2007 at [31]: a minimum period of 21 years imprisonment was imposed.

<sup>196</sup> *R v Howse*, above n 180, at [62].

Associated offending may be taken into account as part of the surrounding circumstances of the case when determining the length of the minimum term of imprisonment.<sup>197</sup> The same applies for circumstances indicated by convictions for additional offences.<sup>198</sup> The sentencing judge must, however, be careful not to double count the related offending as the minimum period is to be imposed for the offence of murder, and the associated offending may only constitute part of the circumstances to be taken into account.<sup>199</sup> Thus, in *R v Hoko* the Court of Appeal held that Harrison J in the High Court had effectively imposed “what [had] the appearance of a cumulative two year minimum sentence” for the crime against the second victim.<sup>200</sup>

In *R v Broughton* however, Lang J increased the minimum term by three years to give effect to completely separate offending.<sup>201</sup> By doing so, the minimum period was no longer imposed solely for the offence of murder. Nonetheless, as His Honour noted “it would be wrong in principle if [the] Court did not recognise the earlier attack”.<sup>202</sup> Similarly, the sentencing judge in *Hoko* acknowledged that any sentence imposed for associated offending would effectively run concurrently with, and be absorbed by, the murder sentence.<sup>203</sup> This poses a difficult issue, as in theory the offender is effectively sentenced twice for the same offence.<sup>204</sup>

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<sup>197</sup> *R v Hoko* CA420/02, 30 June 2003. See *R v Houma* [2008] NZCA 512 at [35]: the Court of Appeal observed that an uplift may be appropriate “when a concurrent sentence is being imposed for associated offending to ensure the overall length of the sentence reflects the offender’s culpability for the entire offending”. See also s 87 of the Act: a sentence of preventive detention may be imposed concurrently with that of life imprisonment for murder (although the offence is excluded as a qualifying offence) for additional offending. Preventive detention in such a case is primarily imposed for the purposes of denunciation, but also for the protection of the community. It also provides an increased likelihood of refusal for parole when the offender is eligible. See *R v Mackrell* CA437/97, 15 September 1998 and *R v Hotene* HC Auckland S23/00, 9 October 2000.

<sup>198</sup> *R v Alder* CA430/01, 25 June 2002 at [2].

<sup>199</sup> *R v Hoko*, above n 196. Hoko was convicted of murdering a young woman whom he had picked up whilst she was hitchhiking. The second victim saw Hoko on the side of the road with the deceased and when attempting to come to her assistance Hoko threatened him with a firearm to prevent him from intervening or helping the young woman.

<sup>200</sup> *Ibid*, at [64]. A 15-year minimum period had been increased by the sentencing judge to 17 years, notwithstanding that the His Honour had previously held that the factors in the case justified a minimum sentence “of at least 15 years”: at [63]. The Court of Appeal quashed the minimum period of 17 years and substituted it with one of 15 years, because the sentencing judge had double counted the related offending: at [67].

<sup>201</sup> *R v Broughton* HC Rotorua CRI-2008-269-62, 26 March 2009 at [91]-[94]. The offender had attacked a second victim 12 days prior to committing the murder to which he was being sentenced.

<sup>202</sup> *Ibid*, at [93].

<sup>203</sup> *R v Hoko*, above n 196, at [63].

<sup>204</sup> But in practice if the unrelated offending was not taken into account when determining the minimum term the offender would essentially be “getting away with” the second offence.

### *3 Relevance of Mitigating Factors*

The principles set out in s 8 along with the aggravating and mitigating factors set out in s 9 “are applicable to the extent that they are relevant to the [four] specified purposes”.<sup>205</sup> Section 103 requires full allowance to be given to the circumstances personal to the offender.<sup>206</sup> The guilty plea and youth are among the few mitigating factors that are commonly recognised,<sup>207</sup> however the list provided in s 9 of the Act is non-exhaustive and the court may take into account any other factor that it thinks fit.<sup>208</sup> The minimum period cannot be less than ten years, therefore if the court considers the case to fall within the ‘standard range’ of murders it cannot reduce the term below the statutory floor. The relevance of mitigating factors has caused more difficulty in relation to s 104 which will be discussed below.

#### ***B Section 104***<sup>209</sup>

While a case that falls within the ‘standard range of murders’ attracts a non-parole period of ten years, cases that are considered to be the ‘most serious murders’ usually require the imposition of a longer term. The Act requires the court to impose a minimum period of at least 17 years if one or more of the specified aggravating factors set out in s 104 apply in the circumstances of the case unless it would be manifestly unjust to do so.<sup>210</sup>

Even though the courts have considered the meaning of manifest injustice in the context of s 102, the Court of Appeal in *R v Williams* did not consider s 104 to necessitate entirely the same interpretation,<sup>211</sup> rather:<sup>212</sup>

[A] minimum term of 17 years would be manifestly unjust where the Judge decides as a matter of overall impression that the case falls outside the scope

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<sup>205</sup> *R v Walsh* CA281/04, 19 May 2005 at [26].

<sup>206</sup> *R v Green & Morice* CA461-04, CA462-04, 2 June 2005 at [26].

<sup>207</sup> Sentencing Act 2002, s 9(2)(a) and (b). See Appendix 1 for a list of the other mitigating factors that the court must take into account: s 9(2).

<sup>208</sup> *Ibid*, s 9(4)(a).

<sup>209</sup> See Appendix 2.

<sup>210</sup> Sentencing Act 2002, s 103 & 104.

<sup>211</sup> *R v Williams* [2005] 2 NZLR 506 at [57].

<sup>212</sup> *Ibid*, at [67].

of the legislative policy that murders with specified features are sufficiently serious to justify at least that term.

Unlike for s 102, there is no added requirement that the circumstances be ‘exceptional’ to allow the case to drop below the 17-year mandatory period as that reflects the particular statutory context of the section as opposed to s 104.<sup>213</sup> The Court further noted that the statutory minimum period may be manifestly unjust if the “qualifying factor [that brings the offence within s 104] has only peripheral significance in the case”.<sup>214</sup>

### *1 The Williams Approach*

The Court of Appeal in *Williams*, in an attempt to provide guidance, held that when determining the appropriate minimum period in a case where one or more factors in s 104 apply, the assessment of culpability involves a two-stage approach.<sup>215</sup> The first step is to consider the degree of culpability in relation to the standard range of murders, consistent with the approach taken in *Howse*.<sup>216</sup> The court must take into account all aggravating and mitigating factors, relating to both the offence and the offender, including those set out in s 104 to the extent that they are relevant to the present case.<sup>217</sup>

The court should further have regard to the underlying policy of s 104, which is that the circumstances of the murder are sufficiently serious, with the presence of one or more of the s 104 factors, so that a minimum period of not less than 17 years is

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<sup>213</sup> *Ibid.*, at [57].

<sup>214</sup> *Ibid.*, at [68]. The courts have on occasion found difficulty determining whether s 104 applies to the case or not. Ultimately it is up to the discretion of the court. See for example *R v Brown* HC Auckland CRI-2008-022829, 10 December 2010: The Crown submitted that s 104(1)(i) applied as the murder was committed in exceptional circumstances (the offender killed an innocent man who came to the aid of a woman in distress). Venning J did not consider the threshold of s 104 to be met; therefore the minimum period was determined in accordance with s 103. This is one of the very few cases in which the qualifying factor of exceptional circumstances has been argued. A minimum period of 16 years was imposed and the Court of Appeal dismissed the appeal against that term: *Brown v R* [2011] NZCA 95. Leave to appeal the decision of the Court of Appeal was dismissed: *Brown v R* [2011] NZSC 75.

<sup>215</sup> *R v Williams*, above n 209, at [52].

<sup>216</sup> *R v Howse*, above n 180, at [61] to [62]: The court must compare the culpability of the offending in the present case with cases of murder that would attract a ten-year minimum period of imprisonment.

<sup>217</sup> *R v Williams*, above n 209, at [52].

justified.<sup>218</sup> In doing so, the court would then determine the appropriate minimum period of imprisonment considering all the circumstances of the case. Where a minimum period of 17 years is indicated by that first step, the sentence imposed must reflect that assessment. If, on the other hand, a lesser period is indicated the court must, as a second step, consider whether the imposition of a minimum period of 17 years imprisonment would be “manifestly unjust”.

## *2 The Approach Prior to Williams*

The first case to consider the application of s 104 was *R v Luff*.<sup>219</sup> Unlike *Williams*, Young J did not set out, nor did he mention, an approach to be followed. Instead impliedly, His Honour systematically worked through the sections of the Act.<sup>220</sup> After finding that s 104 applied,<sup>221</sup> Young J considered whether or not a minimum period of 17 years would be manifestly unjust. This essentially when compared to *Williams*, dispenses with the first step of which the Court of Appeal set out, however *Luff* was decided before *Williams* and therefore no settled approach had yet been determined.

His Honour’s approach primarily was a consideration of all the circumstances of the case as a whole, including aggravating and mitigating factors relating both to the offence and the offender, which in the writer’s view is consistent with the assessment required by the Act.<sup>222</sup> Young J consequently found there to be no manifest injustice in imposing a minimum period of 17 years. While the Crown submitted that a minimum period of 20 years would be appropriate, His Honour considered 17 years was sufficient, taking into account the offenders early guilty plea, his age, and his family background.<sup>223</sup> A reduction of three years from the 20 years submitted was justified.

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<sup>218</sup> Ibid, at [52].

<sup>219</sup> *R v Luff* S4/02, 18 September 2002. The case involved the cold-blooded killing of a police officer acting in the course of duty. While trying to prevent the murder of a young girl with whom the offender had previously been in a relationship with, the police officer was shot by the offender with a rifle effectively at point blank range and without warning: at [20].

<sup>220</sup> Sentencing Act 2002, ss 102, 103, and 104. See Appendix 2.

<sup>221</sup> Specifically s 104(f): as the deceased was a police officer acting in the course of his duty. See Appendix 2.

<sup>222</sup> In accordance with the principles and purposes set out in ss 7, 8 and 9.

<sup>223</sup> The mitigating factors of youth (the offender was 17 years of age) and the guilty plea, while taken into account, did not render the 17-year minimum term manifestly unjust. If the approach and threshold of manifest injustice in *Williams*, above n 209, were applied to the circumstances of the case, the

Following *Luff*, the application of s 104 was considered in *R v Mackness*.<sup>224</sup> The approach set out by Venning J has been said to have its attractions, even after *Williams* had been decided.<sup>225</sup> His Honour, after finding that s 104 applied to the case,<sup>226</sup> initially considered the meaning of “manifestly unjust” in the context of s 102, referring to the decision of *R v Rawiri*<sup>227</sup> along with the Act itself. He concluded by outlining what he thought was the appropriate approach to be taken in the context of s 104 as follows:<sup>228</sup>

- (1) If s 104 prima facie applies there is a presumption in favour of a minimum period of non parole of at least 17 years.
- (2) It is for the prisoner to show why a term of imprisonment of 17 years would be manifestly unjust.
- (3) The words “manifestly unjust” impose a high threshold, not to be overcome lightly. Manifestly means evidently, or unmistakably.
- (4) Aggravating and mitigating circumstances must be taken into account with the result that even with powerful mitigating circumstances the mandatory term of imprisonment of 17 years might still apply having regard to aggravating factors.

The above approach seems to be rather appealing and it is relatively similar to the approach taken by the courts in relation to s 102.<sup>229</sup> However, the Court of Appeal in *Williams* did not refer to it let alone endorse it. Instead the requirement that the injustice be evident was considered as the only principle, aside from the meaning of “manifestly unjust” being ascertained in light of the principles and purposes of sentencing,<sup>230</sup> to have equal application in the context of both ss 102 and 104.<sup>231</sup>

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aforementioned mitigating factors would likely have resulted in a finding of manifest injustice, and the end minimum period may have been below 17 years. The threshold for s 104 is now much lower as a result of the decision in *Williams* and subsequent cases: discussed in this chapter below.

<sup>224</sup> *R v Mackness* T 023921, 14 April 2003. A 12-year-old girl was brutally kicked in the head twice by her stepfather and then locked in her room. She was later found convulsing and unable to speak, and died in hospital the following day.

<sup>225</sup> See *R v Williams* HC Napier CRI-2008-092-013286, 13 May 2010.

<sup>226</sup> Specifically the victim was particularly vulnerable because of her age, as well as the circumstances in which she was living, and the control exerted over her by the offender: s 104(1)(g).

<sup>227</sup> *R v Rawiri & Ors* HC Auckland T014047, 16 September 2002.

<sup>228</sup> *R v Mackness*, above n 222, at [14].

<sup>229</sup> Especially because of the high threshold attached to a finding of manifest injustice.

<sup>230</sup> Not mentioned in *Mackness*, above n 222.

<sup>231</sup> *R v Williams*, above n 209, at [56].

Nevertheless, certain aspects of the approach taken by Venning J have been accepted and applied in subsequent cases.<sup>232</sup>

Hansen J in *R v Smith*<sup>233</sup> expressly adopted the approach in *Mackness*. However he added the additional requirement that the court must take into account the sentencing principles and purposes set out in ss 7, 8 and 9 of the Act.<sup>234</sup> The circumstances may not have in themselves justified the finding of manifest injustice, however, in line with *Williams*, His Honour noted the guilty plea as being a powerful mitigating factor and to make no allowance for it would be manifestly unjust.<sup>235</sup> Accordingly John Hansen J found a minimum period of 17 years would be manifestly unjust, and a discount of three years was given resulting in a 14-year minimum term.

The Court of Appeal in *R v Parrish*<sup>236</sup> impliedly adopted the approach set out in *Mackness* and applied in *Smith*. It was noted by the Court of Appeal that Laurenson J in the High Court conducted the sentencing exercise under the Act with considerable care as to the analysis, discussion, and application of the sentencing principles.<sup>237</sup> Nonetheless, the Court did not agree with the overall approach taken in regards to s 104.<sup>238</sup> In the High Court Laurenson J held that the sentencing judge is required to consider three issues relating to s 104, that is whether the minimum period of imprisonment should exceed, remain at, or be less than 17 years.<sup>239</sup> His Honour went on to state that the sentencing judge must decide the level of culpability attached to each aggravating factor of s 104 that applies in the circumstances of the case, in determining whether the minimum period should be more, equal to, or less than 17 years.<sup>240</sup> In doing so, the judge must take into account whether or not it can be said to

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<sup>232</sup> For example, Priestly J in *R v Williams* (2010), above n 223, found quite convincing the principle that the offender has the onus of showing why the minimum period of 17 years would be manifestly unjust and commented accordingly: “Somebody standing on the sideline must reach the conclusion that a 17 year MPI would clearly infringe the normal tenets of justice”: at [67].

<sup>233</sup> *R v Smith* HC Dunedin S03/1402, 15 May 2003. The defendant killed a young woman, who was epileptic, after offering her a ride home, in a brutal and frenzied attack.

<sup>234</sup> Referred to previously as being accepted by the Court of Appeal in *Williams*, above n 209.

<sup>235</sup> The defendant also showed genuine remorse.

<sup>236</sup> *R v Parrish* CA295/03, 26 November 2003.

<sup>237</sup> *Ibid*, at [6].

<sup>238</sup> Section 104 applied in the case because of many factors i.e., the use of a weapon, the calculated planning involved, the unlawful intrusion, the high level of cruelty and callousness implicit in the victim’s slow death, and her vulnerability: *Ibid*, at [14].

<sup>239</sup> *Ibid*, at [15].

<sup>240</sup> *Ibid*: “The net result is that the Court... must assess the degree of culpability involved in each... to determine just how unacceptable an unacceptable element is, in a particular case.” In the writer’s view,

be the ‘worst’ example of the relevant element that the courts have been presented with.<sup>241</sup>

The Court of Appeal observed that Laurenson J had not sufficiently recognised the narrow or more directory nature of s 104, and further did not acknowledge that the section is framed only in mandatory terms.<sup>242</sup> Therefore, a more permissive approach was wrongly adopted, as was indicated by the three alternatives that were broadly open to the judge to determine the justified minimum period of imprisonment. Instead “[t]he strong presumption, where the section applies, is that the minimum period to be served is to be not less than 17 years unless that would result in manifest injustice.”<sup>243</sup> Furthermore, the qualifying factor, or factors, relevant in the case at hand do not have to be the ‘worst’ with which the courts have been presented to justify a minimum period in excess of 17 years.<sup>244</sup>

The Court of Appeal in *Parrish* essentially adopted the meaning of manifestly unjust, and the way in which it is to be determined, as it applies to s 102,<sup>245</sup> distinguishable from *Williams*. The Court expressly stated that a departure from 17 years was only possible in exceptional cases,<sup>246</sup> whereas no indication in *Williams* was found to exist in the legislative history to confine manifest injustice to exceptional circumstances.<sup>247</sup> It was further held that there must be an assessment of all the circumstances of the

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this does not seem to provide a straightforward or appropriate way of dealing with s 104. Nor does it indicate a clear understanding or interpretation of the mandatory nature of the section.

<sup>241</sup> *Ibid.* To determine whether a particular aggravating factor is the worst of which the courts have been presented is also an elusive concept.

<sup>242</sup> *Ibid.*, at [17] - [18].

<sup>243</sup> *Ibid.*, at [17].

<sup>244</sup> *Ibid.*, at [15]. This principle appears to have been accepted in subsequent cases, for example Chambers J in *R v Li* HC Auckland T024483, 15 December 2003 agreed that the threshold level of the an aggravating factor falling within s 104 must be high, nevertheless nothing was said to suggest that it had to necessarily equate with the ‘worst’ of which the courts have seen. Insofar as that is recognised, if the level of the qualifying factor is low, s 104 may be found to have no application in the case: see *R v Meads* HC Hamilton CRI-2009-019-8828, 31 March 2011 at [27] to [30]: Allan J found the murder to be “undoubtedly horrific” but was satisfied that it did not involve a high degree of brutality, depravity or callousness to engage s 104(e). See also *R v Brown* HC Auckland CRI-2008-004-022829, 10 December 2010 at [21]: Venning J commented that the circumstances have to be ‘truly exceptional’ for s 104(i) to apply; His Honour did not believe that they were, even though he found them to be “undoubtedly tragic”.

<sup>245</sup> With reference to *R v Rapira* [2003] 3 NZLR 794.

<sup>246</sup> *R v Parrish*, above n 234, at [19].

<sup>247</sup> *R v Williams*, above n 209, at [59].

case, including those related both to the offence and the offender, ascertained in light of the sentencing principles and purposes.<sup>248</sup>

Therefore, the approach in *Parrish* seems to uphold the previous high threshold attached to the term manifestly unjust<sup>249</sup>. However it may not necessarily be practical as a substantial proportion of cases will attract, or require, a minimum period of imprisonment of 17 years.<sup>250</sup> In short, a rigid application of s 104 may result in dissimilar levels of culpability attracting the identical minimum period of imprisonment of 17 years<sup>251</sup> where it is apparent that differing sentences were warranted.<sup>252</sup> It may decrease the likelihood of significant effect being given to powerful mitigating factors relating to the offender, unless they are ‘exceptional’ to indicate manifest injustice. This may further conflict with various principles of sentencing, in particular s 8(h) of the Act.<sup>253</sup>

### *3 Difficulties arising from the Williams Approach*

As a result of *Williams* and the meaning attached to the term “manifestly unjust”, it appears that rather than providing consistency or certainty to the sentencing framework for murder, the decision has brought about many difficulties in the application of s 104 that may have possibly been avoided. The approach has caused confusion among the sentencing judges,<sup>254</sup> and as the Court of Appeal in *R v Paul* appropriately recognised, there are inherent difficulties at both of the suggested

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<sup>248</sup> Analogous to step one of the *Williams* approach.

<sup>249</sup> Similar to the threshold required in terms of s 102.

<sup>250</sup> A lengthy period of imprisonment may be imposed invariably, even where the circumstances of the case clearly indicate a lesser sentence to be appropriate, and in effect may restrict the judicial discretion of the sentencing judge.

<sup>251</sup> *R v Williams*, above n 209, at [64].

<sup>252</sup> The same point was noted more recently in *R v Williams* (2010), above n 223, at [70]: Priestly J stated that he had a huge uneasiness about the justice in the case of an automatic 17-year MPI, which stems in part from the parliamentary straightjacket of the 10-year and 17 year minima, which judges must not read down. Further His Honour stated that it would be idle to suggest that the same level should meet all murders caught by s 104: at [71]. In the writer’s view, the legislature enacted s 104 for the purposes of ensuring an appropriate response to murders committed involving the specific aggravating factors. Such murders are inherently serious and the penalty should reflect the gravity of the offending.

<sup>253</sup> Sentencing Act 2002, s 8(h): the court must take into account the personal circumstances of the offender that would mean that the sentence would otherwise be disproportionate. See Appendix 1.

<sup>254</sup> See for example *R v Williams* HC Wellington CRI-2004-078-1816, 24 February 2006 at [19], a decision closely following that of *R v Williams*, above n 209.

steps.<sup>255</sup> If the Court of Appeal had affixed a similar or equal definition to manifest injustice,<sup>256</sup> by adopting a corresponding application in the context of s 104, the decision may have provided for a more desirable and less problematic approach.<sup>257</sup> However, following an equal application of manifest injustice in both contexts may not necessarily dispense with such difficulties.<sup>258</sup>

A frequently recounted issue derives from the exercise often described as ‘comparing the incomparable’,<sup>259</sup> when attempting to compare the case at hand with other murder cases to aid the assessment with respect to the appropriate sentence.<sup>260</sup> Potter J in *R v Ying* put it quite adequately when she stated that “[m]urder is a violent crime and in comparing cases Judges are indeed required to compare to the best of their ability, the incomparable”.<sup>261</sup> Such an exercise has often been described as invidious or “elusive at best”.<sup>262</sup>

The approach in *Williams* adds further difficulty as it requires comparison with cases of dissimilar circumstances, those being of the ‘standard range of murders’ rather than cases to which s 104 has been applied.<sup>263</sup> Even though the case involves one or more of the specified aggravating factors to attract a 17-year minimum period, the sentencing judge must compare cases of a much lesser culpability. Accordingly, the

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<sup>255</sup> *R v Paul* CA496/05, 1 August 2006 at [27].

<sup>256</sup> Similar to that discussed earlier in regards to s 102 in Chapter Two.

<sup>257</sup> Not only in regards to s 104 alone, but further in regards to the sentencing framework for murder in general. However, as the Court of Appeal in *Williams*, above n 209, noted at [64]: “Applying the general rule rigidly would create anomalies, because different levels of offending may attract the same minimum period of imprisonment (17 years) in some situations.”

<sup>258</sup> For example, the consequences of meeting the threshold in each section differ considerably. The outcome in s 102 is that a lesser sentence than life imprisonment is imposed which may be seen as a more favourable and significant consequence for the offender. Whereas in s 104 the outcome is that life imprisonment is still imposed however the MPI is lower than 17 years (and not always significantly lower), therefore not as desirable or favourable to the offender.

<sup>259</sup> See for example, *R v Howse*, above n 180, at [62] per Tipping J.

<sup>260</sup> For example Venning J in *R v Mackness*, above n 222, at [18] commented: “It is invidious to try to draw comparisons between cases that are awful in themselves”.

<sup>261</sup> *R v Ying* HC Hamilton T032171, 7 April 2004, at [37] after referring to the statements made by the Court of Appeal in *R v Howse*, above n 180.

<sup>262</sup> *R v Mulligan* HC Wanganui CRI-2010-083-1242, 1 July 2011 at [41]. See also *R v Paul*, above n 253, at [27]. Clifford J explained that it may give the impression that the court does not necessarily consider the particular case of murder as the most serious of offences known to our law. Nevertheless, His Honour acknowledged such an exercise is required: at [27].

<sup>263</sup> See *R v Job* HC Whangarei CRI-2009-029-001324, 7 October 2010 at [50]: Andrews J acknowledges that “to some extent what one is trying to do is to compare what simply cannot be compared”.

Court of Appeal in *R v Green & Morice*, after acknowledging the “far from identical processes” required for s 103 and s 104, noted:<sup>264</sup>

[A]pplying the primary s 104 criteria by reference to the sentence which would otherwise be appropriate under s 103 would involve a mixing of concepts as a s 103 sentence is the result of a two stage analysis whereas the primary s 104 criteria focus solely on the circumstances of the murder.

In the writer’s view the exercise contradicts with the usual sentencing practice of looking to cases of similar circumstances for guidance as to the appropriate starting point.<sup>265</sup> It also appears to conflict with the principle set out in s 8(e) of the Act,<sup>266</sup> in which the court “must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances”. Perhaps the courts, while acknowledging the need for consistency,<sup>267</sup> do not fully grasp the inconsistencies within the area, especially those concerning the correct approach to be applied.

The difficulties relating to the approach in *Williams* extend beyond those acknowledged by the courts with regard to comparing murder cases with one another. Sentencing judges often refrain from recognising the aforementioned obligation of comparing the present case with cases where the standard ten-year minimum period has been imposed, or where s 104 has not been applied.<sup>268</sup> Nevertheless, even if the requirement is identified it seems to remain somewhat an anomaly in this context and

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<sup>264</sup> *R v Green & Morice* CA461-04, CA462-04, 2 June 2005 at [25] & [26].

<sup>265</sup> The modern methodology as such does not necessarily apply to sentencing for murder, however the sentencing judges are very familiar with the practice. It appears difficult to depart from as it is often used in other areas of sentencing and provides a clear check against the sentence in the particular case, and is also consistent with the principles and purpose of the Act.

<sup>266</sup> Sentencing Act 2002.

<sup>267</sup> See for example *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010 where Chisholm J stated at [14]: “Comparisons with other cases are also difficult but inevitable because there has to be some consistency in sentencing”.

<sup>268</sup> It is usually impliedly disregarded. See for example *R v McSweeney* HC Auckland CRI-2006-044-006720, 28 November 2008 at [22]-[23], and *R v Trevithick* HC Auckland CRI-2007-244-000009, 19 June 2007. Venning J in both cases, referred to the *Williams* approach, however no mention was made to the requirement of making comparisons, rather His Honour considered cases to which s 104 applied and those that involved a similar culpability to the present case.

is rarely followed.<sup>269</sup> Comparing cases of similar culpability, those to which s 104 apply, seems to be the preferred approach.<sup>270</sup>

Regarding the above issue, a possible and more appropriate solution may be to follow the approach taken by Mallon J in *R v Watene*,<sup>271</sup> and more recently taken to some extent by Stevens J in *R v Terewa*.<sup>272</sup> When considering the *Williams* approach, both Judges reviewed a number of cases that involved murders where the s 104 criteria were and were not met. This approach allows for an overall consideration of the offender's culpability in the circumstances by way of comparison with a wider range of murder cases, and remains consistent with the principle of s 8(e). It appears attractive given the usual practice of sentencing judges, however whether or not it will be followed in subsequent cases is uncertain.<sup>273</sup>

A further issue arises concerning the 'minima'<sup>274</sup> of 17 years imprisonment and the understanding or appreciation of its significance. The requirement is mandatory and should not be read down by the courts unless the sentencing judge is satisfied that the minimum term would be manifestly unjust in the circumstances.<sup>275</sup> It has been acknowledged in many cases that manifest injustice in s 104 requires a relatively high threshold, albeit lower than that of s 102. It appears that the importance of the prescribed minimum period has been weakened insofar as the appropriate discount for mitigating factors, usually those relating to the offender, is concerned. A degree of uncertainty remains regarding the proper credit, if any, to be given for such features to a finding of manifest injustice, in particular the guilty plea and youth.

Furthermore, the courts regularly refer to the minimum term as denoting a 'starting point', similar to that used in the modern methodology of sentencing, from which

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<sup>269</sup> See for example *R v Job*, above n 261; *R v Fraser* HC Christchurch CRI-2009-061-000244, 9 July 2009; *R v Zhou* HC Auckland CRI-2005-092-10395, 13 October 2006 at [27] to [29].

<sup>270</sup> As was stated by the Court of Appeal in *R v Paul*, above n 253, at [28] "[i]t is difficult for a sentencing Judge to ignore, in fixing the 'notional' sentence required by *Williams* step one, the 17 years 'road marker' indicated by s 104".

<sup>271</sup> *R v Watene* HC Wellington CRI-2007-485-127, 11 December 2007 at [28].

<sup>272</sup> *R v Terewa* HC Rotorua CRI-2009-087-002744, 19 February 2010 at [38] to [42].

<sup>273</sup> In contrast a different approach was taken by Chisholm J in *R v Hekkenberg* HC Nelson CRI-2005-004-4128, 10 May 2007. His Honour, rather than making comparisons with cases, considered the aggravating and mitigating factors to decide whether the case was, in terms of culpability, well away from the 'usual' murder.

<sup>274</sup> As referred to by Priestly J in *R v Williams* (2010), above n 223.

<sup>275</sup> *R v Williams*, above n 209, at [34]; *R v Williams* (2010), above n 223, at [70].

adjustment can be made for personal circumstances of the offender.<sup>276</sup> As previously noted this method is not commonly used in relation to cases of murder. There is no indication either in the Act<sup>277</sup> or appellate decisions concerning s 104 to suggest that 17 years should be regarded as a mere starting point as opposed to a more mandatory period of imprisonment.

#### *4 Relevance of Mitigating Factors*

Section 9(2) of the Act requires the court to take into account the specified mitigating factors, including inter alia, youth and the guilty plea, to the extent that they are applicable in the case at hand. A case of murder is no exception to that requirement, and s 9 has been said to be an “overarching provision”.<sup>278</sup> The Act does not indicate the weight to be given to any particular factor, rather it emphasises that there is no implication that any factor should be given greater effect than any other.<sup>279</sup> Mitigating factors should be relevant to the determination of the minimum period of imprisonment, along with the consideration of manifest injustice, but as has been acknowledged:<sup>280</sup>

[T]o reduce the minimum period below 17 years simply because s 9 says [a mitigating factor must be taken into account] is to... give undue emphasis to s 9 at the expense of the mandatory provisions of s 104.

The courts are, often without consideration, invariably allowing a discount for a certain few factors that have been recognised to mitigate the culpability of the offender or the offending. Not all mitigating factors should be given equal weight merely because they have been proven to exist, especially due to the supposedly more rigid nature of s 104. The wording of the provision requires the court to impose a 17-

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<sup>276</sup> See for example *R v Aporo* HC Palmerston North CRI-2005-054-2872, 20 October 2006 at [17]; & *R v Fraser*, above n 267, at [30].

<sup>277</sup> See the exact wording of s 104(1), “The court *must* make an order under s 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be *manifestly unjust* to do so” (emphasis added). See Appendix 2.

<sup>278</sup> See *R v Li* HC Auckland T024483, 15 December 2003 at [27] per Chambers J. See also Hall, Geoff *Hall’s Sentencing* (online looseleaf ed, LexisNexis) at SA104.1(b).

<sup>279</sup> Sentencing Act 2002, 9(4)(b).

<sup>280</sup> Hall “*Hall’s Sentencing*”, above n 276, at SA104.1(b).

year minimum term “unless it is satisfied it would be manifestly unjust to do so”, not “unless the offender can show a mitigating factor to be present”.

(a) Youth

The courts, particularly those who sentence the offender at first instance, appear to be undecided or confused about the relevance of youth when assessing the issue of manifestly unjust, notwithstanding that Parliament had not created a youth or age exception to the minimum term under s 104.<sup>281</sup> While a young offender cannot rely on his or her age to displace the presumption in s 102,<sup>282</sup> youth has often been met, without exception, by a finding of manifestly unjust under s 104. The different thresholds that apply for either statutory context are, therefore, very evident in this respect, resulting in a very inconsistent approach. The underlying policy of s 104 should be remembered.<sup>283</sup> The courts often fail to acknowledge the significance of the section when considering the issue of youth.

The younger the offender the more age has been held to be relevant to the assessment of manifest injustice under s 104,<sup>284</sup> although some recognition is almost always given to youth by way of reducing the minimum period from the mandatory 17 years.<sup>285</sup> It must be noted that other mitigating factors, such as emotional immaturity or a guilty plea usually contribute to the finding of manifest injustice in this respect.<sup>286</sup> There are

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<sup>281</sup> Acknowledged in *R v Slade* [2005] 2 NZLR 526 at [43]; affirmed in *R v Job*, above n 261, and *R v Boyes-Warren* HC Christchurch CRI-2008-009-019959, 10 March 2010.

<sup>282</sup> See Chapter Two.

<sup>283</sup> I.e., where the circumstances of the murder are sufficiently serious a minimum period of 17 years should be imposed.

<sup>284</sup> See *R v Kriel* HC Whangarei CRI-2008-027-2728, 23 March 2010 at [56]. Although s 104 was found to apply, Asher J considered youth (14 years), among others, and that the offender was essentially acting like a child to justify 17 years as being manifestly unjust. It must be noted, however, that His Honour took into account the lack of aggravating factors (i.e., no premeditation and the absence of a weapon) as mitigating the culpability of the offending and offender. This approach is inconsistent with the Act, and the approach to be applied under s 104. Moreover, after 17 years was found to be manifestly unjust, Asher J, in determining the appropriate minimum period, went to the statutory datum point and from there essentially followed the *Howse* approach. A minimum term of 1 ½ years was imposed.

<sup>285</sup> See *R v Trevithick*, above n 266; *R v Boyes-Warren*, above n 279.

<sup>286</sup> See *R v Kriel*, above n 282, at [57] – [58] & [61]. Asher J noted that the offender acted with considerable immaturity, and that he panicked after the offending whereby he acted naively and as a child would in the circumstances; See also *R v Trevithick*, above n 266: because the offender pleaded guilty, he was only 15 years at the time, and that he had limited emotional maturity, a minimum period of 14 years was imposed, notwithstanding that s 104 applied.

cases in which it has not been appropriate to discount the minimum term.<sup>287</sup> When sentencing an offender for a crime as serious as murder, youth alone should not count for a great reduction.<sup>288</sup> However it usually does, notwithstanding the clear recognition by the Court of Appeal on numerous occasions that a youth exception as such cannot be ‘created’.<sup>289</sup>

#### (b) Guilty plea

Whether or not the guilty plea should *always* mitigate a sentence or a minimum period with regard to cases where life imprisonment is imposed remains uncertain.<sup>290</sup> There is little guidance as to the appropriate discount to be given in cases of murder, despite the attempts by both the Court of Appeal and the Supreme Court to offer some assistance, albeit the Supreme Court did not do so directly relating to the context of murder.<sup>291</sup> Particular difficulty has also arisen from the decision of *Williams*,<sup>292</sup> yet it can be observed that in most,<sup>293</sup> if not all, murder cases credit is given to those offenders who plead guilty including when s 104 applies.

It has been recognised by the courts on numerous occasions that it would be “manifestly unjust” if two offenders with equal culpability were given an identical minimum period of imprisonment for the same offending despite only one offender having pleaded guilty.<sup>294</sup> The writer does not disagree with that proposition, however, the common practice of discounting the 17-year ‘minima’ for the guilty plea on

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<sup>287</sup> For example, usually those that are described as being particularly brutal, cruel or callous: see *R v O’Brien* HC New Plymouth T6/02, 21 February 2003; CA107/03, 16 October 2003; see also *R v Luff*, above n 217: the offender was 17 years old, while His Honour recognised L was out of the range of the Youth Court, and was effectively to be dealt with as an adult, he still acknowledged that he was very young. But the facts involved the cold-blooded and deliberate killing of a police officer, which outweighed any effect that youth could have had on the offending.

<sup>288</sup> See *R v Luff*, above n 217, at [26].

<sup>289</sup> *R v Slade*, above n 279, at [48].

<sup>290</sup> See *Hessell v R* [2011] NZSC 135 the guideline judgment on the issue.

<sup>291</sup> See *R v Williams*, above n 209; *Hessell v R* [2009] NZCA 450; & *Hessell v R*, above n 288. Fogarty J in *R v Flewellyn* HC Christchurch CRI-2008-042-002328, 29 April 2010 expressed his uneasiness “quite candidly” regarding the lack of guidance to sentencing judges in this context resulting from the *R v Hessell* (CA), above n 289: at [8].

<sup>292</sup> Specifically in regards to comments at [73] which will be discussed below.

<sup>293</sup> Not usually in cases where s 102(1) is in issue, or those which may be described as falling within the ‘standard range of murder’ – tier one of the sentencing structure.

<sup>294</sup> *R v Williams*, above n 209, at [72]; see for example *R v Fraser*, above n 267, [32] where a discount of 18 months from the MPI of 17 years was given for the guilty plea, even though s 104 applied and the offender lacked remorse.

almost every occasion appears to be somewhat contradictory to the underlying policy of, and the intentions of Parliament for including, s 104 in the Act.<sup>295</sup> It further raises concerns relating to the threshold of manifest injustice in the wider context of sentencing for murder.

The rationale behind allowing a discount for the guilty plea principally relates to various policy reasons, such as saving the expense and time of a jury trial and, in particular, witnesses and victims are spared the stress of giving evidence.<sup>296</sup> Furthermore a guilty plea usually offers acknowledgement of responsibility to the offending<sup>297</sup> which may be beneficial to those closest to the deceased. Prior to the Supreme Court decision of *Hessell* the Court of Appeal attempted to assist sentencing judges in relation to murder cases by adopting the Law Commission's recommendation of the preferred approach, which is that the amount of discount is left up to the discretion of the sentencing judge in each case.<sup>298</sup> In that regard, however, the general guidelines as set out in the judgment should be followed.

The Court appears to have further endorsed a second approach of applying the guilty plea guideline<sup>299</sup> to the 'discretionary component' of the minimum period of imprisonment.<sup>300</sup> That is, to treat the ten-year minimum term as the norm and apply the discount to the uplift from that datum point.<sup>301</sup> Such an approach appears to have been most helpful to sentencing judges and has subsequently been applied in many cases.<sup>302</sup> By contrast, prior to the decision of *Hessell*, France J in *R v Duff*<sup>303</sup> fixed the "quantum of deduction", which he considered not to be constrained by the test of manifest injustice, by reference to the normal principles. From the 17-year minima,

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<sup>295</sup> Murders with specified features of s 104 are sufficiently serious to justify a term of at least 17 years imprisonment: *R v Watene*, above n 269, at [33]; *R v Terewa*, above n 270, at [48].

<sup>296</sup> For a full discussion of these reasons see *Hessell v R* (SC), above n 288, at [45].

<sup>297</sup> *Ibid*, at [45].

<sup>298</sup> *Hessell v R* (CA), above 289, at [67] and [73].

<sup>299</sup> Set out at [15] of the judgment: *Ibid*.

<sup>300</sup> The Court noted it as being worthy of consideration at [71].

<sup>301</sup> *R v Flewellen*, above n 289, at [9]. For example if the minimum period, before applying the discount, is 16 years the discount will be provided from the uplift (in this case 6 years) from the ten-year standard term; See also *R v Somerville* HC Christchurch CRI-2009-009-14005, 29 January 2010 at [19] to [22].

<sup>302</sup> For example applied in *R v Boyes-Warren*, above n 279, at [54] per French J. Her Honour accepted the most principled approach to be that of applying the discount to the discretionary component of the minimum period, and allowed a 20 per cent credit from the 17 years on the finding of manifest injustice, resulting in an end minimum non-parole period of 15 and a half years.

<sup>303</sup> *R v Duff* HC Wellington CRI-2008-091-98, 3 October 2008.

which His Honour regarded as a ‘starting point’, an allowance of 15 per cent was given, resulting in a two and a half year discount, even though the plea was entered late.<sup>304</sup>

The Supreme Court in *Hessell* did not directly address the issue of the appropriate discount to be given in murder cases, nor did they agree with the general guilty plea guideline set out by the Court of Appeal. Instead “the heavily structured nature” of the approach was considered to be an “inappropriate departure from the statutory requirement of evaluation of the full circumstances of each individual case”.<sup>305</sup> In essence it was held that the overly rigid approach limits the discretion of the judge to alter the sentence accordingly to reflect the particular gravity of the offence and the personal circumstances of the offender. The sliding scale of discount, dependent upon the timing of the plea, was said to be too inflexible and ran the risk of pressuring those offenders who were innocent to plead guilty in order to gain a more lenient sentence.<sup>306</sup> While the desirability of consistency in sentencing levels is a factor to be recognised in accordance with s 8(e) of the Act, the Supreme Court emphasised that it was but one factor and thus it was inappropriate to give it greater weight than the others.<sup>307</sup>

The correct approach was to consider all the circumstances in which a plea of guilty is entered, not merely the timing.<sup>308</sup> Ultimately it is up to the discretion of the sentencing judge in any particular case to determine the appropriate discount, however the reduction should not exceed 25 per cent; this reflects that any remorse shown by the offender is dealt with independently.<sup>309</sup> The assistance from the Supreme Court may only have an indirect bearing on murder cases, and there continues to be a lack of direct guidance in this area.

#### (i) Discount for Guilty Plea in Murder Cases

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<sup>304</sup> *Ibid*, at [33].

<sup>305</sup> *Hessell v R* (SC), above n 288, at [72].

<sup>306</sup> *Ibid*, at [72].

<sup>307</sup> *Ibid*, 135 at [37]; See also *R v Clifford* [2011] NZCA 360 at [47].

<sup>308</sup> *Hessell v R* (SC), above n 288, at [70]: includes the degree to which the plea facilitated the administration of justice, whether the plea was at the first opportunity, the value of the plea in the particular circumstances, whether the accused had legal representation and the strength of the prosecution case.

<sup>309</sup> *Ibid*, at [75]. The offender must not merely claim the remorse.

The discount for a guilty plea may often be less in a murder case under s 104 compared to an ordinary case where there is no presumption that the sentence will be a specific level.<sup>310</sup> The Court of Appeal in *Williams* expressly stated that “[d]epartures from the 17-year minimum are only to occur in cases of clear injustice,”<sup>311</sup> which notwithstanding the common practice, does not appear to presuppose that a discount should be given for the guilty plea in *all* murder cases where s 104 applies. Although the Act requires that a plea of guilty must be taken into account as a mitigating factor,<sup>312</sup> in order to establish ‘clear injustice’ more is needed than the mere fact that credit would have been given but for s 104 applying in the circumstances.<sup>313</sup>

Essentially a discount from the 17 year ‘minima’ should only be given if it would otherwise be manifestly unjust not to, and if the term itself would “include a real element of discount for a guilty plea” that term should not be affected<sup>314</sup>. Thus the Court of Appeal in *Williams* suggested that it might be appropriate not to reduce the minimum period of imprisonment in a particular case, despite the offender having pleaded guilty. Not all sentencing judges have endorsed the reasoning behind that approach;<sup>315</sup> rather the difficulties surrounding the appropriate discount remain. While it is often stated that “sentencing judges have little room for manoeuvre”,<sup>316</sup> especially in regards to s 104, credit is invariably given in murder cases. The Court of Appeal in *Hessell*, even though regretting that they could not be more definitive on this issue, indicated that *Williams* should not be regarded as the last word on the interpretation of s 104,<sup>317</sup> leaving the difficulties unresolved and creating more uncertainty within the area.

At best, in any murder case, it appears that a guilty plea might justify a discount of approximately one to two years, and that level of allowance is common in s 104

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<sup>310</sup> *R v Williams*, above n 209, at [73]; *R v L* HC Auckland CRI-2004-44-8643, 13 June 2006 at [29].

<sup>311</sup> *R v Williams*, above n 130, at [73].

<sup>312</sup> Sentencing Act 2002, s 9(2)(b) “whether and when the offender pleaded guilty” (direct to appendix).

<sup>313</sup> *R v Williams*, above n 209, at [73].

<sup>314</sup> *Ibid*, at [73].

<sup>315</sup> See *R v L*, above n 308, at [30] per Rodney Hansen J, “I am not sure that I fully understand the reasoning behind this approach, although I accept... that there may be grounds for distinguishing the approach to be taken where there is a statutory presumption of a minimum non-parole period”.

<sup>316</sup> *R v Williams* (2010), above n 223, at [69].

<sup>317</sup> *Hessell v R* (CA), above n 289, at [73];

cases.<sup>318</sup> It is often acknowledged that a ‘substantial’ or ‘significant’ discount, regularly given for other offences, would be inappropriate in murder cases of this seriousness, as Fogarty J in *R v Norman* accepted, the Court of Appeal has made it clear that the reduction should be limited.<sup>319</sup> Nevertheless if the approach of applying the discount to the discretionary component of the 7 years were adopted, and the now maximum of 25 per cent were given, the end result would be a credit of approximately one year and eight months. That, of course, is the largest discount that the court should be able to give in those circumstances, consistent with the authorities.<sup>320</sup>

### ***D Concluding Comments***

What is lacking and of real concern is consistency and transparency in sentencing decisions for murder.<sup>321</sup> There is little evidence of an accepted principled approach to be followed, notwithstanding the guidance given by the Court of Appeal. A murder that involves circumstances that attract the application of s 104 is inherently serious, and the sentence should reflect that fact. The discretion not to impose a 17-year minimum period falls to be assessed against the threshold of manifest injustice, yet the courts often pay little attention to the significance of that mandatory ‘benchmark’. To allow a discount for a mitigating factor simply because it would be unfair not to do so is inconsistent with the many principles and purposes of the Act.

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<sup>318</sup> *R v Watene*, above n 269, at [35]; *R v McSweeney* [2007] NZCA 147 at [10].

<sup>319</sup> *R v Norman* HC Christchurch CRI-2006-009-010787, 14 June 2007 at [26].

<sup>320</sup> The Court of Appeal in the recent decision of *R v Clifford*, above n 305, has reaffirmed their previous approach to guideline judgments, however, in addition to that the Court set out the now adapted approach, by the Supreme Court, in relation to giving a discount for the guilty plea in general. While the case does not directly address the appropriate credit to be given in murder cases it nonetheless provides for a clear understanding of what is generally required and allowed by the courts: at [60].

<sup>321</sup> The Supreme Court in *Hessell v R* (SC), above n 288, 135 at [51] recognised that the legislative history indicates that through the inclusion of s 8(e) in the Act Parliament was concerned to achieve a certain degree of consistency and transparency in sentencing decisions, without placing excessive limits on judicial discretion. But consistency is only a number of the many principles listed in the Act that must be taken into account when sentencing an offender for murder.

## *IV Sentencing for Manslaughter*

The current sentencing framework for manslaughter bears little resemblance to that of murder,<sup>322</sup> notwithstanding that both involve a homicide and both attract a maximum penalty of life imprisonment. It is important to note the breadth of judicial discretion within this area as opposed to murder. The task for the sentencing judge in manslaughter cases is difficult as it involves balancing the competing demands of sentencing, in particular upholding the sanctity of life, but also recognising the level of culpability in the case at hand.

### *A Sentencing Framework*

The maximum penalty for manslaughter is life imprisonment,<sup>323</sup> however, unlike murder, such a sentence is rarely imposed.<sup>324</sup> In contrast to many other offences the consequences of the offending are unintended and may result from a relatively minor unlawful act, or rather unusual circumstances.<sup>325</sup> Manslaughter encompasses a wide range of offending, with a corresponding range of culpability, from full inadvertence to situations little short of murder. For example, death may result from sheer carelessness,<sup>326</sup> an opportunistic or impulsive push to the ground,<sup>327</sup> wounding with a weapon or from a planned and prolonged attack.<sup>328</sup> Consequently there is no guideline judgment as the courts have deliberately refrained from, and acknowledged the

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<sup>322</sup> There is no distinct sentencing structure similar to that of ss 102, 103 and 104 for murder.

<sup>323</sup> The court may impose a sentence of preventive detention under s 87 of the Act for the offence of manslaughter as it is included as one of the qualifying offences: s 87(5)(b). However, in recent times preventive detention has not been imposed upon an offender solely for the offence of manslaughter. It has on occasion been given serious consideration: see *R v Southon* HC Hamilton CRI-2004-019-007442, 17 August 2007, a lengthy term of 12 years imprisonment with a minimum period of 8 years was held to provide adequate protection for the public.

<sup>324</sup> Crimes Act 1961, s 177. The maximum penalty was imposed in *R v Wickliffe* [1987] 1 NZLR 55: see discussion below. There are at least two other cases in New Zealand where life imprisonment has been imposed for manslaughter, however they date back to 1915 and 1916 (*Parkinson* Napier Supreme Court, 8 June 1915; *Devoin* Wellington Supreme Court, 2 October 1916).

<sup>325</sup> *R v Leuta* [2002] 1 NZLR 215 at [62]; *R v Jamieson* [2009] NZCA 555 at [33].

<sup>326</sup> Including cases of motor manslaughter, see for example *R v Bannan* HC Christchurch CRI-2010-009-014017, 15 December 2010; *R v Tuirirangi* HC Wanganui CRI-2010-083-2891, 21 June 2011: two concurrent sentences of six years imprisonment were imposed for the manslaughter of a mother and her son as a result of dangerous drink driving.

<sup>327</sup> Also sometimes referred to as ‘single punch’ cases. See *R v Larson* HC Dunedin CRI-2011-012-001013, 6 July 2011: Chisholm J imposed a sentence of three years imprisonment.

<sup>328</sup> In addition, if the killing was committed pursuant to a suicide pact the accused is guilty of manslaughter and not of murder: Crimes Act 1961, s 180.

difficulty in, comparing or forming categories of similar cases to give guidance as to the appropriate sentence.<sup>329</sup>

More importantly the sentence must reflect the sanctity of life, but it must also be proportional to the circumstances of the case.<sup>330</sup> The loss of a life, whether intentional or not, is always a serious and heinous offence, and society demands that it must be met with the appropriate condemnation.<sup>331</sup> Therefore, the courts have the difficult role of balancing the conflicting interests in accordance with the principles and purposes of sentencing.<sup>332</sup>

### *1 The Maximum Penalty*

The courts have only in recent times imposed the maximum penalty for manslaughter on one occasion.<sup>333</sup> Sentences of that severity have been noted to be exceptional,<sup>334</sup> and it is difficult to find a recent comparable case. Life imprisonment for manslaughter is very seldom imposed, if at all. A penalty nearest to the maximum, in any given case, should be reserved for and imposed only where the circumstances of the offending are near to the most serious of cases for that crime.<sup>335</sup> The court must

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<sup>329</sup> *R v Leuta*, above n 323; *R v Edwards*, above n 327, at [14]; acknowledged in *R v Sanders & Ors* HC Wellington CRI-2009-078-824, 10 December 2010 at [14] per Dobson J.

<sup>330</sup> *R v Wickliffe*, above n 322, at 20; *R v Kohai* CA65/90, 25 June 1990 per Richardson J at p. 3-4; Sentencing Act 2002, section 8(a).

<sup>331</sup> *Solicitor-General v Kane* CA154/98, 23 September 1998 at 9.

<sup>332</sup> As for murder, particularly those set out in ss 7, 8 and 9 of the Act.

<sup>333</sup> In *R v Wickliffe*, above n 322, the offender was initially found guilty of murder in 1972 and sentenced to the then mandatory sentence of life imprisonment (the killing took place in the course of an armed robbery). The subsequent history of the case is rather extensive, however in short Wickliffe appealed his conviction in 1986 on the basis that he did not deliberately shoot the victim rather it was accidental, as he had no intention of pulling the trigger. On appeal the verdict of murder was substituted for that of manslaughter. Notwithstanding that the Court of Appeal viewed the proper verdict of the case to be murder, it was held that such a verdict could not safely be allowed to stand because the Court could not go as far as to say Wickliffe's claim on appeal would not leave a jury with reasonable doubt. As a result the Court had the task of disposing of the case, either by ordering a new trial or re-sentencing on the basis of manslaughter. While the Court had the power to substitute the sentence, the maximum penalty of life imprisonment was upheld, predominantly for reasons of public protection, but further recognising the gravity of the offending and also the personal circumstances of Wickliffe himself.

<sup>334</sup> *Ibid*, at 17.

<sup>335</sup> Sentencing Act 2002, s 8(d).

impose the least restrictive sentence appropriate in the circumstances.<sup>336</sup> As Napier CJ in *Webb v O'Sullivan* stated:<sup>337</sup>

The Courts should endeavour to make the punishment fit the crime, and the circumstances of the offender, as nearly as may be. Our first concern is the protection of the public, but, subject to that, the Court should lean towards mercy. We ought not to award the maximum which the offence will warrant, but rather the minimum which is consistent with a due regard for the public interest.

Nevertheless, the recently enacted “3 strikes” regime requires a sentence of life imprisonment to be imposed, without exception, when manslaughter is committed as a stage-3 offence.<sup>338</sup> A minimum period of 20 years must be imposed unless it would be manifestly unjust, in which case the offender must be ordered to serve a minimum period of not less than ten years.<sup>339</sup>

The most common sentence for manslaughter is that of a long-term determinate sentence of imprisonment.<sup>340</sup> The offender is eligible for parole after serving only one third of that sentence,<sup>341</sup> and unlike life imprisonment, is only subject to recall until the expiry date of that finite term.<sup>342</sup> Actual release is determined in the usual manner by the Parole Board on the basis of the risk to the public posed by the offender, as the paramount consideration is the safety of the community.<sup>343</sup> The court does not necessarily have to impose a term of imprisonment, despite it being the common practice; rather the full range of sentencing alternatives is available.<sup>344</sup>

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<sup>336</sup> *Ibid*, s 8(g); Hall, Geoff *Hall's Sentencing* (online looseleaf ed, LexisNexis) at I.3.1.

<sup>337</sup> *Webb v O'Sullivan* [1952] SASR 65 at 66 per Napier CJ. This statement is often cited. Note: it was not a manslaughter or New Zealand case, but is still relevant to the imposition of the maximum penalty.

<sup>338</sup> Sentencing Act 2002, s 86D. See Appendix 3.

<sup>339</sup> *Ibid*.

<sup>340</sup> A fixed term of more than two years: Sentencing Act 2002, s 4.

<sup>341</sup> Parole Act 2002, s 6(4), 20 and 84. For example, if an offender is sentenced to serve six-year imprisonment he or she becomes eligible for parole after two years.

<sup>342</sup> Parole Act, s 82(3). See also the definition of ‘Sentence expiry date’: Parole Act 2002, s 4.

<sup>343</sup> See s 7 for the other guiding principles that the Board must take into account when making the decision.

<sup>344</sup> See for example the sentencing hierarchy set out at s 10A of the Act. For example Brewer J in *R v Samita* HC Auckland CRI-2007-044-3542, 8 October 2010 imposed a non-custodial sentence of 400 hours community work, upon an experienced caregiver for the death of a patient in a residential care facility. The patient was left face down in the bath for approximately five minutes, and drowned. Responsibility or deterrence were held not to be of high importance, notwithstanding the gravity of the offending: at [25]-[26]. Brewer J noted that there is a misunderstanding in the community as to the

## ***B Sentencing Levels***

The absence of a guideline judgment for manslaughter has not necessarily been regarded as a hindrance,<sup>345</sup> rather the courts have viewed that to make generalisations in manslaughter cases would be unwise,<sup>346</sup> as such categories may in fact impede the assessment,<sup>347</sup> or divert the inquiry away from the degree of culpability in the particular case.<sup>348</sup> The Court of Appeal has recently confirmed that in cases involving serious violence where serious injury (if not death) was a foreseeable outcome the guideline judgment of *R v Taueki*<sup>349</sup> may be relevant to assessing the appropriate sentence for manslaughter.<sup>350</sup>

Nevertheless it has been observed in *R v Jamieson*<sup>351</sup> that *Taueki* will not be relevant in all manslaughter cases due to the varying levels of culpability, which may “involve moderate or even minor personal culpability on the offender’s part”.<sup>352</sup> Therefore, it appears that the courts often revert back to the modern methodology, that is, assessing all the circumstances of the case in light of the principles and purposes of sentencing,<sup>353</sup> and making adjustments for aggravating and mitigating factors, which in this context allows for the ‘human nature’ of sentencing to be upheld.

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appropriate response to be given by the courts in such a case, to which the writer agrees. There are some cases in which a non-custodial sentence is appropriate, as the protection of the community is not necessarily required, and the offending is not in need of deterrence or denunciation. However, the sanctity of life still needs to be upheld. The balancing of the competing demands of sentencing is a complex task in these cases.

<sup>345</sup> Contrast *R v Rawiri & Ors* HC Auckland T014047, 16 September 2002 at [35] Fisher J said: “In the case of manslaughter the exercise is made no easier by the Court of Appeal’s consistent reluctance to establish sentencing guidelines. I respectfully question whether the time has come to review that approach.”

<sup>346</sup> *R v Wickliffe*, above n 322, 16.

<sup>347</sup> *Solicitor-General v Kane*, above n 329, at 8.

<sup>348</sup> *R v Leuta*, above n 323, at [57]; re-affirmed in *R v Rapira* [2003] 3 NZLR 794 at [128].

<sup>349</sup> *R v Taueki* [2005] 3 NZLR 372. In regards to cases of wounding, or causing grievous bodily harm, with intent (offending that falls within s 188(1) of the Crimes Act 1961) *Taueki* provides guidance to judges to help determine the appropriate starting point by setting out bands of offending, and relevant factors that may contribute to or reduce the seriousness of the conduct involved. In manslaughter cases the judge can rank the relative seriousness of the circumstances by reference to the specified aggravating factors: *R v Sanders & Ors*, above n 327, at [15].

<sup>350</sup> *R v Jamieson*, above n 323, at [34]; *R v Tai* [2010] NZCA 598 at [11].

<sup>351</sup> *R v Jamieson*, above n 323.

<sup>352</sup> *Ibid*, at [33].

<sup>353</sup> In particular Sentencing Act 2002, ss 7-9.

In cases where *Taueki* is relevant the Court of Appeal has recognised that the sentencing judge is faced with a choice as to the correct approach.<sup>354</sup> The judge may either assess the offender's culpability by reference to, among other things, comparable manslaughter cases, albeit cautiously, or consider the sentence in "*Taueki* terms" in which an appropriate adjustment must be made for the fact that death has ensued.<sup>355</sup> The alternative approaches are not mutually exclusive, and may be utilised together to afford a check on one another.<sup>356</sup> It appears that the courts prefer to make comparisons with similar manslaughter sentences with focus predominantly being placed on an overall assessment of all the circumstances of the case.<sup>357</sup> However, there have been cases in which the *Taueki* approach has been expressly applied, or such an analysis has been considered to be appropriate.<sup>358</sup>

In some cases, usually those involving provocation, the courts have considered the categories referred to in *R v Edwards* as being of great assistance.<sup>359</sup> The Court of Appeal in *Edwards* considered the outcome of the UK Sentencing Advisory Panel on the issue of sentencing in cases of homicide, particularly those of domestic violence, where provocation was argued. Furthermore, the Court recognised that the sentencing ranges resulting from the analysis were accurate.<sup>360</sup> By way of illustration *Ambach v R*<sup>361</sup> involved very serious violence, being both cruel and brutal, falling little short of murder, however no reference was made to *Taueki* either by Winkelmann J in the High Court or by the Court of Appeal. Rather, because the case involved provocation,

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<sup>354</sup> *R v Tai*, above n 348.

<sup>355</sup> *Ibid*, at [12]. The two different approaches were recognised in *R v Sanders & Ors*, above n 327, at [14]-[15] per Dobson J.

<sup>356</sup> *R v Tai*, above n 348, at [12].

<sup>357</sup> See *R v Goldstone* HC Auckland CRI-2009-044-10031, 28 May 2010 per Miller J. A sentence of three years four months imprisonment was imposed upon the offender who recklessly (although the facts were disputable) shot and killed the victim at close range.

<sup>358</sup> See for example *Pahau & Ors v R* [2011] NZCA 147 at [96] to [98]; *R v Jamieson*, above n 323; *R v Tai*, above n 348: The offender knocked the victim to the ground with a single punch, causing him to fall face first onto hard concrete. The victim died by way of brain injuries. The Court of Appeal considered both approaches in turn, beginning with the '*Taueki*-based' approach, of which the sentencing judge had followed, and subsequently checked that analysis against comparable manslaughter cases. The end sentence was four years and six months imprisonment. *Tai* was re-affirmed in *Kepu v R* [2011] NZCA 104.

<sup>359</sup> *R v Edwards*, above n 327.

<sup>360</sup> Categories set out in *R v Edwards*, above n 327, at [31]; also referred to in *R v Blackmore* CA29/05, 18 May 2005 at [39].

<sup>361</sup> *Ambach v R* [2011] NZCA 93.

albeit a very low level, reliance was largely placed on the decision of *Edwards*, even though other comparable cases were referred to.<sup>362</sup>

When comparing similar cases of manslaughter, due to the variance in circumstances, the sentencing judge must proceed with caution and in doing so must carefully analyse the case before him.<sup>363</sup> It has been acknowledged by the Court of Appeal that caution must also be had when attempting to draw comparisons between manslaughter cases and those of wounding with intent to cause grievous bodily harm.<sup>364</sup> For the most part this may be due to the readily inferred assumption that cases of manslaughter should attract the imposition of a higher sentence. Accordingly, in the recent case of *R v Harris*, Wild J stated that killing another human being, in terms of gravity, sets manslaughter cases apart from those of violent offending where death has not resulted.<sup>365</sup> However, it is apparent considering the divergence of manslaughter sentences that a lesser sentence may be warranted due to the degree of culpability of the offender, notwithstanding that a life has been lost.

If the circumstances of the offence show the level of culpability to be low then the sentence usually reflects this.<sup>366</sup> Sheer carelessness or stupidity, alongside powerful mitigating factors such as an unblemished record, an early guilty plea and genuine remorse, may on occasion warrant a lesser sentence.<sup>367</sup> Furthermore, a loss of control, predominantly due to provocation may further attract a more ‘symbolic’ sentence rather than one that would ordinarily be imposed in the circumstances. In *R v Bourke* Simon France J imposed a sentence of just two years and ten months imprisonment.<sup>368</sup> The facts of the case were akin to murder, however the verdict of manslaughter

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<sup>362</sup> The sentence primarily resulted from a consideration of the categories in *Edwards*, above n 327.

<sup>363</sup> *R v Edwards*, above n 327, at [14].

<sup>364</sup> *R v Leuta*, above n 323; *Solicitor-General v Kane*, above n 329; *R v Jamieson*, above n 323.

<sup>365</sup> *R v Harris* HC Greymouth CRI-2009-018-000901, 8 April 2011.

<sup>366</sup> For example, in *Harris*, above n 363, even though the offender stabbed the victim, he did not do so with the intention of killing him (although the facts were not entirely clear). However in His Honour’s view the level of culpability justified the sentence of three and a half years imprisonment.

<sup>367</sup> *R v Mears* HC Rotorua CRI-2010-069-2211, 2 February 2011.

<sup>368</sup> *R v Bourke* HC Palmerston North CRI-2009-054-4180, 14 December 2010. Bourke shot his brother three times at close range while they sat in the back seat of their car, consequently killing him. The victim had repeatedly tried to have his brother kill him, and the circumstances of the case were held to be rather unique.

reflected the acceptance of the defence of provocation and attracted a very low level of personal culpability.<sup>369</sup>

By contrast, if the level of culpability is high the penalty should recognise the seriousness of the offence.<sup>370</sup> For example, where there is evidence of vulnerability, deliberation and force, which places the offending within the serious category of manslaughter, a longer term of imprisonment may be necessary to reflect the gravity of the offending, especially if the offender was fortunate to escape a verdict of murder.<sup>371</sup> In *R v Sanders & Ors*,<sup>372</sup> a case falling little short of murder, involving two co-offenders, the overall culpability of each resulted in a sentence of nine and a half years for Sanders and ten years for Galloway.<sup>373</sup> While the sentences in *Sanders & Ors* may appear longer than many others imposed for manslaughter, they reflect the high level of culpability involved.<sup>374</sup>

### *1 Comparisons with Violent Offending Where Death does not Result*

There have been cases in which a more severe sentence has been imposed, compared to those of manslaughter, where death has not resulted but the victim has sustained serious injuries. The offences include those at which the guidelines in *Taueki* were specifically directed and analogous forms of violent offending involving the infliction

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<sup>369</sup> The short sentence was primarily a result of Bourke’s significantly diminished culpability. Simon France J did not wish to down play the offending, nor did he want to absolve Bourke from all responsibility: *Ibid*, at [29]. There were many factors that had to be considered, and ultimately it is a balancing act in light of the individual circumstances of the case. The sentence appropriately reflected the level of culpability involved.

<sup>370</sup> Cases of this severity usually require the imposition of a minimum period of imprisonment to reflect one or all of the purposes set out at s 86 of the Act.

<sup>371</sup> See for example *Woodcock v R* [2010] NZCA 489, CA733/2009, 28 October 2010 at [42]: a sentence of 12 years imprisonment was upheld on appeal for the killing of a three-month-old child (the offender’s daughter); a summary schedule of sentences in cases of manslaughter involving children was provided in *Woodcock v R*. Leave to appeal against sentence was refused: *Woodcock v R* [2011] NZSC 8.

<sup>372</sup> *R v Sanders & Ors*, above n 327, at [18]. The defendants attacked the victim in his own house (a home invasion), who they knew to be a transvestite and a low-level drug dealer. The attack was described as a “savage and sustained attack that was simply not survivable”: at [7].

<sup>373</sup> The disparity between the offenders was to reflect the aggravating factor that unlike Mr Sander’s participation in the crime, Mr Galloway’s involvement constituted a hate crime, which could not be cancelled out by his youth: *R v Sanders*, above n 327, at [43].

<sup>374</sup> Dobson J further imposed a minimum period of one half of the term upon both offenders, which was warranted to “mark the seriousness of [the] brutal and tragic manslaughter”, and appropriate for deterrent purposes: *Ibid*, at [50] - [51]. Galloway successfully appealed his sentence, which was substituted with one of nine years imprisonment with a minimum period of four years by the Court of Appeal – to give effect to mitigating factors not recognised by Dobson J in the High Court: *Galloway v R* [2011] NZCA 309, CA23/2011, 7 July 2011.

of serious harm.<sup>375</sup> For example, in *R v Flavell*<sup>376</sup> a final sentence of four years and nine months on each count of causing grievous bodily harm was imposed.<sup>377</sup> Flavell appealed his sentence on the basis that it was manifestly excessive, and further that the judge had misapplied the *Taueki* guideline judgment.<sup>378</sup> On appeal the sentence was quashed and replaced with a sentence of three years and six months on each count.<sup>379</sup> The sentence is not particularly lengthy for the offence of causing grievous bodily harm. However, manslaughter cases often attract much shorter terms of imprisonment.<sup>380</sup>

By contrast a longer term was imposed in *August v R*.<sup>381</sup> The offender was sentenced to nine years and four months imprisonment.<sup>382</sup> Judge Spear, in the District Court, took the maximum sentence of 14 years as his starting point,<sup>383</sup> which clearly reflects both the gravity of the offending and the culpability of the offender. The intense attack, which included stomping the victim's head, lasted approximately ten to 15 minutes; the offender admittedly wanted the victim to feel pain.<sup>384</sup> The sentence was upheld on appeal, and appropriately categorised as falling within the most serious case under s 188 of the Crimes Act.<sup>385</sup>

### ***C Minimum Periods of Imprisonment***

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<sup>375</sup> *R v Taueki*, above n 347, at [9]. The Court of Appeal did note that when applying the guidelines to by analogy to offences other than under s 188, appropriate adaptation must be made to reflect the seriousness of the offence and the maximum penalty that it attracts. See for example *R v Leaf* HC Napier CRI-2011-020-2954, 8 February 2011.

<sup>376</sup> *R v Flavell* DC Auckland CRI-2009-488-003792, 17 February 2011. The facts involved an incident at a petrol station where a fight broke out between Flavell and others. The first count related to Flavell stabbing the victim with a broken bottle, and the second related to Flavell hitting the victim twice in the head with a baseball bat. The offender was sentenced in relation to offences of causing grievous bodily harm in accordance with the *Taueki* guidelines.

<sup>377</sup> *Ibid*, at [32]. To be served concurrently.

<sup>378</sup> *Flavell v R* CA108/2011, 3 August 2011.

<sup>379</sup> *Ibid*. To be served concurrently.

<sup>380</sup> It was argued on behalf of Flavell that when considered against sentences given in manslaughter cases the sentence was manifestly excessive. The Court did not find the cases cited as helpful, and viewed the most effective way to monitor sentencing levels in such cases was to apply the guidance given in *Taueki*: *Ibid*, at [5] & [29].

<sup>381</sup> *August v R* CA372-2010, 24 March 2011.

<sup>382</sup> *Ibid*: Following a plea guilty to intentionally causing grievous bodily harm, which left the victim in a permanent vegetative state, as opposed to death. The offender kicked the victim brutally about his upper body and head while lying unconscious on the floor. August was also ordered to serve a minimum period of six years imprisonment.

<sup>383</sup> Under the Crimes Act 1961, s 188(1).

<sup>384</sup> *Ibid*, at [4] to [7].

<sup>385</sup> *Ibid*, at [24].

Where a court imposes a determinate sentence of more than two years imprisonment for manslaughter, it may also order that the offender serve a minimum period of imprisonment under s 86 of the Act.<sup>386</sup> Effectively the section enables the sentencing judge to override the provisions of the Parole Act that allow for the offender to be considered for release on parole after serving one third of the imposed determinate sentence.<sup>387</sup> Minimum periods are more common in cases involving serious offending,<sup>388</sup> as “[t]hey attract longer prison terms with the consequent wider gap between the appropriate nominal sentence and one-third in each case”.<sup>389</sup> The sentencing judge retains the discretion whether or not to impose a minimum term in any given case having regard to the specified criteria.<sup>390</sup>

The Court of Appeal in *Brown*, subsequently applied in *Taueki*, regarded the approach to the section as follows:<sup>391</sup>

The Sentencing Act contemplates a two-stage process, involving the setting of the nominal (maximum) sentence as the first stage, and undertaking the exercise required by s 86 (where it is applicable) as the second stage (*Brown* at para [35]).

The second stage involves the consideration of two further questions – whether a minimum term should be imposed, and if so, how long should that term be.<sup>392</sup> In essence if the circumstances of the case reflect a high level of culpability it should be reflected by a lengthier sentence. Nevertheless, minimum periods are infrequently imposed in manslaughter cases even though they may be warranted or required to uphold the sanctity of life. However, the court must impose the least restrictive

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<sup>386</sup> Sentencing Act 2002, s 86: can be up to two-thirds of the finite sentence or ten years, whichever is the lesser period.

<sup>387</sup> Hall “*Hall’s Sentencing*” at SA86.1; Parole Act 2002, s 84(1). See also *R v Brown* [2002] 3 NZLR 670 at [23].

<sup>388</sup> See *Ambach v R*, above n 359: The Court of Appeal upheld the finite sentence of 12 years with a minimum period of 8 years imposed in the High Court (*R v Ambach* HC Auckland CRI-2007-004-27374): see discussion above in regards to cases of manslaughter of high culpability.

<sup>389</sup> *R v Brown*, above n 385, at [33].

<sup>390</sup> Sentencing Act 2002, s 86(2): The court may impose a minimum period of imprisonment under s 86 if satisfied that the otherwise applicable non-parole period under s 84(1) of the Parole Act is insufficient for all or any of the purposes set out in subs (2) (accountability, denunciation, deterrence, and the protection of the community). The four factors correspond with the principles set out in s7(1)(a), (e), (f), & (g): noted in *R v Walsh* CA281/04, 19 May 2005 at [25].

<sup>391</sup> *R v Taueki*, above n 347, at [53]; See also *R v Brown*, above n 385, at [35].

<sup>392</sup> *R v Taueki*, above n 347, at [54]; *R v Brown*, above n 385, at [35].

outcome in the circumstances of the case.<sup>393</sup> If the normal non-parole period in accordance with the Parole Act 2002 would be sufficient to satisfy any or all of the four purposes in s 86, it may not be necessary to impose a minimum term.<sup>394</sup>

#### ***D Concluding Comments***

Sentences in manslaughter cases are largely dependent upon the level of culpability as opposed to the consequences of the offending. The protection of the community, among other sentencing principles, requires a lengthier sentence for those who deliberately intend to hurt others compared to those who do not.<sup>395</sup> The nature of the offending should not lose its significance so that the consequences of death are given too much weight in the assessment of the appropriate sentence.<sup>396</sup> Sentences for manslaughter pose an inherent difficulty in striking a balance between the consequences of the offence and the culpability of the offender. Such a ‘balancing act’ is ultimately left up to the discretion of the sentencing judge who has the very difficult and important role of ensuring that the value and sanctity of life, as recognised by the community, is maintained. While consistency in sentencing levels remains at the forefront of the assessment, the sentence should also be proportionate to the individual circumstances of the case.

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<sup>393</sup> Sentencing Act 2002, s 8(g).

<sup>394</sup> The “3 strikes” regime effectively ties the hands of the courts in this respect. Presumably the sentencing judge has no discretion to consider imposing or not imposing a minimum period at stage-2 or stage-3, however this consequence is dependant upon the interpretation given to the phrase ‘manifestly unjust’ within the particular statutory context.

<sup>395</sup> See also sentences imposed for attempted murder. For example *R v Simiona* HC Wanganui CRI-2010-083-378, 7 April 2011: A sentence of eight years and three months was imposed, along with an order that the offender serve a minimum period of half that final sentence.

<sup>396</sup> Hall “*Hall’s Sentencing*”, above n 334, at I.5.9.

## *V The Way Forward*

The punishment for an offender convicted of homicide should be justified.<sup>397</sup> In essence, the offender should “receive his or her just deserts”.<sup>398</sup> The severity of the crime itself should not outweigh the gravity of the particular case. Although murder is widely thought to be the gravest offence, the circumstances of two individual cases are rarely alike to the point that the offenders should receive an identical sentence. The same can be said for manslaughter. The developments of the sentencing framework for homicide illustrate the progression of the principle of proportionality within the area.<sup>399</sup> Significantly the Sentencing Act 2002 conferred upon the courts a discretion not to impose the maximum penalty for murder. The ability to consider the culpability of the offender has now been removed with regard to both murder and manslaughter committed at a certain stage under the provisions of the so-called “3 strikes” regime.

### *A Looking Forward*

The Sentencing and Parole Reform Act 2010 significantly changed the law relating to sentencing for homicide, and is very much at odds with the principles and purposes that apply in respect to those offences. It is evident that the “3 strikes” regime will unduly fetter the discretion of the courts to adjust the sentence to “fit the crime” when murder is committed as a stage-2 or stage-3 offence, and when manslaughter is committed as a stage-3 offence. The legislation is premised upon punishing offenders on the basis of their criminal record, which is only one factor,<sup>400</sup> among the many, that should be considered. It was argued that the protection of the public would be achieved through deterrence and incapacitation,<sup>401</sup> only two out many purposes for which a court may sentence or otherwise deal with an offender.<sup>402</sup> It is, therefore, easy

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<sup>397</sup> As required by the theory of retribution: *Adams* at SA7.01.

<sup>398</sup> Hall, Geoff *Sentencing in New Zealand* (Butterworths, Wellington, New Zealand, 1987) at I.3.2.

<sup>399</sup> More so in regards to murder as opposed to manslaughter, albeit only with respect to the imposition of a minimum period of imprisonment.

<sup>400</sup> Sentencing Act 2002, s 9(1)(j).

<sup>401</sup> Deterrence and incapacitation were argued to be the way in which the purposes of the provisions – the protection of the community – would be achieved.

<sup>402</sup> Although incapacitation is not expressly included in s 7, the purpose may fall within the protection of the community (s 7(g)), or the purpose of holding the offender accountable for the harm done (s 7(a)). Nothing in the Act implies that any purpose must be given greater weight than any other: s 7(2).

to understand how a disproportionate response to the wrongdoing may result if, and when, the provisions are expressly applied.

While murder and manslaughter carry the same maximum penalty, the sentences actually imposed differ considerably. The range of circumstances that result in a conviction for either offence is extremely varied, yet the 2010 amendments require the court to sentence all offenders convicted of murder at either stage-2 or stage-3 in the same manner – to a sentence of life imprisonment without parole. All those who are convicted of manslaughter at stage-3 are to be punished equally – to a sentence of life imprisonment with a minimum period of at least 20 years. Except there is an apparent ‘safeguard’ for exceptional cases in which a life sentence without parole, or the substantially long minimum term would be “unjustifiably harsh”.<sup>403</sup> Judicial discretion is thus to be preserved under the rubric of “manifestly unjust”, albeit only in relation to the non-parole period for manslaughter or lack thereof for murder.

### *1 Manifestly Unjust*

The interpretation of the expression “manifestly unjust” within the context of murder has resulted in an often confused and inconsistent approach to sentencing the offender to either life imprisonment or the appropriate minimum period. More importantly the courts have attached a different meaning, or significance to the phrase under the relevant sections. Within the context of s 102, “manifestly unjust” affords a very limited and constrained discretion to the sentencing judge to impose a penalty less than life imprisonment,<sup>404</sup> whereas within the context of s 104, “manifestly unjust” operates in a much broader manner.<sup>405</sup>

The legislature did not take heed of those difficulties and implemented the same phrase as an exception to the mandatory “3 strikes” provisions without any legislative guidance as to the appropriate meaning. It is likely that the courts within the context

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<sup>403</sup> (18 February 2009) 652 NZPD 1420 at 1421 per Simon Power (the then Minister of Justice).

<sup>404</sup> Reflected by only three cases having displaced the presumption in favour of life imprisonment. See chapter two.

<sup>405</sup> In particular the guilty plea and youth: see Chapter Three.

of ss 86D<sup>406</sup> and 86E<sup>407</sup> will interpret the phrase “manifestly unjust” very broadly to allow for either a more proportionate sentence or for consistency in sentencing levels within the area. Whether or not this will impact upon the use of the expression in relation to murder as a stage-1 offence is unclear, however it will presumably result in further difficulties, especially regarding uniformity in the approach.

## *2 General Implications of the Regime*

The amendments have the potential of undermining many well-established principles and purposes of sentencing. As to consistency of sentencing levels, the courts will no longer enjoy the helpful assistance of looking to similar cases to provide guidance as to the appropriate starting point. It is important to remember that the task of comparing manslaughter case with one another must be undertaken with caution, and it is often difficult to draw analogies between two individual cases. The exercise will be further restricted as manslaughter cases will now be separated into a further category – stage-1, stage-2 or stage-3 offence. Thus similar cases will only provide guidance to the sentencing judge if the offender in the case at hand is being sentenced at the stage under the “3 strikes” provisions. The same implication will relate to murder, however only with regard to the minimum period of imprisonment.

Prosecutorial discretion will be given greater emphasis under the “3 strikes” as the charges laid will be critical to the sentence imposed. Although, it was proposed that all prosecutions involving charges that qualify for a stage-3 offence will be referred to the Crown Solicitor to provide an assurance that the appropriate charges are laid.<sup>408</sup> Whether or not this will make any difference in practice is uncertain. Furthermore, there may be pressure upon the defendant to plead guilty to a lesser offence, if a plea-bargain is offered, thereby attracting a lesser penalty.

The guilty plea, as is evident from the discussion throughout this paper, is often acknowledged by a reduction in the minimum period for murder, and the notional

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<sup>406</sup> In relation to manslaughter at stage-3. It will apply to any of the 40 specified offences committed as a stage-3 offence: s 86D. See Appendix 3.

<sup>407</sup> In relation to murder at stage-2 or stage-3.

<sup>408</sup> See second reading of the bill: (4 May 2010) 662 NZPD 10673; and third reading of the bill: (25 May 2010) 663 NZPD 11226.

sentence for manslaughter. Under the “3 strikes” regime those who plead guilty will presumably be given the same sentence as those who do not, notwithstanding the policy reasons for recognising the factor as mitigating the culpability of the offender. The only way in which the guilty plea may be taken into account is if the factor alone, or is one of a number of factors that, leads the court to a finding of manifest injustice, which again is dependant upon the threshold or interpretation given to the expression within this context. As a consequence, there will be less incentive to plead guilty, which will result in more trials, and ultimately lead to more appeals.<sup>409</sup>

### ***B Conclusion***

Sentencing an offender for homicide is not an easy task, especially considering the inherent seriousness of the crime. It involves balancing the sanctity and value of life against the need to deter and condemn those who commit such an offence. The importance of judicial discretion within this area should not to be forgotten. The facts of the individual case are of particular significance, and it is the courts’ responsibility to weigh them against the competing principles and purposes of sentencing.<sup>410</sup> Furthermore, a Sentencing Act based on retributive punishment requires the penalty to be proportionate to the wrongdoing.<sup>411</sup>

The Supreme Court in *Hessell v R* recently recognised the proper application of punishment for offending to be an evaluative task, which:<sup>412</sup>

[R]eflects the amalgam of sentencing discretion, on the one hand, which ensures the gravity of individual offending and circumstances of the offender are duly assessed, and sentencing consistency, on the other, which tempers sentencing judgment to ensure that sentencing outcomes reflect a policy of like treatment for similar circumstances.

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<sup>409</sup> Hall, Geoff *Hall’s Sentencing* (online looseleaf ed, LexisNexis) at SA86A.3.

<sup>410</sup> *R v A* [1994] 2 NZLR 129 at 132 per Cooke P; *Hessell v R* [2010] NZSC 135 at [26]. In particular those in ss 7, 8 and 9 of the Act. See Appendix 1.

<sup>411</sup> Sir Bruce Robertson *Adams on Criminal Law – Sentencing* (online looseleaf ed, Brookers) at SA7.01.

<sup>412</sup> *Hessell v R* (SC), above n 408, at [43].

This exercise is an important feature of sentencing.<sup>413</sup> While it cannot be completely unfettered, it should not be unduly fettered.<sup>414</sup> Consistency of sentencing levels is important, however it is equally important that the punishment be appropriate in all the circumstances of the particular case.<sup>415</sup>

Sentencing for homicide should be approached in a principled manner. It is not always.<sup>416</sup> Appellate guidance has attempted to provide assistance in this respect as the Act is often vague or without direction.<sup>417</sup> The inconsistencies within this area are evident after an in-depth analysis of the approach to sentencing offenders convicted of murder or manslaughter. The courts often focus too much on the need for consistency of sentencing levels, only one of the many principles of sentencing. This gives little weight to the culpability of the offender, which should be at the forefront of the assessment.<sup>418</sup>

The manner in which an offender is sentenced for murder differs from that of manslaughter, particularly in regards to the restrictions placed on the discretion of the court to determine the appropriate sentence. This is primarily because “murder is widely thought to be the gravest of crimes”,<sup>419</sup> whereas manslaughter is known to reflect a lesser degree of culpability. The sentencing judge is not completely without the ability to impose a proportionate sentence. The imposition of a lesser sentence than life imprisonment,<sup>420</sup> or a minimum period of imprisonment,<sup>421</sup> recognises the differing levels of culpability even for an offence as serious as murder.

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<sup>413</sup> *R v Taueki* [2005] 3 NZLR 372 at [30]. The Court of Appeal emphasised that a sentencing judge needs to evaluate the seriousness of all the individual factors of the case. Without this evaluative task, there would be a danger of a formulaic or mathematical approach to sentencing the offender, which is undesirable.

<sup>414</sup> As pointed out by counsel for Hessell in *Hessell v R* (SC), above n 408.

<sup>415</sup> *Ibid*, at [38].

<sup>416</sup> See in particular Chapter Three: the difficulties arising from the approach to the imposition of a minimum period of imprisonment for murder under s 104.

<sup>417</sup> Especially in regards to the appropriate meaning to be attached to the phrase ‘manifestly unjust’: see Chapters Two and Three.

<sup>418</sup> While comparisons between similar cases should be made, the aggravating and mitigating factors of the individual case should be given greater weight. This should apply to sentencing for murder and manslaughter.

<sup>419</sup> *Attorney-General’s Reference No 3 of 1994* [1998] 1 Cr App Rep 91 at 93 per Lord Mustill.

<sup>420</sup> Sentencing Act 2002, s 102(1).

<sup>421</sup> *Ibid*, s 103 and 104.

The courts have often failed to exercise their knowledge and understanding in the correct manner, despite the well-established approach to determining the appropriate minimum period for murder, when life imprisonment is imposed. Furthermore, there are inherent difficulties with the approach itself. For example, to make comparisons with cases that fall within the ‘standard range of murder’ is invidious, especially in regards to s 104 where the cases are intrinsically more serious than the ordinary range. Comparing cases involving similar circumstances is an innate exercise of the courts,<sup>422</sup> and if disturbed will run the threat of resulting in an inconsistent approach, as it has under s 104 of the Act.

The interpretation of the phrase “manifestly unjust” is also problematic, especially given the different thresholds attached to the words under ss 102 and 104. The relevance of mitigating factors, usually those of the offender, have caused the most difficulty in this respect. While the Act requires the court to take mitigating factors into account, there is no indication that s 9 is an overarching provision.<sup>423</sup> The courts invariably allow a discount for such factors under s 104, whereas the weight given to them under s 102 is more constrained. As a result, it is difficult to discern the appropriate meaning to be given to the expression with the context of murder. While the discretion of the court should be preserved, and is under the “manifestly unjust” rubric, it should be applied consistently to provide a principled response to sentencing an offender for murder.

Due to the flexibility of the approach to sentencing for manslaughter the extent and nature of judicial discretion is much broader as opposed to murder.<sup>424</sup> The courts are able to tailor the sentence to fit the circumstances of the case, in particular the culpability of the offender. The sanctity of life must be upheld, however the punishment must be proportionate to the gravity of the offending, which differs considerably in all manslaughter cases.<sup>425</sup> While the sentences imposed are frequently

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<sup>422</sup> And is also required by s 8(e) of the Act. However, it must be remembered that the principle of consistency is only one of many principles that the court should take into account: *Hessell v R; Clifford v R*.

<sup>423</sup> Contrast comments per Chambers J in *R v Li* HC Auckland T024483, 15 December 2003 at [27]. See also Hall “*Hall’s Sentencing*”, above n 407 at SA104.1(b).

<sup>424</sup> In particular because there is not specified regime in the Act.

<sup>425</sup> This is the primary issue relating to sentencing for manslaughter. This is often a misunderstanding of how to deal with cases of extremely low culpability, especially because in such cases there is usually no need to protect the community or deter others from offending in a similar way: see *R v Samita*. But

low, cases that are, or are near to, the most serious for offending of this kind usually attract a longer sentence. The maximum penalty of life imprisonment should be reserved for the ‘worst of the worst’.

The principle of proportionality is provided for, among others, in s 8 of the Act and requires the court to take into account “the gravity of the offending in the particular case, including the degree of culpability of the offender”.<sup>426</sup> The provisions of the Sentencing and Parole Reform Act 2010 unduly restrict the court from considering all the circumstances in cases of murder<sup>427</sup> and manslaughter<sup>428</sup> alike. The regime will result in highly disproportionate sentences and will add further difficulty to an area that is already problematic. A scheme premised solely upon punishing offenders on the basis of their previous convictions is in every respect unjust. Sentencing for murder and manslaughter, as a result, will no longer be a human process; rather it will become largely mechanical.

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it must always be remembered that a human life has been taken, and some form of punishment should follow that fact.

<sup>426</sup> Sentencing Act 2002, s 8(a).

<sup>427</sup> When committed as a stage-2 or stage-3 offence: s 86E.

<sup>428</sup> When committed as a stage-3 offence: s 86D.

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*Newspaper Articles*

The Minister of Justice, Sir John Findlay “Statement by the Minister of Justice” *Ashburton Guardian* (New Zealand, 14 February 1911).

## *Appendix 1*

### ***Sentencing Act 2002, ss 7, 8 & 9***

#### **7 Purposes of sentencing or otherwise dealing with offenders**

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
  - (b) to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or
  - (c) to provide for the interests of the victim of the offence; or
  - (d) to provide reparation for harm done by the offending; or
  - (e) to denounce the conduct in which the offender was involved; or
  - (f) to deter the offender or other persons from committing the same or a similar offence; or
  - (g) to protect the community from the offender; or
  - (h) to assist in the offender's rehabilitation and reintegration; or
  - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

#### **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender

that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

## **9 Aggravating and mitigating factors**

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

- (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
- (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
- (c) that the offence was committed while the offender was on bail or still subject to a sentence:
- (d) the extent of any loss, damage, or harm resulting from the offence:
- (e) particular cruelty in the commission of the offence:
- (f) that the offender was abusing a position of trust or authority in relation to the victim:
- (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
- (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
  - (i) the hostility is because of the common characteristic; and
  - (ii) the offender believed that the victim has that characteristic:
- (ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):
- (hb) the nature and extent of any connection between the offending and the offender's—
  - (i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or
  - (ii) involvement in any other form of organised criminal association:
- (i) premeditation on the part of the offender and, if so, the level of premeditation involved:
- (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

- (a) the age of the offender:
  - (b) whether and when the offender pleaded guilty:
  - (c) the conduct of the victim:
  - (d) that there was a limited involvement in the offence on the offender's part:
  - (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
  - (f) any remorse shown by the offender, or anything as described in section 10:
  - (g) any evidence of the offender's previous good character.
- (3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).
- (4) Nothing in subsection (1) or subsection (2)—
- (a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
  - (b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

## Appendix 2

### **Sentencing Act 2002, ss 102, 103 & 104**

#### **102 Presumption in favour of life imprisonment for murder**

- (1) An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.
- (2) If a court does not impose a sentence of imprisonment for life on an offender convicted of murder, it must give written reasons for not doing so.

#### **103 Imposition of minimum period of imprisonment or imprisonment without parole if life imprisonment imposed for murder**

- (1) If a court sentences an offender convicted of murder to imprisonment for life it must,—
  - (a) if section 86E(1) does not apply to the conviction,—
    - (i) order that the offender serve a minimum period of imprisonment under that sentence; or
    - (ii) if subsection (2A) applies, make an order under that subsection; or
  - (b) in any case where section 86E(1) applies to the conviction, take the action prescribed by that section.
- (2) The minimum term of imprisonment ordered may not be less than 10 years, and must be the minimum term of imprisonment that the court considers necessary to satisfy all or any of the following purposes:
  - (a) holding the offender accountable for the harm done to the victim and the community by the offending;
  - (b) denouncing the conduct in which the offender was involved;
  - (c) deterring the offender or other persons from committing the same or a similar offence;
  - (d) protecting the community from the offender.
- (2A) If the court that sentences an offender convicted of murder to imprisonment for life is satisfied that no minimum term of imprisonment would be sufficient to satisfy 1 or more of the purposes stated in subsection (2), the court may order that the offender serve the sentence without parole.
- (2B) The court may not make an order under subsection (2A) unless the offender was 18 years of age or over at the time that the offender committed the murder.
- (3) *[Repealed]*
- (4) *[Repealed]*
- (5) *[Repealed]*
- (6) *[Repealed]*
- (7) Subsection (2) is subject to section 104.

#### **104 Imposition of minimum period of imprisonment of 17 years or more**

- (1) The court must make an order under section 103 imposing a minimum period of imprisonment of at least 17 years in the following circumstances, unless it is satisfied that it would be manifestly unjust to do so:
  - (a) if the murder was committed in an attempt to avoid the detection,

- prosecution, or conviction of any person for any offence or in any other way to attempt to subvert the course of justice; or
- (b) if the murder involved calculated or lengthy planning, including making an arrangement under which money or anything of value passes (or is intended to pass) from one person to another; or
  - (c) if the murder involved the unlawful entry into, or unlawful presence in, a dwelling place; or
  - (d) if the murder was committed in the course of another serious offence; or
  - (e) if the murder was committed with a high level of brutality, cruelty, depravity, or callousness; or
  - (ea) if the murder was committed as part of a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002); or
  - (f) if the deceased was a constable or a prison officer acting in the course of his or her duty; or
  - (g) if the deceased was particularly vulnerable because of his or her age, health, or because of any other factor; or
  - (h) if the offender has been convicted of 2 or more counts of murder, whether or not arising from the same circumstances; or
  - (i) in any other exceptional circumstances.
- (2) This section does not apply to an offender in respect of whom an order under section 86E(2)(b) or (4)(a) or 103(2A) is made.

## *Appendix 3*

### ***Sentencing Act 2002, ss 102, 103 & 104***

#### **86D Stage-3 offences other than murder: offender sentenced to maximum term of imprisonment**

- (1) Despite any other enactment,—
  - (a) a defendant who is committed for trial for a stage-3 offence must be committed to the High Court for that trial; and
  - (b) no court other than the High Court, or the Court of Appeal or the Supreme Court on an appeal, may sentence an offender for a stage-3 offence.
- (2) Despite any other enactment, if, on any occasion, an offender is convicted of 1 or more stage-3 offences other than murder, the High Court must sentence the offender to the maximum term of imprisonment prescribed for each offence.
- (3) When the court sentences the offender under subsection (2), the court must order that the offender serve the sentence without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to make the order.
- (4) Despite subsection (3), if the court sentences the offender for manslaughter, the court must order that the offender serve a minimum period of imprisonment of not less than 20 years unless the court considers that, given the circumstances of the offence and the offender, a minimum period of that duration would be manifestly unjust, in which case the court must order that the offender serve a minimum period of imprisonment of not less than 10 years.
- (5) If the court does not make an order under subsection (3) or, where subsection (4) applies, does not order a minimum period of not less than 20 years under subsection (4), the court must give written reasons for not doing so.
- (6) If the court imposes a sentence under subsection (2), any other sentence of imprisonment imposed on the same occasion (whether for a stage-3 offence or for any other kind of offence) must be imposed concurrently.
- (7) Despite subsection (2), this section does not preclude the court from imposing, under section 87, a sentence of preventive detention on the offender, and if the court imposes such a sentence on the offender,—
  - (a) subsections (2) to (5) do not apply; and
  - (b) the minimum period of imprisonment that the court imposes on the offender under section 89(1) must not be less than the term of imprisonment that the court would have imposed under subsection (2), unless the court is satisfied that, given the circumstances of the offence and the offender, the imposition of that minimum period would be manifestly unjust.
- (8) If, in reliance on subsection (7)(b), the court imposes a minimum period of imprisonment that is less than the term of imprisonment that the court would have imposed under subsection (2), the court must give written reasons for doing so.

#### **86E When murder is a stage-2 or stage-3 offence**

- (1) This section applies if—
  - (a) an offender is convicted of murder; and

- (b) that murder is a stage-2 offence or a stage-3 offence.
- (2) If this section applies, the court must—
  - (a) sentence the offender to imprisonment for life for that murder; and
  - (b) order that the offender serve that sentence of imprisonment for life without parole unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so.
- (3) If the court does not make an order under subsection (2)(b), the court must give written reasons for not doing so.
- (4) If the court does not make an order under subsection (2)(b), the court must,—
  - (a) if that murder is a stage-3 offence, impose a minimum period of imprisonment of not less than 20 years unless the court is satisfied that, given the circumstances of the offence and the offender, it would be manifestly unjust to do so; and
  - (b) if that murder is a stage-2 offence, or if the court is satisfied that a minimum period of imprisonment of not less than 20 years under paragraph (a) would be manifestly unjust, order that the offender serve a minimum period of imprisonment in accordance with section 103.
- (5) If, in the case of a stage-3 offence, the court imposes under subsection (4)(a) a minimum period of imprisonment of less than 20 years, the court must give written reasons for doing so.
- (6) If, in the case of a stage-2 offence, the court makes an order under subsection (4)(b) and the offender does not, at the time of sentencing, have a record of final warning, the court must—
  - (a) warn the offender of the consequences if the offender is convicted of any serious violent offence committed after that warning; and
  - (b) record that the offender has been warned in accordance with paragraph (a).
- (7) It is not necessary for a Judge to use a particular form of words in giving the warning.
- (8) On the entry of a record under subsection (6)(b), the offender has a record of final warning.
- (9) The court must give the offender a written notice that sets out the consequences if the offender is convicted of any serious violent offence committed after the warning given under subsection (6)(a).

## *Appendix 4*

### ***Relevant Sections of the Crimes Act 1961***

#### **158 Homicide defined**

Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever.

#### **160 Culpable homicide**

- (1) Homicide may be either culpable or not culpable.
- (2) Homicide is culpable when it consists in the killing of any person—
  - (a) by an unlawful act; or
  - (b) by an omission without lawful excuse to perform or observe any legal duty; or
  - (c) by both combined; or
  - (d) by causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or
  - (e) by wilfully frightening a child under the age of 16 years or a sick person.
- (3) Except as provided in section 178, culpable homicide is either murder or manslaughter.
- (4) Homicide that is not culpable is not an offence.

#### **167 Murder defined**

Culpable homicide is murder in each of the following cases:

- (a) if the offender means to cause the death of the person killed:
- (b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not:
- (c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he does not mean to hurt the person killed:
- (d) if the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

#### **168 Further definition of murder**

- (1) Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:
  - (a) if he means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2), or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:
  - (b) if he administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:
  - (c) if he by any means wilfully stops the breath of any person for any of

- the purposes aforesaid, and death ensues from such stopping of breath.
- (2) The offences referred to in subsection (1) are those specified in the following provisions of this Act, namely:
- (a) section 73 (treason) or section 78 (communicating secrets):
  - (b) section 79 (sabotage):
  - (c) section 92 (piracy):
  - (d) section 93 (piratical acts):
  - (e) section 119 to 122 (escape or rescue from prison or lawful custody or detention):
  - (f) section 128 (sexual violation):
  - (g) section 167 (murder):
  - (h) section 208 (abduction):
  - (i) section 209 (kidnapping):
  - (j) section 231 (burglary):
  - (k) section 234 (robbery):
  - (l) section 267 (arson).

**171 Manslaughter**

Except as provided in section 178, culpable homicide not amounting to murder is manslaughter.

**172 Punishment of murder**

- (1) Every one who commits murder is liable to imprisonment for life.

**177 Punishment of manslaughter**

- (1) Every one who commits manslaughter is liable to imprisonment for life.

*Appendix 5*

***Table 1: Life Imprisonment and Duration of Non-Parole Periods***

<b>Act</b>	<b>Non-Parole Period</b>
Criminal Justice Act 1954	5 years
Criminal Justice Amendment Act 1962	10 years
Criminal Justice Amendment Act 1975	7 years
Criminal Justice Act 1985	7 years
Criminal Justice Amendment Act 1987	10 years
Sentencing Act 2002	10 years