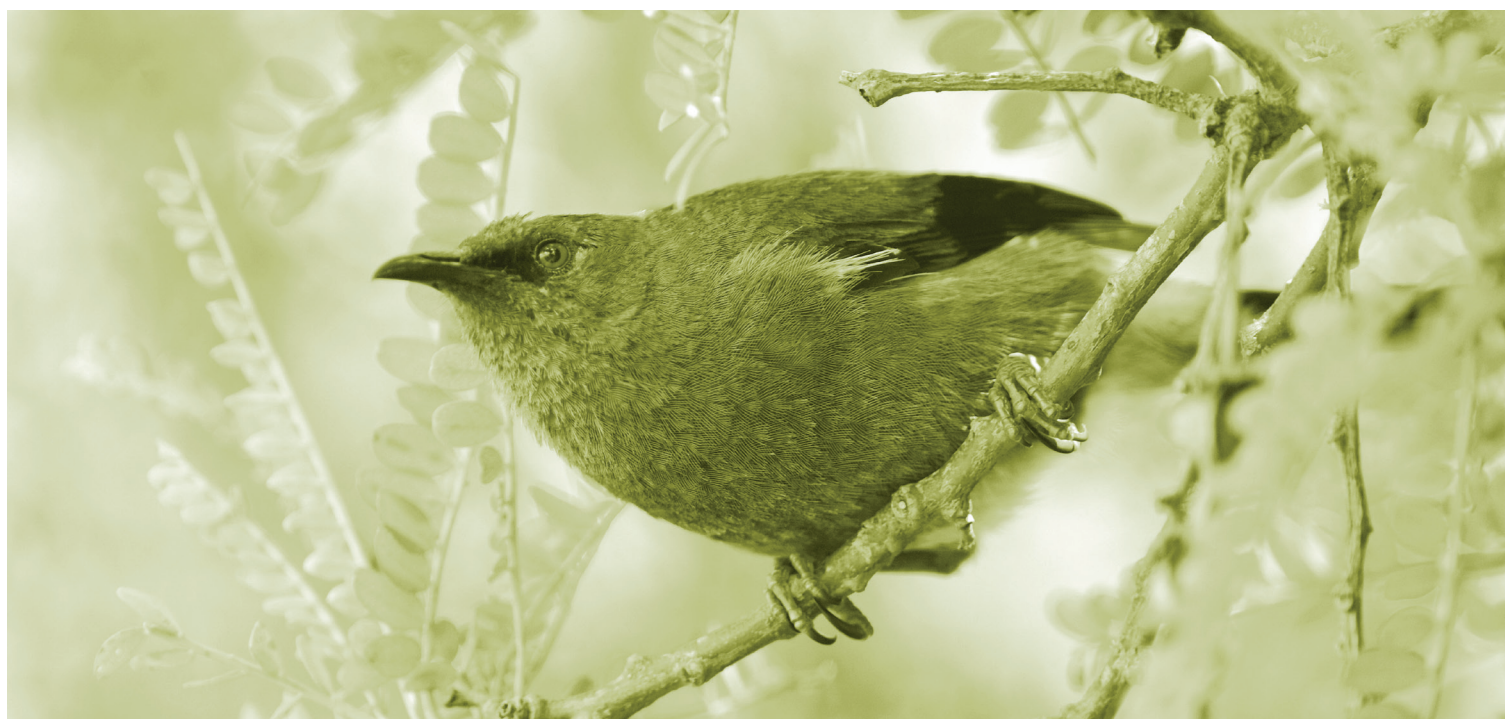


YOUNG ADULTS IN THE CRIMINAL JUSTICE SYSTEM IN AOTEAROA NEW ZEALAND



A principled framework for reform

NESSA LYNCH

with contribution from Huhana Ginty



PLEASE CITE THIS REPORT AS:

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AUTHOR'S NOTE:

The cover image is inspired by the whakataukī which reflects the ethos of the Young Adults' List Court in Porirua , 'Iti rearea teitei kahikatea ka taea' – like the bellbird and the kahikatea tree, young adults too can reach great heights. This was gifted to the Court by Ngāti Toa.

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SUMMARY OF KEY FINDINGS

- > Increasingly, scientific evidence and societal patterns indicate a gradual development into maturity through to the mid-twenties. This group is referred to in this report as *young adults* or *emerging adults*.
- > Many aspects of law and policy in Aotearoa New Zealand (for example, the recent raising of the upper age limit for state care) recognise the evolving capacities of young adults.
- > The age of penal majority in Aotearoa New Zealand is currently set at 18 years, meaning that young adults are dealt with in the adult system with its emphasis on individual accountability.
- > Characteristics of young adults include age related factors such as impulsivity, susceptibility to peer influence and increased capacity for change. The evidence on characteristics of justice system involved young adults includes prevalence of neuro-disability.
- > A principled framework for reform should be premised on Te Tiriti and human rights principles, as well as the evidence on age-related development.
- > Other jurisdictions are increasingly recognising the concept of young adulthood in criminal justice systems, through inclusion in existing youth justice systems, or in the establishment of specialist jurisdictions and processes.
- > Some initiatives to respond to this group are in evidence in Aotearoa, for example, a separate court list for young adults which commenced at Porirua District Court in March 2020.
- > Options for reforms which would recognise the special characteristics of young adults include:
 - > Extending the jurisdiction of the Youth Court to include some or all young adults,
 - > Extending protections of the youth justice jurisdiction to young adults (such as the extra protective rights during police questioning),
 - > Implementing “third system” approaches such as the Young Adults” List Court,
 - > Raising awareness of brain development evidence,
 - > Considering additional measures for expungement of young adults’ convictions.

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Any errors are my own, and the law is stated as of April 2022.

SECTION I

PURPOSE AND SCOPE

PURPOSE AND SCOPE

Evidence and principle support that a criminal justice system should have special provision to recognise the vulnerabilities, and the potential for change, in young adults. As will be discussed in more detail later, though the age of 18 is often considered the marker of adulthood, scientific evidence on brain development and contemporary societal norms indicate a gradual development into maturity through to the mid-twenties. In this report, I use the term “young adults” to describe this group, though some literature will also use the term “emerging adults”.

Although Aotearoa New Zealand has seen some movement on initiatives for young adults in the criminal justice system, this has generally been driven by the judiciary and practitioners, rather than top-down policy or legislative change. Sentencing discounts for youth have been driven by precedent rather than statutory foundations or sentencing guidelines.

There has been little scholarly treatment or public debate on the issue in a New Zealand context.¹ The thinking on recognising the concept of young adulthood in this jurisdiction lags developments in comparable jurisdictions.

This project will provide an independent and robust review of the principle, evidence and comparative examples, and analyse options for further reform and innovation.

This report is intended to be a resource for others, and a springboard for changes to practice, policy and legislation.

This report from the project provides:

- > Review of the principles and evidence supporting discrete treatment and systems for young adults in the criminal justice system,
- > Analysis of existing initiatives for young adults,
- > Analysis of developments in comparable jurisdictions,
- > Proposals for reform,
- > Recommendations for further research and evaluation.

It is intended to be a framework and reference point for legal practitioners, the policy profession, judiciary, social and youth workers and for advocacy purposes.

¹ See for instance Stephen Woodwork and Nessa Lynch, “Decidedly but Differently Accountable”? — Young Adults in the Criminal Justice System (2021) NZLR 109-140.; Andrea Parosanu & Ineke Pruin (2020) “Young adults in the criminal justice system – Some comparative perspectives” (2020) 8 NZLJ 296-299.

SECTION II

THE RESEARCH PROJECT

THE RESEARCH PROJECT

This section discusses the aims and scope of the project and how the research was conducted.

2.1. AIMS OF THE PROJECT

The key aims of the project are:

- > Assess whether principles and evidence support special consideration for young adults in the criminal justice system in New Zealand,
- > Discuss how other areas of law and policy recognise the transition to adulthood and what this should mean for the criminal justice system,
- > Consider the adequacy of existing ways of recognising young adulthood in Aotearoa New Zealand’s criminal justice system, such as the youth discount in sentencing,
- > Use comparative examples to explore two broad conceptual frameworks for reform of court-based responses to young adults- treating young through the existing youth court system or aspects of it or recognising a “third system” with separate provision for this age group,
- > Make recommendations on whether reform in practice, policy and law should occur, and what possible models could be explored.

2.2. SCOPE

This research project is relatively narrow in scope and focused on how the criminal justice system could be reformed to reduce harm to those already in it. It does not consider in detail the journey or life histories of young adults, nor engage in detail with the societal factors (deprivation, colonisation, poverty, mental health and wellbeing, experience of the care and protection system) that influence young adults’ entry to the criminal justice pipeline. These underlying factors are significant and their impact on factors such as over-representation of young Māori and young adults with disabilities is acknowledged. This project has a specific focus on the short- and medium-term changes that could made

to better support young people in contact with the system currently. The work can be classed as incremental reform but supporting the visions for transformational change of our care² and criminal justice systems³ expressed more fully elsewhere.

This is also largely a desk-research and literature review project and did not directly collect the views of young adults or those with lived experience. As I discuss later on, any reforms which are contemplated must encompass consultation with young adults themselves.

2.3. HOW THE PROJECT OPERATED

The project had three stages:

Stage 1 was the literature review: we reviewed and synthesised literature from Aotearoa New Zealand and other comparable jurisdictions and collected and categorised relevant case-law. We also wrote a discussion paper (which was a shorter and more preliminary version of this final paper, and which contained some questions for discussion and some proposals). This was circulated to the advisory group and various stakeholders for comment, as well as those people who attended our online workshop.

In Stage 2, we brought together around 25 stakeholders (from the legal profession, students, academics, policy professionals, the judiciary, other professions (psychology, psychiatry, speech and language therapists) and non-governmental organisations. This was a half day workshop via Zoom in which we heard each other's perspectives and discussed the issues raised in the discussion paper. High level summaries of the workshop and the views expressed there appear throughout this report.

Stage 3 involved the writing of the final report and the feedback and review stages.

Covid-19 did affect this project, like all aspects of life in Aotearoa, and meant that the workshop had to be held online and planned in-person meetings and visits had to be conducted virtually. Protest activity in the parliamentary precinct in February 2022 also meant that in-person meetings were curtailed.

Review and feedback on the draft final report were provided by the advisory group and other interested stakeholders. The views and findings in the report are my own and any errors are my responsibility.

2 Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua* (Wai 2915); Office of the Children's Commissioner, , 2021); *Te Kuku O Te Manawa Ka puta te riri, ka momori te ngākau, ka heke ngā roimata mo tōku pēpi* (Report one of two) Office of the Children's Commissioner, June 2020 www.occ.org.nz/assets/Uploads/TKTM-JUNE2020-Final.pdf); and *Te Kuku O Te Manawa Moe ararā! Haumanutia ngā moemoeā a ngā tūpuna mō te oranga o ngā tamariki* (Report two of two) Office of the Children's Commissioner, November 2020 retrieved from www.occ.org.nz/assets/Uploads/Te-Kuku-O-Te-Manawa-Report-2-OCC.pdf).

3 *Ināia Tonu Nei – Hui Māori Report*.(Ministry of Justice, July 2019). *The time is now: We lead, you follow*. Wellington, New Zealand. Retrieved from www.justice.govt.nz/justice-sector-policy/key-initiatives/hapaitia-te-oranga-tangata; *Turuki! Turuki!* Transforming our criminal justice system. The second report of Te Uepū Hāpai i Te Ora Safe and Effective Justice Advisory Group (2020) Retrieved from www.justice.govt.nz/assets/Documents/Publications/turuki-turuki.pdf.

SECTION III

CONTEXTUAL BACKGROUND

CONTEXTUAL BACKGROUND

This section gives some background on the principles and operation of the criminal justice system, particularly the current age-related boundaries, and the differences between the adult and youth systems.

This provides context for the analysis and recommendations later in this report.

Aotearoa New Zealand has a somewhat complex graduated system for age-related responsibility and liability in the criminal justice system. The system distinguishes between “children” (aged 10 to 13 years) and “young persons” (aged 14-17 years).⁴ Children may only be subject to formal measures (such as prosecution) in very restricted circumstances and the key underlying principle is that offending is symptomatic of welfare issues.⁵ Available responses to offending by young people are more expansive with an increased focus on individual accountability and formal measures.

The age of penal majority was raised to 18 in July 2019. This age had been set at 17 since at least 1989, meaning that 17-year olds were treated as adults. This change is a major development in ensuring that all young people benefit from youth justice protections such as the special rules for police questioning and investigation.

However, there are still exceptions to jurisdiction for very serious offences such as murder and manslaughter or where jury trials are elected. In these situations, cases are tried and finalised in the adult High or District Courts. There can be other situations where a young person’s case is transferred out of the Youth Court to the adult court for sentence.⁶

Once a young person turns 18, any new offending is dealt with in the adult system – meaning that at present, all young adults are dealt with in the adult system.

4 Oranga Tamariki Act 1989, s 2.

5 For more detailed information see Office of the Children’s Commissioner, *State of Care: Children with Offending Behaviour* (Office of the Children’s Commissioner, 24 August 2020). www.occ.org.nz/publications/reports/children-with-offending-behaviour

6 Oranga Tamariki Act, s. 289(1)(b). The Ministry of Justice’s 2020 figures indicate that 249 children and young persons were convicted and sentenced in the adult court. Ministry of Justice, *Youth Justice Indicators, 2020*, www.justice.govt.nz/assets/Documents/Publications/Youth-Justice-Indicators-Summary-Report-December-2020-FINAL.pdf

The table below summarises the differences between the adult and youth justice systems.⁷

DIFFERENCES BETWEEN THE ADULT AND YOUTH JUSTICE SYSTEMS IN AOTEAROA NEW ZEALAND

YOUTH JUSTICE SYSTEM	ADULT JUSTICE SYSTEM
<p>Youth justice principles in the <i>Oranga Tamariki Act 1989</i> focus on diversion and reintegration with formal measures and custodial orders as a last resort.</p>	<p>Principles of the <i>Sentencing Act 2002</i> focus on retribution, deterrence and rehabilitation.</p>
<p>Principal focus is diversion from formal measures, through alternative action, police diversion and partnership with iwi and community organisations.</p>	<p>Some diversionary processes, but formal measures often used.</p>
<p>Principles require decision-makers to prioritise and support the well-being of children, young people and their families, whānau, hapū and iwi above all else. Support may look like fostering the ability of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with youth offending. This is a overarching principle as stated in Sections 208(2)(c)(i) and 208(2)(c)(ii) of the <i>Oranga Tamariki Act 1989</i>.</p>	<p>Individual accountability.</p>
<p>The Youth Court has a specialized layout and specially selected and trained judges and lawyers.</p> <p>Youth Advocate (specialized youth lawyer) provided to all defendants free of charge.</p> <p>Lay advocates available to support young defendants and represent interests of whānau, hapū, iwi and wider family groups.</p> <p>Oranga Tamariki are represented with specialized social workers.</p> <p>Each Youth Court has a health clinician present.</p> <p>A significant amount of hearings may have a Ministry of Education representative and/or a communication assistant.</p>	<p>More limited support and what support is available varies Court by Court. Oranga Tamariki and the Ministry of Education are generally not present and free legal representation is not universally available.</p>

⁷ This table first appeared in Nessa Lynch, Andrew Becroft, Ian Lambie and Tamara Wilson-Tasi *Four Urgent Law Changes for the Youth Justice System*, co-authored with Andrew Becroft, Ian Lambie and Tamara Wilson Tasi (October 2021) www.wgtn.ac.nz/_data/assets/pdf_file/0008/1976084/Four-Urgent-Law-Changes-for-the-Youth-Justice-System.pdf

YOUTH JUSTICE SYSTEM	ADULT JUSTICE SYSTEM
Family Group Conferences are a key decision-making mechanism that involves victims in decisions.	Proof and other decisions determined through adversarial process. Restorative justice may be available.
Legislative requirements to explain the proceedings to the child or young person and others and encourage and assist the child or young person's participation and views including giving reasonable assistance.	No legislative requirement to ensure understanding.
Youth Court Judges receive specific training and support to communicate with children and young persons.	
Decision-makers must respect and uphold the rights of the child or young person under the Children's Convention and the Disabilities Convention.	
Automatic name suppression and strict restrictions on media reporting.	Name suppression not automatic, media may report freely on proceedings.
Court closed to the public.	Court open to the public.
Ngā Kōti Rangatahi and Pasifika Courts are an option in most areas of the country. "Cross-over lists" available for the large numbers of children and young persons with co-existing care and protection status.	A few areas have special courts e.g. Matariki Court.
Most cases resolved through absolute discharge. Youth Court orders do not appear on the young person's formal record and are not considered "convictions". ⁸	Convictions will remain on young person's record (subject to the <i>Criminal Records (Clean Slate) Act 2004</i>), affecting employment and travel prospects.
Age- appropriate accountability with maximum of six months in custody. Admission to a place of detention is seen as a last resort and custody time will be spent in youth justice residence.	Adult sentences include imprisonment, life imprisonment and minimum non-parole periods. Sentence of imprisonment likely to be served in Department of Corrections facility, or in some circumstances a youth justice residence.

8 Though, they may be taken into account as part of a person's behavioural history if later sentenced in the adult courts. See *Kohere v Police* (1994) 11 CRNZ 442 is authority for saying that the adult court can take such notations into account as being part of a person's behavioural history.

As may be observed, once they are no longer within the jurisdiction of the youth justice system, an individual who offends is placed in a system with very different goals and principles, and a system which is not specifically designed for young adults.

Yet, it must be noted that Te Ao Mārama, the new operating model for the District Court, does signal a significant change in direction:⁹

“Te Ao Mārama will incorporate best practices developed in the District Court’s solution-focused specialist courts into its mainstream criminal jurisdiction. This is to realise the shared vision for the court by improving access to justice as well as enhancing procedural and substantive fairness, for all people who are affected by the business of the court, including defendants, victims, witnesses, whānau and parties to proceedings.”

Key features of Te Ao Mārama will be developed and implemented in partnership with the community and local iwi and will include:¹⁰

“Focus on social, psychological, emotional and physical underlying causes of crime

Referral pathways for tailored rehabilitation or treatment

Wider community, iwi and stakeholder involvement in court

Heightened interagency coordination

Use of plain language in court

Kaupapa Māori approaches in the mainstream

Exploration of a new Kaitakawaenga (co-ordinator) role between the court, participants and services

Greater use of cultural speakers through s 27 of the Sentencing Act.”

Thus, although a key contextual issue for this report is the gulf between the adult and youth justice systems, it is important to note that reforms are ongoing to improve the procedural fairness and operation of the adult District Court. These should have positive implications for young adults, as well as all people appearing before the court. Nevertheless, it is worth also considering young adult- specific changes to the justice system alongside those broader changes signalled by reforms such as Te Ao Mārama. The best-case scenario is that young adults benefit from both focused reforms and broader reforms aimed at improving the system generally.

9 Chief District Court Judge “Transformative Te Ao Mārama model announced for District Court”, Statement from the Chief District Court Judge (media release, 11 November 2020) Retrieved from www.districtcourts.govt.nz/media-information/media-releases/11-november-2020-transformative-te-ao-marama-model-announced-for-district-court

10 Chief District Court Judge “Transformative Te Ao Mārama model announced for District Court”, Statement from the Chief District Court Judge (media release, 11 November 2020) www.districtcourts.govt.nz/media-information/media-releases/11-november-2020-transformative-te-ao-marama-model-announced-for-district-court

SECTION IV

THE CONCEPT OF YOUNG ADULTHOOD

THE CONCEPT OF YOUNG ADULTHOOD

This section explores the concept of young adulthood, drawing on scientific and sociological perspectives.

4.1. DEFINING YOUNG ADULTHOOD

The first, and fundamental, question is what the age parameters of young adulthood are. Though the age of 18 is often considered the marker of adulthood, scientific evidence on brain development and societal patterns indicate a gradual development into maturity through to the mid-twenties.

As is discussed throughout this report, different definitions and age parameters are used in different contexts and different jurisdictions to refer to this group. Generally, the term young adult is taken to mean an individual from age 18 to the mid-twenties.¹¹

There are no reported studies which discuss young adults' view of the appropriate age boundary. However, a study of young people and young adults in Scotland demonstrated that young adults had nuanced views on the appropriate transition age between youth justice and adult criminal justice.¹²

"There was no clear consensus among participants as to the age at which someone should no longer be treated as a young person, and there appeared to be no shared understanding of the age at which adulthood was reached - although this may reflect the differences in the young people's own ages. Instead, the transition to adulthood appeared to be understood as a gradual progression, rather than any sharp cut off. Consequently, it was clear that the young people did not support "cliff edges" in terms of moves from youth to adult justice and in sentencing practice."

11 David P Farrington, Rolf Loeber. and James C Howell, "Young adult offenders: The need for more effective legislative options and justice processing" (2012) 11(4) Criminol. Public Policy 729.

12 Johanne Miller and Sarah Anderson (2021) *A qualitative exploration of the attitudes of young people to the sentencing of young people in Scotland* – Research report for the Scottish Sentencing Council. www.scottishsentencingcouncil.org.uk/media/2130/20210803-a-qualitative-exploration-of-the-attitudes-of-young-people-to-the-ssc-draft-guideline-and-sentencing-of-young-people-in.pdf, (August 2021) at para. [172].

4.2. THE DEVELOPMENTAL SCIENCE/BRAIN DEVELOPMENT LITERATURE

Over the last three decades, there has been considerable work analysing the implications of developmental science for the law.

The McArthur Foundation's Network on Adolescent Development and Juvenile Justice (based in the United States) has been ground-breaking in this respect, bringing together legal, psychological, medical and psychiatric evidence in support of developmentally informed procedure and outcomes in the criminal justice system.¹³

This research, along with advocacy and strategic litigation, has resulted in several significant United States constitutional cases mitigating harsh sentences on the grounds of adolescent brain development.¹⁴ Key developments that have occurred from this advocacy include, the ban on the death penalty for adolescents and an end to mandatory life without parole sentences for juveniles.¹⁵

It has also underpinned legislative and policy changes in the area of transition to adulthood, not only in the United States but in other jurisdictions.¹⁶

Another incredibly useful contemporary resource is that which was commissioned by the Scottish Sentencing Council. This "umbrella review" synthesises the international evidence on brain development and the characteristics of justice-system involved adolescents and young adults and considers its application in the judicial context.¹⁷

In this section, I briefly review the scientific literature on brain development and considers the implications for law and policy in Aotearoa New Zealand. This is a complex and fast-moving area of science and commentary, and only brief plain language summaries are given here. Readers can refer to the footnote references for additional detail.

This section is focussed on age-related factors, those relating to neuro-disability are discussed later.

13 A bibliography may be accessed from the Network's website.
www.adjj.org/content/published_works.php

14 Laurence Steinberg "The influence of neuroscience on US Supreme Court decisions about adolescents' criminal culpability" (2013) 14(7) Nat. Rev. Neurosci 513.

15 Laurence Steinberg & Elizabeth S Scott, "Less guilty by reason of adolescence: developmental immaturity, diminished responsibility, and the juvenile death penalty" (2003) 58(12) Am. Psychol 1009.

16 Kirti Zeijlmans, Take Sipma, and André M Laan. "European Justice Systems and a Developmental Approach to Young Adults" *Incarceration* (2021) 1 *Incarceration and Generation* 151; Eva P Schmidt, Stephanie E. Rap, and Ton Liefwaard. "Young adults in the justice system: the interplay between scientific insights, legal reform and implementation in practice in The Netherlands." (2021) 21(2) *Youth Justice* 21, 172-191, and Erika Fountain, Erika, Alyssa Mikytuck, and Jennifer Woolard. "Treating emerging adults differently: How developmental science informs perceptions of justice policy." (2021) 7(1) *Translational Issues in Psychological Science* 65.

17 Scottish Sentencing Council, *The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review*. Submitted to the Scottish Sentencing Council in January 2020 Published, February 2020.) www.scottishsentencingcouncil.org.uk/media/2044/20200219-ssc-cognitive-maturity-literature-review.pdf

4.2.1 AGE-RELATED CHARACTERISTICS IN YOUNG ADULTS

As mentioned, there is an extensive and evolving literature on youth and brain development. Research findings have demonstrated the following aspects for young adults. These are related to the findings on adolescent brain development but have distinct characteristics. Three relevant themes from the literature are:

4.2.1.1. RISK TAKING/ IMPULSE CONTROL

Firstly, young adults have been shown to have reduced impulse control.¹⁸ This group may have under-developed resources for navigating the stressful and chaotic “hot processing” states that are often present in the circumstances surrounding violent offending. For example, interpreting the emotional states of others or reacting to threatening behaviour by others. Young adults are likely to have the same range of cognitive abilities to adults but there are evident differences in psychosocial functioning.¹⁹

4.2.1.2. PEER INFLUENCE

Secondly, like adolescents, it is apparent that young adults are influenced by their peers.²⁰ As group offending is common in this age group, the effect of peers is highly relevant.²¹ Relevantly, a young adult may be able to manage well in a more controlled (“cold processing”) situation. Whether an emerging adult has the degree of maturity required to make an appropriate decision is context specific. This suggests (which will be discussed again in a later section), that that it is not inconsistent for statutory age boundaries to vary according to context.²² When in a neutral environment, without peer influence (such as non-emergency healthcare or educational settings), young adults have the cognitive capacity to regulate their behaviour; “in the presence of peers or under conditions of emotional arousal, however, the socioemotional network becomes sufficiently activated to diminish the regulatory effectiveness of the cognitive-control network”.²³

4.2.1.3 THE AGE OF OPPORTUNITY

However, it is important not to frame this evidence solely in terms of deficits. From a brain development perspective, it is also a stage of life where behaviour change is more

18 Laurence Steinberg “Commentary on Special Issue on the Adolescent Brain: Redefining Adolescence” (2016) 70 *Neuroscience and Biobehavioral Reviews* 343.

19 Elizabeth Cauffman and Laurence Steinberg “(Im)maturity of judgment in adolescence: why adolescents may be less culpable than adults” (2000) 18 *Behavi Sci Law* 741.

20 Laurence Steinberg “Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science” (2007) 16 *Current Directions in Psychological Science* 16 at 56.

21 Elizabeth Cauffman and Laurence Steinberg “Emerging Findings from Research on Adolescent Development and Juvenile Justice” (2012) 7 *Victims & Offenders* 428 at 434.

22 Laurence Steinberg “Should the science of adolescent brain development inform public policy?” (2012) 28 *Issues in Science and Technology* 67 at 71.

23 Laurence Steinberg “Should the science of adolescent brain development inform public policy?” (2012) 28 *Issues in Science and Technology* 67.

readily possible. Steinberg has described this period as the “age of opportunity” where the brain is susceptible to both risk-taking and rehabilitation²⁴ as well as habilitation.²⁵

This is a period where reintegrative and rehabilitative programmes show better results when compared with fully functioning adults.²⁶ There are few services, particularly in prison, that are available for most young adults. Applying strict age delineations rather than needs-based approaches further exacerbates the lack of access to services.

4.2.2. CROSS-CULTURAL

In the international scientific literature, young adulthood is recognized as a cross-cultural developmental and social period of transition.²⁷ Young adults share more characteristics in common with adolescents than they do with adults. Researchers have consistently found that the brain matures much later than previously thought, with development continuing to the early to mid-twenties.

It is apparently that brain pathways develop in such a way that young people engage in more risk-taking behaviour than their child/younger or adult counterparts. This has been recognised as relevant to debates of criminal responsibility and culpability,²⁸ both internationally²⁹ and to some extent in Aotearoa New Zealand.³⁰ Concerns have been raised about whether these findings are Western-centric,³¹ and this is being explored through a developing cross-cultural literature demonstrating these life stages of transition from childhood to adolescence.³²

4.3. THE CHARACTERISTICS OF CRIMINAL JUSTICE SYSTEM INVOLVED YOUNG ADULTS

So far, the discussion has focussed on the age-related characteristics of young adults; young adulthood as a developmental stage.

24 Laurence Steinberg, *Age of opportunity: Lessons from the new science of adolescence*. (Houghton Mifflin Harcourt, Boston, 2014).

25 Habilitation refers to the idea of people having the first opportunity to access services to address their needs and speaks to society's responsibilities - Dodson, Kimberly, LeAnn Cabage, and Hannah Brown “Developing and Implementing Evidence-Based Policies and Practices: Improving Offender Treatment Outcomes” in Kimberly Dodson (ed) *Routledge Handbook on Offenders with Special Needs* (Routledge, Milton, 2018) at p. 500.

26 Laurence Steinberg, *Age of opportunity: Lessons from the new science of adolescence*. (Houghton Mifflin Harcourt, Boston, 2014).

27 Natasha Duell, Laurence Steinberg, Grace Icenogle et al, (2018). “Age patterns in risk taking across the world. *Journal of youth and adolescence*,” (2018) 47(5), J Youth Adolesc 1052-1072.

28 Laurence Steinberg, “Adolescent brain science and juvenile justice policymaking” (2017) 23(4) *Psychol. Public Policy Law* 410.

29 Laurence Steinberg, “The influence of neuroscience on US Supreme Court decisions about adolescents” criminal culpability” (2013) 14(7) *Nat. Rev. Neurosci* 513.

30 Ian Lambie, Julia Ioane and Charlotte Best “17-year olds and youth justice (2014) 31 NZLJ 316-320

31 Gerard Lansdown, *The Evolving Capacities of the Child* (Innocenti Insight) Save the Children/UNICEF, Florence, 2005.).

32 Natasha Duell et al “Age patterns in risk taking across the world” (2018) 47 J Youth And Adolesc. 1052.

We must also consider the characteristics and vulnerabilities of the young adults who populate the criminal justice system and how these can affect participation in justice proceedings and assessments of liability and culpability.

4.3.1. NEURO-DISABILITY

It is also increasingly understood in the local and international literature that neuro-disabilities such as foetal alcohol syndrome spectrum disorders, the impact of trauma, and brain injuries caused by accidents or assault, are strongly correlated with entry to the criminal justice systems.³³ There is increasing knowledge of the prevalence of disabilities, neuro-diversities and cognitive difficulties amongst people in the criminal justice system, particularly those who commit serious harms. Cognitive difficulties may arise from traumatic brain injury, abuse and neglect or neuro-disabilities such as autism, ADHD, foetal alcohol spectrum disorders, intellectual disability and mental illness. People with these conditions are highly over-represented in the criminal justice system, particularly in those in the custodial population.³⁴

These conditions also affect young adults' impulse control and mean that they are more likely to become involved in offending and the criminal justice system.³⁵

Foetal alcohol spectrum disorders can appear as "bad" or uncooperative behaviour and limit receptiveness to treatment when co-morbid with other mental health issues.³⁶ Brain damage caused by accidents or assault, can also have detrimental effects on young adults' capacity.³⁷ Traumatic brain injuries (TBI) are most likely to occur when a person is young.³⁸ TBIs have potentially permanent effects on cognitive and social functioning; this can impact on a young adults' wellbeing and future financial and social stability.³⁹

33 Ian Lambie (2020). "What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand. Auckland, NZ: Office of the Prime Minister's Chief Science Advisor." (2020) 12(1) *Psychology Aotearoa* 22; and Nessa Lynch, (2016). *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects With Justice*. Retrieved from <http://neurodisabilitiesforum.org.nz/wp-content/uploads/2016/05/Neurodisabilities-Forum-2016-Report-1.pdf> *Justice* (Neurodisabilities Forum, 30 May 2016).

34 Nessa Lynch, *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Neurodisabilities Forum, 30 May 2016) www.neurodisabilitiesforum.org.nz

35 Claire R Moynan and Tom M McMillan "Prevalence of head injury and associated disability in prison populations: A systematic review" (2018) 33(4) *J Head Trauma Rehabil* 275.

36 Ian Lambie "What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand" (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) 12(1) *Psychology Aotearoa* 22 at 26.

37 Nessa Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Neurodisabilities Forum, 30 May 2016) www.neurodisabilitiesforum.org.nz. See also Nathan Hughes et al., Huw Williams, Prathiba Chitsabesan, Rebecca Davies and Luke Mounce *Nobody made the connection: The prevalence of neurodisability in young people who offend* (Office of the Children's Commissioner, 2012).

38 Lambie (2020), at 14. Ian Lambie "What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand" (2020) 12(1) *Psychology Aotearoa* 22 at 24.

39 Lambie (2020), at 16. Ian Lambie "What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand" (2020) 12(1) *Psychology Aotearoa* 22 at 16.

4.4. HOW DO WE AVOID FRAMING THE SCIENTIFIC EVIDENCE AS DEFICIT-FOCUSSED?

Discussions at the workshop indicated some concerns about deficit framing or deficit thinking. By this, we mean framing people in ways which pathologize and problematise them and ignore their strengths.⁴⁰ Participants emphasised that literature and policy material frames brain development and neuro-disability in terms of problem and deficit rather than centring opportunity. There was also concern that individual assessment model, with a deficit focus and led by professionals may not work for Māori. Participants emphasized the need to decolonize professional practice⁴¹ and also to recognize and centre the protective factors of whanau and community.

It is also important to disentangle the age-related development evidence from the evidence about common characteristics of justice-involved young adults. Whether a young adult has characteristics such as neuro-disability or not, there is a clear case to distinguish young adults as a group based purely on age-related developmental factors.

it is important to frame the age -related developmental evidence as being strongly indicative of the possibility for change.

Young adulthood is not only a time of risky behaviour, this is a time where behavioural change is readily achievable.

4.5. YOUNG ADULTHOOD IN CONTEMPORARY SOCIETY

The societal concept of young adulthood as a recognisable stage of life has developed and expanded across history. There are some quirks in the historical narrative. While in previous generations, a young person would be expected to achieve markers of adulthood such as marriage, children, establishment of a separate household, buying a home ownership or full-time employment at the age of, or close to the age of 18, the age of majority (indicating full legal personhood), was traditionally set at 21. However, these historical patterns support an argument that young adulthood is a recognised distinct period of the life course, where there is societal acceptance that some protective measures are required.⁴²

40 Duncan Astle and Sue Fletcher-Watson "Beyond the core-deficit hypothesis in developmental disorders" (2020) 29(5) *Curr Dir Psychol Sci* 431.

41 Richard Tindle, Maria Raciti, & Ahmed Moustafa "Psychological research involving indigenous people: Australia and Aotearoa (New Zealand)" (2021) 2(1) *Discover Psychology* 1; Came, Heather, Maria Baker, and Tim McCreanor "Addressing structural racism through constitutional transformation and decolonization: Insights for the New Zealand health sector" (2021) 18(1) *J. Bioethical Inq.* 59.

42 Stephen Woodwark and Nessa Lynch "'Decidedly but Differently Accountable'? —Young Adults in the Criminal Justice System" (2021) *NZLR* 109.

4.5.1. THE AGE OF MAJORITY

The age of majority was traditionally set at 21. The age of 18 as the voting age etc is a more recent development. There is no particular logic to setting the upper age of the youth justice system at 18. Schiraldi notes that early United States" youth courts adopted an upper age of 18 because that was the time when young people left home, married and entered the workforce. This is no longer the case, with young adults now gradually transitioning to these markers of adulthood.⁴³ These international societal trends are mirrored in Aotearoa New Zealand. Statistics New Zealand reported in 2016 that New Zealanders are marrying later than in the past.⁴⁴ Around a quarter of 20-24-year olds are in full-time education.⁴⁵

4.5.2. VULNERABILITY

There is societal acceptance that this group of young adults require special protections because of their vulnerability. After the death of a 19-year -old student at the University of Canterbury, the government moved quickly to ensure that universities would be held accountable for failures in care towards this vulnerable group through a requirement to establish a Pastoral Care Code and attendant liability provisions.⁴⁶

4.5.3. YOUNG ADULTS IN THEIR FAMILY GROUP

The development of the proportion of young adults still living with their parents can be another indicator for a prolongation of the transition to adulthood. New Zealand data from the 2006 census indicates that approximately half of 18-20-year olds lived with their families of origin, diminishing to approximately one in 5 of 24-year olds.⁴⁷ Government policy is beginning to recognise this, for example in creating a right for young people who were previously in state care to receive advice and assistance up until the age of 24.

43 Vincent Schiraldi "Opinion: Young offenders don't belong in adult prisons. California has a chance to end the practice" *Los Angeles Times* (Los Angeles, January 7, 2020.).

44 Statistics New Zealand, "Marriages, Civil Unions, and Divorces: Year ended December 2016 (accessed December 2019)." (3 May 2017) Stats NZ www.stats.govt.nz/information-releases/marriages-civil-unions-and-divorces-year-ended-december-2016

45 Retrieved from Statistics New Zealand "Young people choose to earn, not learn" (26 June 2018) Stats NZ www.stats.govt.nz/tereonews/young-people-choose-to-earn-not-learn

46 Education (Pastoral Care) Amendment Bill 2019 (184-2). Now the Education (Pastoral Care) Amendment Act 2019 (2019/78).

47 Statistics New Zealand "Proportion of Young People who lived in Family of Origin" based on 1986 – 2006 census data.

SECTION V

THE FOUNDATIONS OF A PRINCIPLED APPROACH

THE FOUNDATIONS OF A PRINCIPLED APPROACH

This section considers what the foundations of a principled approach to young adults are.

5.1. TE TIRITI O WAITANGI

Te Tiriti o Waitangi is the central starting point for considering principled reform of the criminal justice system. Te Tiriti establishes the framework within which the rights of young adult Māori must be read.

The criminal justice system disproportionately impacts Māori. It is well documented that Māori are overrepresented in the New Zealand criminal justice system. Of concern in the context of young adults is that Māori account for 65% of youth in prison, which is a significantly higher proportion than the general prison population.

Because the Māori population is proportionately younger, the criminal justice system has an even more disproportionate impact on young adult Māori. This is a problem experienced by Māori across many areas of government policy which have age-related impacts. For example, Māori have criticised the government in relation to the Covid-19 vaccine rollout, which, by focusing on older age-groups first, has ended up disproportionately disadvantaging Māori due to their young population. A similar issue exists in relation to criminal justice, where Māori are more likely to be affected in part because the criminal justice system has the biggest impacts on young people, and the Māori population is disproportionately young compared to the general population.” This is a similar frame to what currently being discussed in relation to the vaccine rollout, which by focusing on older age-groups first has ended up proportionately disadvantaging Māori due to their younger population.

The Waitangi Tribunal’s expression of the Treaty principles is a useful starting point for this project: Te tino rangatiratanga; Kawanatanga; Good governance; Reciprocity and mutual benefit; Partnership; Active protection; Options; Equity; Equal treatment; and Redress.⁴⁸ Given the context of the criminal justice system and the past wrongs and inequity of outcomes that exist, the Crown’s treaty obligations to Māori are heightened.⁴⁹ While it is not the core focus of this paper to undertake a Te Tiriti analysis of criminal justice reform implications, these principles are briefly mentioned because any eventual reform should undertake such an analysis, and must take these principles into account.

48 Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 5 September 2018), at Chapter 3, p 189.

49 See Waitangi Tribunal *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017); and Waitangi Tribunal *Hauora Report on Stage One of Health and Services Outcomes Kaupapa Inquiry* (Wai 2575, 2019). For example, in the context of Corrections in the *Tū Mai te Rangī!* report, the Waitangi Tribunal found that the Crown’s obligation to actively protect Māori interests is “heightened in the knowledge of past historical wrongs done by the Crown and any prejudice that has affected subsequent generations.” (at 27). Similarly, the *Hauora* report found that where adverse disparity or inequality in outcomes exists, the Crown’s treaty obligations to Māori are heightened (at 29, 32, 37).

The Tribunal has also articulated what is required in the development and implementation of law, policy and practice to achieve a treaty compliant approach:⁵⁰

- > Recognition and respect by the Crown and Māori for each other's authority;
- > The ability of the Crown to exercise kawanatanga and Māori to exercise rangatiratanga; and
- > Ongoing dialogue, and negotiation and agreement between the Crown and Māori on all matters affecting Māori.

5.2. HUMAN RIGHTS

The international human rights framework is increasingly specifically recognising that young adults should also have specific procedures and mitigation in recognition of their vulnerability. In this section, the recognition of young adults in the human rights framework is explored.

5.2.1. DOMESTIC HUMAN RIGHTS FRAMEWORK

The Bill of Rights Act provides for a child's right (in the context of minimum standards of criminal procedure) "to be dealt with in a manner that takes account of the child's age".⁵¹ This applies to those up to the age of 18, but there are no specific age-related requirements for others.

However, it is intrinsic to other minimum standards of criminal procedure (such as fair trial rights) that a person is able to participate meaningfully in court proceedings.⁵² If a young adult is unable to participate effectively and meaningfully due to age related capacity issues, their rights to a minimum standard of criminal procedure is not upheld.

5.2.2. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The international human rights framework is the international human rights instruments which Aotearoa New Zealand has ratified. Though there are no specific provisions in international treaties which require New Zealand to implement special provision for young adults, international human rights bodies increasingly recognising that young adults should have specific procedures and processes which recognise their vulnerabilities.

As far back as 1985, Rule 3.3 of the Beijing Rules provided that "efforts shall also be made

50 For instance, see: Waitangi Tribunal, *Te Mana Whatu Ahuru: Report on Te Rohe Pōtae Claims* (Wai 898, 5 September 2018), at 157-158, 182-183; Waitangi Tribunal, *He Whakaputanga me te Tiriti: The Declaration and the Treaty – The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 14 October 2014), at 529; Waitangi Tribunal, *Report on the Crown's Foreshore and Seabed Policy* (Wai 1071, 4 March 2004), at 38, 139; Waitangi Tribunal, *Tū Mai te Rangī! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 7 April 2017), at 66.

51 New Zealand Bill of Rights Act 1990, s 25(i).

52 Meredith Rossner, David Tait and Martha McCurdy. "Justice reimagined: challenges and opportunities with implementing virtual courts" (2021) 33(1) *Curr. Issues Crim. Justice* 94.

to extend the principles embodied in the Rules to young adult offenders”.⁵³ The United Nations Committee on the Rights of the Child provides guidance on the implementation of the United Nations Convention on the Rights of the Child to which Aotearoa New Zealand has signed up to. In its recently revised (2019) General Comment on the rights of children in child justice proceedings, the Committee explicitly recognised and approved the application of mitigation and special procedures for young adults.⁵⁴

In Europe, the Council of Europe has also recognised the principle of treating young adults differently.⁵⁵ Rule 11 of the 2008 Recommendation states that “the extended transition to adulthood”, which should make it “possible for young adults under the age of 21 to be treated in a way comparable to juveniles and to be subject to the same interventions”. Similarly, the European Rules for Juvenile Offenders Subject to Sanctions or Measures⁵⁶ state in Basic Rule No. 17 that “young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly”.

Thus, it may be said that there is a developing norm of international human rights law that young adults should have special consideration in the criminal justice system

In addition, general human rights standards require that defendants are able to participate effectively in proceedings. Protection of due process requires that defendants have supports and procedures in place so that they can understand and participate. This support special provision to ensure that groups with particular characteristics and vulnerabilities (such as young adults) can appropriately and meaningfully participate in criminal proceedings.

5.3. DEVELOPMENTAL SCIENCE, CONSISTENCY AND HUMAN RIGHTS – IS THERE DISSONANCE?

As we have seen, there are strands of evidence and principle supporting special provision for young adults (and adolescence). One lens is that of developmental science and neuropsychology, which emphasises that young adults are more likely to take risks and more susceptible to rehabilitation and habilitation. This is more associated with the United States, where evidence related to brain development has been used to recognise aspects of the criminal justice system and sentencing as being inhumane and disproportionate. This way of thinking may be in response to the relatively weak system of human rights protection in the United States.

The other lens is that of human rights: seeing special provision for young adults (and adolescents) as being a human rights requirement based on general characteristics of the group, whether or not the particular young adult or young person has age-related developmental deficits.

53 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, General Assembly resolution) GA Res 40/33, annex. (1985).

54 United Nations Committee on the Rights of the Child - *General comment No. 24 (2019) on children’s rights in the child justice system*. UN Doc CRC/C/GC/24, (18 September 2019, para.) at 32.

55 Committee of Ministers of the Council of Europe (2008) *Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures*. (Council of Europe, 5 November 2008).

56 Committee of Ministers of the Council of Europe (2003) *Recommendation Rec (2003) 20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice*. (Council of Europe, 24 September 2003).

These are different lenses but lead to similar results.

In addition, human rights bodies have recently been recognising that brain development evidence can support implementation of human rights standards. For instance, the recent updated General Comment no 24 by the United Nations Committee on the Rights of the Child uses brain development evidence to justify the recommendation of a higher minimum age of criminal responsibility: “documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing... States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.”⁵⁷

As I argued in a previous paper with Ton Liefaard (referring not only to young adults but to children and young persons):⁵⁸

“There are some challenges in these shifting concepts of childhood, youth and emerging adulthood. The development of these policies for lower-risk emerging adults coupled with the exclusion from protective measures of some children for serious offending may mean a categorisation of deserving/undeserving or risky/not risky. This is compared to the “bright-line” test in children’s rights standards of protective measures being predicated on the child’s age rather than their level of risk or seriousness of the offence. It is also worth considering whether there are any challenges for the wider field of children’s rights. In particular, is there a cognitive dissonance in children’s rights scholarship, where in other fields such as education, medical decision-making, voice of the child, citizenship and gender identity, we consider and advocate that even young children are capable of exercising agency and autonomy and to appreciate the consequences of their proposed decisions. Is this a consistent approach? Or is there a need for consistency?”

Building on these comments, it is important to understand the nuance of the brain development evidence, and to ensure that recognising young adults’ needs and vulnerabilities in one setting is not used as an argument for their diminished capacity in another.

Young adults may be perfectly capable of making decision in non-stressful situations with appropriate support. But it is in situations associated with offending, such as being in a group, feeling threatened, and drug or alcohol consumption, where the age-related development factors are relevant. Establishing protective and supportive procedures and processes in one sphere does not render a person without capacity in another.

Thus, provisions for recognising young adults should not have any dissonance with other legal markers such the age of consent, voting age or the age of majority.

57 United Nations Committee on the Rights of the Child, *General comment No. 24 on children’s rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at 22).

58 Nessa Lynch and Ton Liefaard “What is left in the “too hard basket”? Developments and challenges for the rights of children in conflict with the law” (2020) 28(1) *Int. J. Child. Rights* 89.

SECTION VI
CURRENT RECOGNITION
OF YOUNG ADULTHOOD

CURRENT RECOGNITION OF YOUNG ADULTHOOD

An important contextual issue when considering possible reform of the criminal justice system, is that law and policy already contains significant recognition of young adults as a group deserving of different and tailored treatment. This demonstrates that society already accepts the need for differential treatment of young adults.

This section discusses current recognition of young adulthood in statute and policy.

The themes which underpin these examples of statutory recognition include; protection of young adults as a vulnerable group, supporting young adults to make decisions and protecting them from unwise choices, and seeing young adults as being part of their whanau/family group rather than solely as an individual.

6.1. EXAMPLES OF RECOGNITION OF YOUNG ADULTHOOD IN STATUTE

There are several examples in statute (both longstanding and recent) of recognition of young adulthood in legislation, examples of which are:

The age of majority in remains 20 years of age, under the Age of Majority Act 1970, unless the statutory regime holds otherwise. This demonstrates that the age of 18 years as a marker of legal adulthood is a more recent development.

A zero-blood alcohol limit is imposed for persons aged less than 20, as opposed to the higher limit for those aged more than 20. This is a recognition that young adults do not have sufficient maturity and capacity to make informed decisions about driving and alcohol.⁵⁹

Under s. 2 of the *Adult Adoption Information Act 1985*, it is from the age of 20, that a person may apply under s 4 for the original birth certificate.

Under s. 303 of the *Gambling Act 2003*, it is an offence for a person aged less than 20 years to participate in casino gambling or to be found in the gambling area of a casino.

Under s. 4 of the Student Allowances Regulation 1998, a student's ability to apply for a student allowance is determined by their parent's income, when single, without supported children and aged less than 24.

59 Land Transport Act 1998, s. 11.

6.2. EXAMPLES OF RECOGNITION OF YOUNG ADULTHOOD IN POLICY

Commercial contracts regularly restrict the supply of services to young adults. For example – rental car companies commonly prohibit renting cars to those aged less than 21 and will impose surcharges on under 25s.⁶⁰ This suggests a societal recognition that young adults are more likely to take risks and need to be supported to make wise choices.

6.3. YOUNG ADULTHOOD IN THE CARE AND PROTECTION SYSTEM

Relevantly, changes over the last few years have recognised the concept of young adulthood in the context of the care and protection system.

The *Oranga Tamariki Act 1989* now explicitly acknowledges as one of its purposes, the need for assisting vulnerable young people to “successfully transition to adulthood.”⁶¹ This period of continued development is reflected in the progressive reduction of care at different ages. Since July 2019, the age up to which a person can be under the jurisdiction of the care system has increased to 21 years. Up until the age of 25, in some circumstances, a young adult who has been in care remains entitled to advice and assistance.⁶² Section 386AAA of the *Oranga Tamariki Act* defines a young person as including those 18 years or over but under 21 years or 18 years of over but under 25 years. The decision to raise the care age to 21 was based on the fact that “transitions to independence are not linear”, and that this period in a young adults life is frequently marked by significant uncertainty.⁶³ To reflect the reality that this is often what transitions look like for young people not in state care (i.e. moving in and out of the family home) the *Oranga Tamariki Act* also says guardianship orders can continue to apply to young adults.

The prevalence of a care history amongst young people and young adults who offend is demonstrated clearly in the international⁶⁴ and national literature. In Aotearoa, Elizabeth Stanley’s work has demonstrated this clearly.⁶⁵ Her work with Sarah Monod de Froideville has also discussed how the label of vulnerability and more recently of “wellbeing” driven

60 Budget New Zealand “Requirements for Renting –” Budget New Zealand www.budget.co.nz/en/customer-care/faqs/nz/requirements-for-renting; Hertz New Zealand - “Renting to Drivers under 25” Hertz www.hertz.co.nz/rentacar/misc/index.jsp?targetPage=Hertz_Renting_to_Drivers_Under_25.jsp. FAQs –>; and Thrifty Car Rental “FAQs” Thrifty www.thrifty.co.nz/faqs/.

61 Oranga Tamariki Act 1989, s 4(1)(j).

62 The meaning of a young persons is extended under the Oranga Tamariki Act 1989, ss 386AAD and 386A.

63 Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Bill 2016 (224-1) (explanatory note) at 7-8.

64 McFarlane, Kath “Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system” (2018) 51(3) Australian & New Zealand Journal of Criminology 412; Mendes, Phili, Rachel Standfield, Bernadette Saunders, Samone McCurdy, Jacinta Walsh, and Lena Turnbull. “Aboriginal and Torres Strait Islander (Indigenous) young people leaving out-of-home care in Australia: A national scoping study” (2021) 121 Child Youth Serv Rev 105848.

65 Stanley, Elizabeth, “From care to custody: Trajectories of children in post-war New Zealand” (2017) 17(1) Youth Justice 57; Stanley, Elizabeth, *The road to hell: State violence against children in postwar New Zealand* (Auckland University Press, Auckland, 2016).

policy ensure that care-experienced children (particularly Māori) remain entrenched in the system for life.⁶⁶

If vulnerability of young people in care is the principled basis for increasing the care age to include young adults, it would be consistent to extend this principle to the justice system considering the connection between youth in care and youth who offend.

6.4. YOUNG ADULTHOOD IN THE CRIMINAL JUSTICE SYSTEM

The specialist young adults court will be discussed in more detail in the following section, but there are other statutory and policy examples of recognition of young adulthood in the criminal justice system in Aotearoa:

The Department of Corrections define a young offender as a person under 20 years and allow for vulnerable young adults⁶⁷ to be placed in a youth unit.⁶⁸

Special provisions also apply to the remand of defendants aged 18-20 years under the Criminal Procedure Act 2011, allowing 18- and 19-year olds to be remanded to the custody of the chief executive responsible for the administration of the *Oranga Tamariki Act*.⁶⁹

66 Stanley, Elizabeth and Sarah Monod de Froideville "From vulnerability to risk: Consolidating state interventions towards Māori children and young people in New Zealand" (2020) 40(4) Critical Social Policy 526.

67 Vulnerability is assessed using the Prison Youth Vulnerability Scale available at www.corrections.govt.nz/_data/assets/pdf_file/0015/10671/pyvsmanual.pdf. See David Tie and Elizabeth Waugh *Prison Youth Vulnerability Scale* (Department of Corrections, 2001). Key indicators are vulnerability to victimisation, wellbeing and vulnerability to suicide or self-harm.

68 Department of Corrections *Prison Operations Manual M.03 <Specified gender and age movements* www.corrections.govt.nz/resources/policy_and_legislation/Prison-Operations-Manual/Movement/M.03-Specified-gender-and-age-movements.

69 Criminal Procedure Act 2011, s 175 (2).

SECTION VII
CASE STUDY – THE YOUNG
ADULT LIST COURT

CASE STUDY – THE YOUNG ADULT LIST COURT

This section discusses, as a case study, the young adults’ list court, currently operating at the Porirua District Court. The Young Adult List Court (*Iti rearea teitei kahikatea ka taea*) at Porirua is a judicially-led innovation, and now operates in partnership with community organisations. The court commenced in March 2020 and officially launched in July 2021. This may be classed as a “third system” response, which is a term for initiatives which recognise young adults as a specific and separate class with distinct needs.

The Young Adult List Court (“YA Court”) is in its early stages, so we do not yet have evidence about its implications for the young adults medium to long term future. Nonetheless, it is a valuable case study in how a third system approach is already operating in the New Zealand context.

7.1. HOW THE COURT OPERATES⁷⁰

The court takes place every Friday. It is a District Court sitting, but with procedural modifications and processes to better support young adults, particularly those with communication difficulties. Any person aged 18-25 who is due to appear at the Porirua Court is allocated to this list. There is specialist multidisciplinary support (e.g. psychologists, social workers) and procedure and communication by the judge and by the other participants is adapted for this age group. There is a focus on participation and ensuring young adults supported to fulfil their conditions and plans, with a view to resolving cases without a conviction where possible. The Porirua District Court has a long standing, positive relationship with other locally based public sector agencies, Iwi, and numerous non-government social service providers.

7.2. EVALUATION OF THE COURT

A recent evaluation found that the YA Court has shown early promise of meeting its objectives. This “formative and short-term outcome” evaluation involved observation and interviews with participants, professionals and stakeholders, as well as a comparison group.⁷¹ The comparison group were defendants from a comparison court of comparable size.

The evaluation found that the YA Court addresses the needs for young adults as individuals as opposed to applying a “one size fits all” approach. Young adults interviewed for the evaluation referred to their experience in as “one of those things that helped me switch

70 This section draws on the author’s experience in visiting the court as well as a recently published evaluation.

71 Judy Paulin, Michelle Moss, Adrian Field, Shaun Akroyd and Nan Wehipeihana *Formative and Short-term Outcome Evaluation of the Porirua District Court Young Adults List Court Initiative Iti rearea teitei kahikatea ka taea* (Artemis Research, July 2021) at 27.

my life around”.⁷² The YA Court reflects a principled-based approach adhering to a variety of views, but with particular emphasis on tikanga Māori. The ethos of the court reflects the whakataukī:

ITI REAREA TEITEI KAHIKATEA KA TAEA

LIKE THE BELLBIRD AND THE KAHIKATEA TREE, YOUNG ADULTS TOO CAN REACH GREAT HEIGHTS

The majority view expressed by stakeholders and defendants was that the young adults in the YA Court had a better understanding of the decisions and the process. They were treated with respect by the judge.⁷³ The evaluation found that the overall success of the YA Court relies heavily on the role of the judge, particularly that the judge pronounces names correctly, acknowledges support people, maintains the distinct court layout and procedure, interacts with the young adult and uses clear and plain language. Other participants felt that because the judge was directly addressing them, they felt more comfortable answering questions at appearances.⁷⁴ One comparison participant said that in the comparison courts, “the judge didn’t even make eye contact with me. It was almost like I was a fly in the room”.⁷⁵

The YA Court places a high value on the importance of manaakitanga. Participants referred to this as seeing the “judge’s caring attitude and guidance”⁷⁶ and being “pleasantly surprised”⁷⁷ when the judge acknowledged their whānau. The Porirua District Court has a long standing, positive relationship with other locally based public sector agencies, Iwi, and numerous non-government social service providers. The YA Court attempts to incorporate tikanga Māori values (such as the value of manaakitanga described above), and consequently one stakeholder described the court as “achieving more for Māori than we’ve ever achieved before because of this inclusiveness.”⁷⁸

The YA Court aims to promote interventions and services before disposing of a young adult’s case. This is illustrated through discussion of a situation where a judge said to a young adult “I’m not going to sentence you just yet. Hang on. We’ll get you some help”.⁷⁹ However, completion of interventions set by the YA Court may influence the young adult’s final sentence. Notably, some young adults have said that they preferred this approach because, for example, the process was easier to understand, and staff were friendlier, more informative and they did not feel rushed.⁸⁰

A key success of the YA Court is the referral to appropriate services which seek to address the causes of the offending. For instance, where a young adult does not have a driving

72 At p. 8.

73 At p. 7

74 At p. 6.

75 At p. 8.

76 At p. 6.

77 At p. 5.

78 At p. 17.

79 At p. 16.

80 At p. 8.

licence (sometimes stemming from an inability to source identification documents), they may be referred to services which can help with licencing and also sitting tests.⁸¹ Young adults can be referred to specific services, for instance, young Māori appearing could be referred to Ngāti Toa for health services, or young Pasifika to a specific Pasifika counselling services. The evaluation found that an indirect benefit of the YA Court was that young adults gained awareness of local social and health services.⁸²

Challenges identified in the evaluation were around whether the YA Court has the balance right in addressing needs and promoting reintegration v. avoiding imposing additional burdens on the young adult. In a specialized pilot court such as the YA Court, timeliness and readiness are crucial. The evaluation noted that young adults appearing on category two offences are taking one and a half times longer to resolve than that in the comparison courts. Because of this delay, some young adults are having to reappear multiple times in court. This has risks because young adults may begin to normalize the courtroom environment which counters the deterrent effect that the courtroom can have on a first-time appearance.⁸³

Similarly, the number of reappearances that a young adult is required to do, may create tension between their life outside of court and within. For example, some young adults are having to take a day's unpaid leave from work, given the uncertainty related to the time of their actual court appearance.⁸⁴ Arguably, taking a day's unpaid leave from work is less stigmatizing than admitting that you must appear in court. This makes it increasingly difficult for a young adult to gain a sense of normalcy in their life. (As a result of this finding, we heard that the days in the YA Court have been differently structured to give more certainty as to when monitoring appearances happen).

The evaluation also found that where young adults were appearing on more serious charges (such as category 3 offences), judges appeared to be less direct with the young adult and more professional with the lawyer, reducing the young adult's participation in the process. This may be explained as being because there is more time before a plea is entered and judges will not engage in an interventional manner until a plea of guilty is entered. This suggests that the YA Court operates under a similar process to the District Court when the offending is more serious.

Similarly, stakeholders are noticing that the role of the victim is being played down as seen in comparison courts. Here, because of the young adult focus, victims are unsure when to contribute and when their perspective is welcomed.⁸⁵ Following the evaluation, we heard that victims have been involved at an earlier stage of proceedings.

7.3. IMPACT OF THE YA COURT

The YA Court is at an early stage of development, and so conclusions on its wider impact are preliminary. Covid-19 lockdowns affected the YA Court in its earliest stages and it must also be noted that pandemic related restrictions have meant that some aspects such

81 At p. 16

82 At p. 16.

83 At p. 11.

84 At p. 10.

85 At p. 20.

as attendance of numbers of whanau members and supporters, and the “graduation” appearance, have been curtailed. The wearing of masks in court and social distancing may also curb effective communication and participation.

It remains to be seen whether the YA Court is a scaleable model, but the experience of the Rangatahi Courts demonstrates that partnering with communities is an effective method of extending a pilot court programme. The evaluation emphasised that the positive outcomes from the YA Court had their foundations in existing strong relationships and partnerships in the Porirua District and Youth Courts. We heard that decisions have been made to roll out the model as part of the Te Ao Mārama process. A YA Court commences in Gisborne on 5th May and in Hamilton later in the year.

The YA Court shows real promise in recognising young adults’ particular characteristics and promoting reintegrative approaches to this group.

It is also likely that where judges, lawyers, police and other professionals participate in the YA Court, they will bring their new awareness of young adult’s characteristics and needs to other contexts.

SECTION VIII
YOUNG ADULTHOOD AND
SENTENCING IN AOTEAROA

YOUNG ADULTHOOD AND SENTENCING IN AOTEAROA

A more traditional which the law recognises young adulthood is through discounts for youth in sentencing. While youth of the offender is a longstanding mitigating factor, more recent decisions have shown more nuanced understanding of the effect which youth and brain development has on culpability. In this section, I review some themes from sentencing decisions. This is not a major quantitative exercise, rather a highlighting of some prevalent patterns. The implications that sentencing practice is inconsistent in recognising young adulthood is a logical one, and underpins some recommendations made later.

8.1. THEMES FROM SENTENCING DECISIONS

There is a growing acceptance amongst sentencing judges that both young people and young adults require additional consideration considering their noticeable differences in brain development. Especially since the Court of Appeal decision in *Churchward v R* (involving sentencing of a young adult and a young person for murder), the youth discount has been applied to recognize the neurological differences between young people/young adults and adults, the disproportionate effect of imprisonment on young people/young adults and that young people/young adults have greater capacity to change.⁸⁶

We summarise some main themes here:

The courts have emphasised the use of the youth discount where imprisonment is likely. The courts recognise that a young person's incomplete brain development will be impacted more severely than other offenders.⁸⁷ However, there is tension where a young adult is facing a sentence of imprisonment but is in the upper age range of young adulthood. Here, we are reminded that the youth discount is discretionary rather than statutory in Aotearoa. Case law suggests that the application of the youth discount is an "elastic concept" without a "clear touchstone figure".⁸⁸ There appears to be acceptance that the parameters of young adulthood is 18 to 25 years old, however there is a common theme that judges define a young adult by their "hallmarks of typical youth offending"⁸⁹. Decisions suggest that the courts have developed a systematic response by classing certain youthful traits to certain categories of offending. In the absence of "truly youthful-type of offending"⁹⁰, the less likely the young adult is to benefit from the youth discount.

Traits such as "self-entitlement, impulsivity and immaturity"⁹¹ are commonly linked with

86 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77]].

87 *R v Unasa* [2020] NZHC 3139 at [35].

88 *R v Tupu-Ngahere* [2017] NZDC 21813 at [11].

89 *R v Feleti* [2019] NZHC 94 at [41].

90 *R v Deimon Nicholls* [2016] NZDC 9688 at [9].

91 *R v Cossey* [2018] NZHC 887 at [37].

young adult offenders. This is in light of the neurological evidence that the front of the brain for a young adult is the last to develop. “That is the part that controls our ability to plan; consider or reflect; to control impulses and to make wise decisions”.⁹² This inability to plan, consider or reflect has impacted the youth discount. Circumstances in which “little appreciation of the serious and potentially fatal risks”⁹³ and acting in a “rash moment of aggression without sense of the consequences”⁹⁴ has warranted a generous discount of 20 percent in some cases.

Some decisions demonstrate holistically assessment of young adults with consideration of their age and the youth-specific traits evident in their offending. Whilst there remains a reluctance in applying the youth discount to those whose offending does not demonstrate hallmarks of youthful behaviour, judicial decisions support the research which suggests that “young adults are not so entrenched in their behaviour, and they want to see a better future for themselves and are willing to do the hard yards to see that that happens”.⁹⁵ However, as the court noted in one case; the “radical effect an offender’s youth can have on sentences, youth cannot be accorded presumptive, let paramount weight”.⁹⁶

We reviewed manslaughter cases that have received a 20 percent discount. This percentage has been applied in a number of cases to “king hit, one punch or similarly impulsive manslaughters”.⁵ Whereas, we saw that sexual violence offences have attracted a ten percent discount. The sexual violence sentencing demonstrated tension when applying the youth discount. In *R v Deimon Nicholls*, the Court awarded some allowance for the youth of the defendant, who was only 18 at the time of the offending. However, as the Court noted “the extent of that allowance must be assessed having regard to the very serious nature of the offending and the interest which the public has in seeing such matters effectively denounced and deterred.” While the defendant was a young adult and the offending was described as “opportunistic”, the Court suggested that “allowances for youth in such circumstances cannot be as great as they would be in truly youthful-type offending”.

8.2. ASSESSING THE SENTENCING DISCOUNT

As Woodwark and I have argued in a separate paper, a principal concern with the current approach of the youth discount is that it applies too late in the process and in a way that does not respond most appropriately to the realities of young adulthood. Current practice in sentencing “where an offender is a youth is to adopt the starting point appropriate for an adult and then to treat youth as a personal mitigating factor”.⁹⁷ Instead of recognising that this transitional period is characterised by inherent differences with full adulthood, age is “put to one side at the first stage”.⁹⁸ Further, the impact of age may be “greatly circumscribed” in cases of serious or aggravated offending.⁹⁹

92 *R v Feleti* [2019] NZHC 94 at [41].

93 *R v Breakwell* [2019] NZHC 3338 at [23].

94 *R v Feleti* [2019] NZHC 94 at [41].

95 *R v Tupu-Ngahere* [2017] NZDC 21813 at [11].

96 *R v Kokiri* [2019] NZHC 501 at [30].

97 Geoff Hall (ed) *Hall's Sentencing* (online looseleaf ed, LexisNexis NZ) at [I.4.2]; see also *R v E* [2007] NZCA 133 at [18]-19].

98 *R v E* (CA362/06) [2007] NZCA 133 at [19].

99 *R v Rapira* [2003] 3 NZLR 794 at [122].

As we note:

“this still results in a situation where young adults are subject to an adult sentence, albeit shorter in length, when they are both socially and biologically different. Imposing a specific approach would also impact Courts’ flexibility in balancing mitigating and aggravating factors, including the degree to which this necessitates a reduced sentence, if at all. It may be most effective for age to influence the type rather than the length of sentence, if not both.”

8.3. DEVELOPMENTS IN ENGLAND AND WALES

Aotearoa New Zealand does not have a system of sentencing guidelines, but it is useful to examine the approach in jurisdictions who do have this system. We will use England and Wales as an example, with some reference to the newly promulgated Scottish Sentencing Council Guidelines.

A number of reports by the United Kingdom House of Commons Justice Committee recognises the need for a tailored approach to young adults. The Committee produced a report in its 2016 – 2017 session criticising the treatment of young adults.¹⁰⁰ In it, it reported that “while young adults offend the most, they have the most potential to stop offending”. A follow up report by the House of Commons Justice Committee was supportive of evidence which found that young adults were susceptible to effective and tailored rehabilitation:¹⁰¹

“The brain can heal to an extent up to the age of 25 if taken out of adverse circumstances, for example, separation from family and friends and exposure to punitive conditions; while the brain is continuing to develop there is a risk that problems will be compounded by involvement in the criminal justice system itself, or developmentally inappropriate interventions provided by its agencies, and that opportunities will be missed to repair in a timely manner the developmental harm caused by brain injury or other forms of trauma.”

The most recent edition of the Code for Crown Prosecutors notes that “Prosecutors should consider the suspect’s maturity, as well as their chronological age, as young adults will continue to mature into their mid-twenties.”¹⁰²

Case-law has stated the importance of considering youth as a factor for this age group:

In *R v Peters*¹⁰³ the Court said:

Although the passage of an eighteenth or twenty- first birthday represents a significant moment in the life of each individual, it does not necessarily tell us very much about the individual’s true level of maturity, insight and

100 House of Commons, Justice Committee, *The treatment of young adults in the criminal justice system*, (House of Commons, Seventh Report of Session 2016–17, HC 169.28 October 2016).

101 House of Commons Justice Committee, “Young adults in the Criminal Justice System” (House of Commons, Eighth Report of Session 2017–19, June 2018, HC 419, para) at 48.

102 Director of Public Prosecutions, “Code for Crown Prosecutors – 8th Edition ((26 October 2018) Available at The Crown Prosecution Service www.cps.gov.uk/publication/code-crown-prosecutors, at 4.14(d).

103 *R v Peters* [2005] EWCA Crim 605, at para. [11.]. The offenders were aged between 18 and 20.

understanding. These levels are not postponed until nor suddenly accelerated by an eighteenth or twenty-first birthday. Therefore although the normal starting point is governed by the defendant's age, when assessing his culpability, the sentencing judge should reflect on and make allowances, as appropriate upwards or downwards, for the level of the offender's maturity."

One of the co-offenders, an 18-year-old female, described as "extremely immature"¹⁰⁴ was given a minimum term of 9 years.

In *R v Eniola Balogun*,¹⁰⁵ the offender was aged 18 when he committed multiple rapes. He was sentenced for one of the rape offences to an extended determinate sentence, under section 226A of the Criminal Justice Act 2003, of 29 years, comprising a custodial term of 21 years' detention and an extension period of 8 years. The Court said that although the offender was an adult, "it is nonetheless well established by case law that the young age and/or lack of maturity of an offender do not cease to have any relevance on his or her 18th birthday."¹⁰⁶ The initial sentence was quashed and substituted for it an extended sentence, comprising of a custodial term of 18 years' detention in a young offender institution and an extension period of 8 years. The result was that the total custodial term was reduced from 21 years' detention to 18 years' detention.

In the 2018 decision in *R v Clarke, Andrews and Thompson*,¹⁰⁷ the Lord Chief Justice stressed the importance of considering the maturity of the offender, even where the offender was aged over 18. A group of offenders ranging in age from 17- 19 were convicted of kidnapping and robbery. The Crown appealed sentence, but leave to appeal was refused

The Lord Chief Justice in his judgment made the following observations:¹⁰⁸

[R]eaching the age of 18 has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. The discussion in *R v Peters* [2005] EWCA Crim 605, [2005] 2 Cr App R(S) 101 is an example of its application: See paras [10]-[12]. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthdays. Experience of life reflected in scientific research (e.g. *The Age of Adolescence*: thelancet.com/child-adolescent; 17 January 2018) is that young people continue to mature, albeit at different rates, for some time beyond their 18th birthdays. The youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday. The ages of these offenders illustrate the point. The youth and immaturity of Clarke and Thompson were appropriate factors for the judge to take into account in these cases even though both were over 18 when they offended.

104 *R v Peters* [2005] EWCA Crim 605, at para [74].

105 *R v Eniola Balogun* [2018] EWCA Crim 2933.

106 *R v Eniola Balogun* [2018] EWCA Crim 2933, at para [38].

107 *R v Clarke, Andrews and Thompson* [2018] EWCA Crim 185.

108 *R v Clarke, Andrews and Thompson* [2018] EWCA Crim 185, para. [5].

SECTION IX

INTERNATIONAL COMPARISONS

INTERNATIONAL COMPARISONS

There is a large body of literature discussing general approaches to young adults in the criminal justice system.¹⁰⁹

It is becoming more commonplace for special provision to be made for young adults. Overall, Pruin and Dunkel reported in a 2015 report that

“In total, 20 out of 35 [European] countries (57 per cent) provide for either the application of educational measures of juvenile law, or special rules concerning specific sanctions for young adults in the general penal law. Furthermore, 18 out of 35 countries (51 per cent) have special rules in the adult criminal law concerning the mitigation of penalties for young adults. 10 out of 35 countries (29 per cent) provide for the mitigation of sanctions according to the general criminal law and the application of sanctions of the juvenile law. It is therefore most exceptional that special rules for young adult offenders are not provided at all, i.e. neither in the juvenile law nor in the general criminal law.”

Jurisdictions have different ways of recognising young adulthood, examples of which will be discussed here. These include – extending the youth justice jurisdiction to some or all young adults, establishing “third system” mechanisms to deal with young adults, and establishing formal sentencing guidelines within the adult system to recognise the particular characteristics of young adults. Some jurisdictions use a combination of these approaches.

As noted, there is considerable comparative literature in this area, and it is a developing area. This section picks some relevant examples and case studies. International comparisons are useful and can be inspirational in demonstrating that change is possible. A developing international norm on age boundaries and special provision signals that Aotearoa New Zealand lags other jurisdictions. However, any models that are considered or implemented must be appropriate to the societal and cultural context of this jurisdiction.

109 Dünkel, Frieder, Dünkel and Ineke Pruin. “Young adult offenders in juvenile and criminal justice systems in Europe.” in Anthony Bottoms, Friedrich Lösel and David P Farrington (eds) *Young Adult Offenders*. (Willan, 2012.) 27-54.; David Farrington, David P., Rolf Loeber, and James C. Howell. “Young adult offenders: The need for more effective legislative options and justice processing.” (2012) 11(4) *Criminology & Public Policy* 11.4 (2012): 729-750. Lösel, Friedrich, Anthony Bottoms, and David P. Farrington, eds. *Young adult offenders: lost in transition?*. Routledge, 2012.; Carla Cesaroni, C. (2015). “Young adults: An overlooked population in Canadian correctional policy and legislation.” (2015) 19(1) *Canadian Criminal Law Review*, 19(1), 115.; David Farrington, David P., Rolf Loeber, and James C. Howell. “Increasing the minimum age for adult court. “Adult Court: Is it Desirable, and What are the Effects?” (2017) 16(1) *Criminology & Pub. Pol’y* 16 (2017): 83.; Vincent Schiraldi, Vincent, Bruce Western, and Kendra Bradner. *Community-based responses to justice-involved young adults*. (US Department of Justice, Office of Justice Programs, National Institute of Justice, 2015.); Vincent Schiraldi, V. and Bruce Western. “Time to rethink the age of adult court jurisdiction.” (2015) 3 *Translational Criminology* 3 (2015): 9-11.; Jason Ziedenberg, Jason, and Vincent Schiraldi. *The risks juveniles face when they are incarcerated with adults*. Washington, DC: (Justice Policy Institute, 1997.); and André van der Laan, A. M., Marinus Beerthuis, M. G., & and Charlotte Barendregt, C. S. (2019). “Juvenile sanctions for young adults in the Netherlands: A developmental perspective.” (2021) 18(4) *European Journal of Criminology*, 1477370819854163. 526.

9.1. EXTENSION OF YOUTH JURISDICTION

The first category of initiatives is those which extend the applicability of the youth justice system and measures to include (some) young adults (e.g. Germany, the Netherlands).¹¹⁰

9.1.1. GERMANY

At our workshop, we had a presentation about young adults in the criminal justice system in Germany. Amongst European Union member state, Germany has the most long-lasting example of a system which provides special protection and provision for young adults. Since the mid-1950s, youth sentences and orders are available for 18- 21-year olds. The judge is required to apply a youth sentence to this group if two conditions are met: if the moral, psychological, and social maturity of the offender is that of a juvenile, or if the type, circumstances, or motives of the offense were typical of juvenile misconduct. A court may impose a fixed sentence of up to 10 years for young adults for serious offences. For 18- to 21-year olds, who have served seven years" youth detention, because of serious criminal offence against life, physical integrity or sexual self-determination, by means of which the victim suffered severe mental or physical damage or was exposed to such a danger, if there is still considerable danger to the public, the court may subsequently order placement in preventive detention. This may occur if it emerges in the overall evaluation, of the offences and the young offender's development, that the young offender is highly likely to commit criminal offences of the above nature again. Sentences to youth imprisonment are served in separation from adult offenders in special youth prisons. Pruin and Dunkel report that in 2012, over 90% of young adults were sentenced under the juvenile law for homicide, rape, and other serious bodily injury crimes, "reflecting the confidence in the ability of the juvenile justice system to appropriately handle the most serious offenses". Writing in 2019, Van Zyl Smit and others note that because most young adults are tried under the juvenile law, the possibility of being sentenced to life imprisonment does not arise at all.

9.1.2. THE NETHERLANDS

Rap, Liefwaard and Schmidt have recently published an overview of how the Netherlands deal with young adults.

The law extends to young adults aged 18 to 23, which means that the sanctions available in the youth justice system can be imposed on young adults who have committed an offence before their twenty-third birthday.

This is on the basis that the individually orientated and educationally focussed youth justice system is more effective for reintegration and preventing recidivism.

110 For an English language summary of Germany, Croatia and the Netherlands, see Schiraldi, V. (2018a, March 27). Raising age to 23: It works for the Dutch. Retrieved from <https://thecrimereport.org/2018/03/27/raising-juvenile-age-to-23-produces-promisingresults-for-dutch-us-researchers/> Schiraldi, V. (2018b, April 4). How Croatia's "Off-Ramps" keep young adults out of prison. Retrieved April 24, 2018, from <https://thecrimereport.org/2018/04/04/how-croatias-off-ramps-keepyoung-adults-out-of-prison/> Schiraldi, V. (2018c, April 10). In Germany, it's hard to find a young adult in prison. Retrieved, from <https://thecrimereport.org/2018/04/10/in-germany-its-hard-to-find-a-youngadult-in-prison/>

Research has shown that in practice, juvenile criminal law is applied relatively often by the Dutch courts in cases concerning serious offences committed by young adults.

9.2. THIRD SYSTEM JURISDICTIONS

Third system jurisdictions are those which have established specific and special procedures for young adults, over and above inclusion in the jurisdiction of a youth court.

9.2.2. EXAMPLES FROM THE UNITED STATES

San Francisco has established “young adult courts” that hold felony cases in abeyance while young adults have a chance to complete rehabilitative programs or otherwise give back to the community. Those who proceed through the young adult court programming can avoid incarceration and, importantly, a criminal record as a reward for successful completion. The youth court is for those aged 18-24.

In New York, young offenders under age 19 can be “adjudicated” as Youthful Offenders, meaning the lesser legal outcome of an adjudication rather than an adult conviction. As a result, judges are allowed the discretion to not apply mandatory sentences and there is therefore a cap on sentences of imprisonment. New York Governor Andrew Cuomo’s Commission on Youth, Public Safety and Justice recommended extending the Youthful Offender law to cover young adult offenders up to age 21. Bills were introduced in both houses of the New York Legislature during the 2017-2018 session that would extend the Youthful Offender law to include young adults who commit crimes prior to their 22nd birthday. Also, in Brooklyn, there is a young adult court for misdemeanours.¹¹¹

111 “Brooklyn Young Adult Court” Centre of Court Innovation www.courtinnovation.org/programs/brooklyn-young-adult-court

SECTION X

TOWARDS REFORM

TOWARDS REFORM

This section considers some options for reform. It first considers some overarching challenges and opportunities, and then goes on to discuss some concrete proposals. It ends with some opportunities for future research and commentary.

10.1. CHALLENGES AND OPPORTUNITIES

A theme discussed at our workshop, and which is a constant theme in any consideration of reform, is the tension between transformational change and incremental change.

Transformational change is undoubtedly required in our criminal justice system and our care system. There are deep and profound concerns with the way in which our system responds to all people, including young adults, who cause harm to others. These remain to be sufficiently addressed and include the disproportionate number of Māori coming into the youth justice system and the lack of for Māori, by Māori approaches.

The type of proposals that are discussed in this report, such as sentencing guidelines and even the young adults list court, do endorse aspects of the current system. This can lead to tension in terms of endorsing the current system (with its attendant harms). However, there is also a need to improve the situation for the young adults that are in the system now and in the coming years. Incremental reform is valuable.

In saying this, the idea of recognising young adults as a separate group with distinct needs and attributes, could also be transformational.

10.2. SOME CONCRETE PROPOSALS

In this section, I discuss some more concrete proposals for reform in Aotearoa New Zealand. This includes assessing the risks and benefits of each option.

1. EXTEND THE YOUTH JUSTICE JURISDICTION TO INCLUDE SOME OR ALL YOUNG ADULTS

As discussed in the comparative section, many jurisdictions extend some or all of the protection of the youth justice system to young adults. Varying age definitions are used, ranging from including those up to age 20, right up to the mid-twenties.

Extension of the youth justice jurisdiction to include young adults, would not only mean that the principles and the outcomes of the youth justice system become available, but also key protections for vulnerable suspects such as the requirement that the suspect understands their rights, and the ability to have an independent nominated person present.

The benefits of this approach would be:

- > Using existing resources, systems and people who already understand vulnerability of youth,
- > Using existing supports such as speech and language/communication assistance, plain language, judges and youth advocates who are used to these procedures,
- > Some young adults to be remanded and sentenced to the youth justice residences – which would make sense particularly where young adults are already in the care of Oranga Tamariki.

This type of proposal has been regularly made in the context of Aotearoa:

The Modernising Child, Youth and Family Expert Panel¹¹² in their final report recommended that the provisions of the youth justice system be extended to 18 and 19 year olds: “In addition, where a person aged 18 or 19 is charged with an offence, a court would have the power to transfer the case to the Youth Court, if the court considers it is in the interests of justice to do so, taking into account the age and maturity of the alleged offender, the nature of the offence and the person’s previous offending”.¹¹³ The brain development argument was by far the most persuasive rationale for the expert panel in including this recommendation.

The Office of the Children’s Commissioner, in their submissions on *The Children, Young Persons, And Their Families (Oranga Tamariki) Legislation Bill*, recommended that the Youth Court should have jurisdiction over some offenders aged 18-19: “We share the EAP’s [Expert Advisory Panel] view that there will be some 18 and 19-year-olds who, because of limited intellectual development, neurodevelopmental disorder (such as autism) or other unusual circumstance, will be much more appropriately dealt with by the more specialised processes and resources of the Youth Court”.¹¹⁴ These recommendations were not eventually adopted but show the increasing recognition and acceptance of the evidence supporting a tailored approach.

The first report from Te Uepū Hāpai i te Ora (The Safe and Effective Justice Advisory Group)¹¹⁵ commended the recent increase to the age of penal majority and reflected that:¹¹⁶ In recognition of what is known about brain development...recommended it could be raised to as high as 25 years or, at least, that those aged 18 to 25 years be dealt with in a different way.

These types of changes would require legislative change to change the jurisdiction of the Youth Court and to apply protections such as the special rules on police questioning. It would not be a particularly complex legislative change. It would also be possible (like

112 This panel of independent experts was appointed to review Child, Youth and Family and its operating model in relation to both youth justice and care and protection.

113 Modernising Child, Youth and Family Expert Panel, *Expert Panel Final Report: Investing in New Zealand’s Children and their Families*. (Ministry of Social Development, December 2015,) at p. 97.

114 The Office of the Children’s Commissioner, “Submission on The Children, Young Persons, And Their Families (Oranga Tamariki) Legislation Bill”. March 2017. www.occ.org.nz/assets/Publications/OCC-sub-CYFPAAct-Bill2-Mar-2017.pdf, para Bill” at [87.].

115 An independent group convened by then Justice Minister Andrew Little to examine the state of the criminal justice system in 2019 and to make proposals for reform.

116 Te Uepū Hāpai i te Ora (2019) *He Waka Roimata- Transforming Our Criminal Justice System: First report of Te Uepū Hāpai i te Ora – Safe And Effective Justice Advisory Group*. (Ministry of Justice, Wellington) at p. 45.

when 17-year olds were included in the youth justice system in 2019, to exclude some offences from the change. Conversely, it may be argued that it is the young adults who offend most seriously who would most benefit from the wrap-around services available in the Youth Court.

Extending the Youth Court's jurisdiction would also allow young adults to benefit from processes such as the Family Group Conference (FGC). The Youth Court cannot make any orders sentencing a young person for their offending unless an FGC has had an opportunity to consider ways in which the Court might deal with the young person in relation to the charge or charges.

This would also mean that young adults could benefit from reintegration- focussed Youth Court orders. At the successful completion of an FGC plan the judge may discharge the individual under s. 282 or s283. A discharge under s. 282 gives the individual a fresh start, the charge is deemed never to have been laid. Effectiveness reports are required to be provided to the Court for community work and any kind of supervision orders. The effectiveness report should be finalised and laid in Court as soon as practicable after the end of the order.

The value of having an FGC is that after the family group conference has been held, the Youth Court may issue orders which may have been recommended in the family group conference plan or social work plan. If the family group conference is unable to reach agreement, a youth court judge will be asked to decide - if a high-level order is being considered, they must first consider advice from a social worker (in the form of a social work report and plan: s334, 335). What is highlighted here is the value placed on the role and experience of a social worker.

Deciding the parameters of young adulthood is a challenge, with comparable jurisdictions using a range of definitions for this age-group. Overall, accepting the recommendation previously made by the Modernising Child, Youth and Family Panel and endorsed by the Children's Commissioner, to bring 18 and 19-year-old young adults into the youth justice system would be an achievable step. There are existing provisions which deal with those young people who turn 18 while under orders in the Youth Court, so this would not be a major step. This could also be an incremental step, with the upper age being reviewed after some experience with integrating these young adults into the youth system.

The challenges (both in terms of principle and operational considerations) in extension of Youth Court jurisdiction might be:

Firstly, the change could divide young adults and young people into deserving and non-deserving cases, if the existing exceptions to the youth justice system were preserved, it would mean that some young adults would come into the youth system, where some young people (for example those accused of murder and manslaughter, would be dealt with in the adult system, and excluded from the protection of the youth justice system. Here I re-endorse recent recommendations made in a joint report, which recommends a universal jurisdiction for youth (that is to include all those aged less than 18 in the youth justice system and remove any exceptions to jurisdiction). A decision would have to be made as to whether all young adults would be dealt with, or whether some offences (e.g. category 4 offences) would be dealt with in the adult system.

Secondly, if it were to include some young adults, the youth justice system would need additional powers due to the volume of more serious cases which would come within its

remit. This would be less relevant if the current exceptions to youth jurisdiction remained, as top-end offending such as murder and manslaughter would be

Thirdly, inclusion of some young adults in the youth justice system could undermine the integrity of youth services – whereas youth services would deal with a large age range from 12- or 13-year olds up to the mid-twenties. It would be important to establish and support young adult-specific programmes e.g. in diversion and addiction support. Nonetheless, this challenge is more operational than principled, and the youth justice system already deals with a range from 10-year-old children to 17-year-old adolescents.

Fourthly, there may be a risk of the dilution of the youth justice system as there is an enormous difference between younger adolescents and older young adults. As was mentioned in the first point above, it is important to maintain the integrity of the youth justice system, that all young people under the age of 18 are entitled to be dealt with through youth specific procedures and outcomes. In saying this, the youth justice system already has exceptions to this principle (such as schedule 1A which excludes some 17-year olds from the youth justice system, or the exceptions for murder and manslaughter). A workshop participant noted that it could be an option to offer Youth Court jurisdiction only to those who are assessed as still demonstrating traits of youthfulness. This has some merit, but would be hard to assess, contribute great delay through the assessment process and adds to that deserving/undeserving narrative.

Fifthly, if some young adults were remanded and sentenced to youth justice residences, it would also be important to ensure that this would not have any negative effect on the safety or provision of services to adolescents in the same facility. This does appear to be done successfully in comparable jurisdictions, for example, the Sentencing Act 1991 (Vic) gives the Victorian courts the option of sentencing “young offenders”¹¹⁷ (defined as offenders aged under 21) who satisfy the eligibility criteria¹¹⁸ to detention in a youth justice centre, rather than an adult prison.¹¹⁹ This provision is intended to prevent immature and vulnerable young offenders from entering the adult prison system.

Lastly, it was also noted on the workshop that if key aspects of the success of the Youth Court involve consistent representation by youth advocates, increased time spent on cases, respect shown and engagement with young people and wrap-around rehabilitation options, could these not be rolled out to all courts and defendants? It was emphasised by participants that the need to treat young adults differently/better arises strongly from deficiencies in the adult system’s functioning. Yet, as discussed above, the challenges in one part of the system are not a reason to avoid reforming another part of the system if both parts are not working well. The urgency of reform means it shouldn’t have to wait for Te Ao Mārama, which while very promising will likely fall short of addressing the full range of issues addressed in this paper, or at the very least take a long time to address those issues.

117 Section 3 of the Sentencing Act 1991 (Vic.), s 3.

118 To make this order, the court must receive a pre-sentence report and be satisfied that there are “reasonable prospects for the rehabilitation of the young offender” or that the “young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison”. See Sentencing Act 1991 (Vic), s 32(1).

119 Sentencing Act 1991 (Vic), s 32.

2. THIRD SYSTEM APPROACHES

As discussed, third system approaches involve special provision for young adults, and the recognition of a separate system and approach which differs from both the youth justice system and from the adult criminal justice system. As Professor Ian Lambie, science advisor to the New Zealand justice sector, notes in a recent report that: “At the heart of the problem is the reality that the peak of offending occurs across the very divide of the age bands between “youth” and “adult” services.”¹²⁰ A third system approach would recognise that this age group has distinct needs and requires different procedures and outcomes.

As discussed, we already have some recognition of young adulthood as a distinct period of life requiring special provision.

Some ways of further embedding the idea of a “third system” might be:

Firstly, to roll out the young adults’ list court to other areas – the young adults court is an example of an approach which considers the particular needs of this young adult group.

Secondly, insert more specific provisions in the Sentencing Act that would require consideration of youth as a mitigating factor.

Thirdly, it is in the area of murder sentencing where young adults are subject to life sentences which are the most punitive and do not take into account brain development. The presumption of life imprisonment should be displaced for young adults, which would mean that judges would have greater discretion to impose a more tailored sentence.

Fourthly, in relation to remand and sentencing, a third system approach would require separate and special provision for young adults in prison. This is already the case to a certain extent as Corrections does have separate provision for young adults in some adult prisons. However, this should be placed on a firmer statutory footing, as in comparable jurisdictions.

The benefits of a third system approach are that it recognises the specific needs and characteristics of young adults. This is demonstrated in the discussion of the Young Adults’ List Court, where the procedure and services available are tailored to young adults.

The Young Adults’ List Court evaluation has shown success for young adult Māori in terms of strengthening connections with the local iwi and community, welcoming whanau to the court, the presence of Māori court professionals and providers, the availability of in-depth cultural reports, availability of referrals to kaupapa Māori services and the use of diversionary mechanisms such as Te Pae Oranga. While many of these aspects will hopefully become more common as a result of the Te Ao Mārama reforms, it suggests that the tailored jurisdictional approach has real promise for young adult Māori.

¹²⁰ Ian Lambie *It’s never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister’s Chief Science Advisor, 12 June 2018) at 13.

3. PROMOTE UNDERSTANDING AND UPTAKE OF BRAIN DEVELOPMENT EVIDENCE

Discussion of comparable jurisdictions showed that other jurisdictions have formal sentencing guidelines which require judges to consider brain development evidence. Other jurisdictions also have produced extensive guidance on brain development evidence.

As Aotearoa does not have sentencing guidelines, there is a responsibility on lawyers to raise brain development evidence in their submissions. This also leaves wide discretion for judges to apply or ignore these findings. This has led to inconsistent practice, where some sentencing decisions contain much reference to scientific evidence, and it is absent from others.

It was suggested at the workshop that there should be some agreed statements on brain development evidence that would be available for lawyers to use. This would be a relatively simple way of ensuring that this type of information is before the sentencer.

Education is also important. For instance, the New Zealand Law Society has recently held seminars on foetal alcohol spectrum disorders and the criminal justice system to raise awareness amongst legal practitioners.

Judicial education is also important. Education of Youth Court Judges on adolescent brain development and the prevalence of neuro-disability and communication has shown practical effects in better recognition of these needs in communication and outcomes.

4. EXPUNGEMENT OF CONVICTIONS FOR YOUNG ADULTS

A key benefit of the youth justice system is that for the most part, young people leave the system without a permanent criminal record. Leaving aside the situations where a child or young person is convicted in the adult court (for example for murder or manslaughter, or where a section 288(o) order occurs), there is no criminal record created.

Young people who have been the subject of a s 283 order are fully entitled to say that they have not been convicted of a criminal offence. The fact that a Youth Court order is not a conviction is strongly conducive to reintegration and recognises that young persons are immature and have greater prospects for rehabilitation. Youth Court orders do not “disappear” completely, however, nor are Youth Court records “sealed”. Thus, persons with a s 283 order should answer “yes” in official documents which ask, “have you ever been charged with an offence?” or “have you ever been before the court in connection with criminal charges?”

Section 283 orders can be taken into account when considering a sentence if the young person subsequently appears before the District Court or High Court (whether as a young person or as an adult).

It is a common feature of employment applications, and applications for visas to other jurisdictions, for there to be a request for a criminal records check. Further, it is increasingly a policy, and now a legislative requirement, for entrants to particular professions and roles to be “vetted”, in order to protect children or vulnerable adults with whom the individual will work or volunteer. There is a balance between protection of the public and particularly

vulnerable people and promoting the reintegration of young adults. This is already the case with youth justice, where although s. 283 orders are not convictions, they may be disclosed (along with other police information) where a person is vetted.

Should a decision be made to include some or all young adults within the youth jurisdiction, this would allow young adults to benefit from this more reintegratively focussed system.

There is a Clean Slate legislative scheme in effect in Aotearoa which allows some convictions to be hidden after a certain period of time. Consideration should be given to expanding this scheme for young adults, given their particular capacity for rehabilitation and change.

10.3. FUTURE RESEARCH

The purpose of this report was to review and collate the existing literature, evidence and principles concerning this age group in the criminal justice system and to make some recommendations for processes and outcomes.

The goal of this project was relatively modest, but it is clear that further and ongoing work will be required to underpin and evaluate potential reforms and ongoing programmes.

Some themes that came up throughout this project that would benefit from further exploration:

- > Ceasing the use of deficit language and normalize the language of opportunity.
- > Incorporating the voices of young adults" and their lived experience in any research and recommendations.
- > Having a professional workforce that can meet the needs of the people asking for support. For example, in our workshop it was noted that in speech and language therapy, there was less than 4% Māori working in the area, and that is a huge barrier for Māori whanau with complex "stuff" going on.
- > Most interventions are very Risk/Need/ Responsivity focused and therefore driven through a Western lens.

SECTION XI
SUMMARY AND
CONCLUDING REMARKS

SUMMARY AND CONCLUDING REMARKS

This report has reviewed law, practice and policy in relation to young adults in the criminal justice system, both in Aotearoa New Zealand and in other jurisdictions.

Key findings are:

The scientific evidence (both from Aotearoa and internationally) relating to brain development demonstrates that young adults are a distinct group. Like adolescents, their capacity for self-regulation and impulse control are not fully developed. Relevantly, their capacity for change is more acute and the impact of appropriate support and reintegrative measures is greater.

There are many indicators that society accepts the need for special protections for young adults due to their vulnerability, such as the recent raising of the care age and the implementation of pastoral care standards for tertiary students.

Human rights standards accept and encourage separate considerations for young adults.

The Aotearoa New Zealand legal system already makes provision for young adults in aspects of the criminal justice system such as bail and remand. The care age has recently risen to 21, with assistance and support available up to age 25.

Comparable jurisdictions are more advanced in mandating special procedures and mitigation for young adults.

A range of options for recognising the particular characteristics and potential of young adults exist, including extending the youth justice jurisdiction and embedding third system approaches were reviewed here. The two main frames of reference are extension of the youth justice jurisdiction to young adults or third system approaches which establish tailored processes and outcomes for young adults. This report canvassed the challenges and opportunities for both concepts. It must be noted that a third system approach – the Young Adults’ List Court – has been established in Porirua and is being rolled out to other areas. This has shown promise (particularly in resolution without conviction), and particularly potential for positive outcomes for young adult Māori, including connecting them with services and programmes to address needs such as counselling, housing and driver licencing.

At the more serious end of the offending spectrum, sentencing decisions regularly cite youth as a significant mitigating factor, with judges recognising the relevance of brain development evidence. These are positive developments, but statutory controls such as the removal of the presumption of life imprisonment for murder for young adults (as well as children and young people) would recognise the particular characteristics of this group and allow a more tailored sentence.

The key thread which must underpin a principled approach to young adults is a re-conceptualization of the public interest in such cases. Arguments against age-appropriate responses find a foundation in statements such as “adult time for adult crime” and

concern for public safety. Yet, the best protection for society is a young adult who has been reintegrated successfully into society and where the causes of the offending have been addressed. Positive outcomes in this age-group will have significant effect on re-offending rates, and particularly the life outcomes for young adult Māori.

The public interest is best served by these reintegrative and age-appropriate responses.

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Michael &
Suzanne
Borin
Foundation