Public Interest Law Journal of New Zealand

(2022) 9 PILJNZ 148

ARTICLE

Hanging off a Cliff Edge: The Case for a Welfare-based Approach for Young Adult Offenders with Care and Protection Backgrounds

RENEE ZHANG*

The Oranga Tamariki Act 1989 governs both the care and protection and youth justice systems and, thus, is positioned to address the needs of young people who offend up to and including the age of 17. However, the criminal justice system presents a cliff edge when these vulnerable young people turn 18. This article focuses on young adult offenders aged 18–25 who have backgrounds in care and protection. Their involvement in the criminal justice system reflects the "care to custody" pipeline. Young adult offenders aged 18–25 are likely to be Māori, have complex needs such as neurodisability and mental health issues, and lack the ordinary support networks. These vulnerabilities compound the structural deprivation faced when leaving state care. This article aims to consider a new response for young adults who offend during their critical transition to adulthood. Currently, a neuroscience development framework dominates young adult literature. This article argues that a welfare-based approach that places a young adult within their broader social context must supplement the current framework. When the emphasis is on the vulnerabilities of the care-experienced young adult that comes before the adult court, this creates a presumption that eligible cases should be referred down to the Youth Court to accommodate their complex needs in supporting a more gradual transition to adulthood.

* BA/LLB(Hons), University of Auckland. I would like to acknowledge the guidance of my supervisor, Katherine Doolin, and the encouragement from my family and friends in this journey.

I Introduction

It is not by accident that the Oranga Tamariki Act 1989 (OTA) deals with vulnerable children and young people between 10–17 years of age who have care and protection concerns as well as young people who commit criminal offences.[1] The "care to custody" pipeline refers to the circumstances of care and protection and vulnerable needs that lead young people into the criminal justice system.[2] A 2020 study notes a disproportionately high rate of young people aged 14–17 involved in serious and recidivist offending had current or historical care and protection backgrounds.[3] These "cross-over" young people move between the welfare and youth justice systems,[4] as a significant proportion of this group go on to offend as adults.[5] Young people coming into contact with care and protection services are 15 times more likely to have a Corrections record by the time they are 19–20 years old.[6]

This article specifically focuses on young adult offenders with a care and protection background as a case study to assess the New Zealand criminal justice system's approach to dealing with 18–25-year-olds who offend. Young people leaving care or a youth justice residential placement experience a greater risk of poor outcomes including: insecure housing, complex health needs, inadequate education and criminal justice involvement.[7] This compounds existing vulnerabilities, such as neurodiversity, mental health needs, and the lack of family and cultural support. The critical issue is that an offender with a care background loses the protections and principles afforded by the youth jurisdiction once they cross the age threshold of 18. The general adult criminal jurisdiction deals with the same individuals who carry the same vulnerabilities.

This article assesses the preferred approach for dealing with young adult offenders leaving care and protection in Aotearoa New Zealand, in light of three broad legislative and judicial trends. These reforms recognise that turning 18 must not present a cliff edge for young adults with complex needs. First, the recent amendments in the OTA and the establishment of a nationwide Transition Support Service in 2019 recognise that support from statutory agencies is beneficial for a young adult with a prior care placement up to the age of 25. Indeed, Hon Tracey Martin MP, then Minister for Children, asserted that "[f]or these young people [in care and protection], the transition to adulthood often comes early, abruptly, and with little in the way of a safety net."[8] Secondly, the judicial recognition in recent Court of Appeal judgments demonstrates an understanding of the developmental nature of young adults and their backgrounds of deprivation. Finally, the implementation of the pilot Young Adult List (YAL) in Porirua in 2020, a specialist initiative

1 Section 2 defines "young person" as "a person of or over the age of 14 years but under 18 years", but see also s 386AAA.

2 Susan Baidawi and Rosemary Sheehan *'Crossover kids': Offending by child protection-involved youth* (Australian Institute of Criminology, December 2019) at 2.

3 Jennifer George *Crossover Youth Scoping Study* (Henwood Trust, April 2020) at 4.

4 Ian Lambie and others *Care and Protection Secure Residences: A report on the international evidence to guide best practice and service delivery* (Ministry of Social Development, May 2016) at 25.

5 George, above n 3, at 8.

6 Carolyn Henwood and others *Rangatahi Māori and Youth Justice: Oranga Rangatahi* (Iwi Chairs Forum, March 2018) at 25.

7 Cabinet Social Policy Committee *Investing In Children Legislative Reform: Underpinning The New Operating Model – Transition To Independence, From 18 To 21 Years Of Age* (Ministry of Social Development, October 2016) at 2.

8 Tracey Martin "New service for young people leaving care" (press release, 26 May 2019).

that separates young adults aged 18 to 25 from those in the adult court, recognises a high prevalence of neurodisabilities in this distinct group.

Part II of this article considers the concept of young adulthood and highlights the developmental theories from a neuroscience and criminology framework. Part III focuses on the impact of young adulthood on those with care and protection backgrounds and their coinciding vulnerabilities, including neurodiversity, systemic deprivation and the disproportionate representation of Māori. Part IV considers whether the current legal landscape goes far enough in addressing a young adult's needs, with a particular focus on sentencing appeal judgments and the YAL.

Part V assesses the possible options for reform in light of the significant proportion of young adult offenders with a care and protection background. The article argues that the District Court should refer eligible young adult offenders to the Youth Court to divert the onset or continuation of offending. It emphasises both the new transition to independence provisions in the OTA and the fundamental features of the youth jurisdiction. The proposed "refer down" mechanism is not an automatic extension of the youth jurisdiction to all young adult offenders. It is a welfare-based approach which creates a presumption that young adult offenders with care and protection backgrounds have specific needs and vulnerabilities that are better addressed by the youth jurisdiction.

II A Distinct Response for Young Adults

Culpability is the touchstone of the criminal justice system and refers to a person's blameworthiness and determines the extent of punishment.[9] Developmental frameworks from a neuroscience and criminology perspective provide two fundamental reasons young adults should be treated differently in the criminal law. First, the neurodevelopmental differences between adults and young adults entail less culpability. Secondly, intervening at the correct time of development enables a significant opportunity for their rehabilitation.

A *The concept of young adulthood*

American developmental psychologist Jeffrey Arnett coined "emerging adults" to describe a distinct developmental period from a child's dependence on parents to becoming an independent and productive member of society.[10] Arnett argues that emergent adulthood extends into the mid-twenties or late twenties in developing countries.[11] As a result, young adults enter traditional adult roles such as employment and marriage much later than previous generations.

New Zealand legislation consistently draws a boundary between childhood and adulthood at age 18. The law treats an 18-year-old as having sufficient maturity to make informed decisions such as getting married without their parents' consent, making a will,

9 David P Farrington, Rolf Loeber and James C Howell "Young Adult Offenders: The Need for More Effective Legislative Options and Justice Processing" (2012) 11 Criminology and Public Policy 729 at 731.

10 Jeffrey Jensen Arnett "Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties" (2000) 55 Am Psychol 469 at 469.

11 At 478.

voting and even standing as an election candidate. Only a small number of legislative provisions require a higher age.[12]

International law recognises young adults as a distinct category. The United Nations has observed that "[s]pecial attention should be focused on developing juvenile justice provisions tailored to young people between 18 and 24 years of age, who are transitioning into adulthood."[13] More recently, in 2019, the Committee on the Rights of the Child approved "the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception", in line with "the developmental and neuroscience evidence that shows that brain development continues into the early twenties".[14]

B *Developmental theories*

(1) Neurodevelopmental science

It is well documented that children and young people's brains do not function at the same level of sophistication as an adult. The welfare model of the youth justice system recognises that youth are rendered less culpable than adults given their intellectual and moral development. As the Court of Appeal discussed at length in *Churchward v R*, the leading case on available discounts for youth offenders, youth have a diminished capacity to control impulsive behaviour, are less future-orientated, and evaluate risks and rewards differently from adults.[15]

Most importantly, recent research has concluded that the prefrontal cortex of a young person may not fully develop until the age of 25.[16] While young adults may be developed cognitively, the prefrontal cortex responsible for impulse control and rational thinking is not fully mature.[17] The diminished reasoning capacity results in a lower degree of culpability in the criminal law. Furthermore, a developing brain is especially susceptible to external pressure, especially peer pressure.[18] These implications are relevant to young adults transitioning into independence yet are underdeveloped self-sufficiently to resist external influence. It also explains group offending among youthful offenders.[19]

A bright line between the youth and adult justice system at the age of 18 implies that youth and young adults are unequally blameworthy, even though individuals in young adulthood may have the same developmental traits as their younger counterparts in the

12 See, for instance, Land Transport Act 1998, s 11, which varies the permissible blood alcohol level while driving a vehicle for those under 20 years. See also Department of Corrections *Prison Operations Manual* <www.corrections.govt.nz> at M.03 and M.03.01, which defines a "young offender" as a person under 20 years and allows the placement of such offenders in special youth units.

13 United Nations *Fact Sheet on Juvenile Justice* (2015).

14 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) at [32].

15 *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [77] and [78].

16 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, January 2020) at 11.

17 Charlotte Walsh "Youth Justice And Neuroscience: A Dual-Use Dilemma" (2011) 51 Brit J Criminol 21 at 23.

18 *Churchward*, above n 15, at [50].

19 Susan Baidawi and Alex R Piquero "Neurodisability among Children at the Nexus of the Child Welfare and Youth Justice System" (2021) 50 J Youth Adolesc 803 at 804.

youth justice system that mitigate culpability.[20] Policymakers incorrectly assume that the legislated age of 18 for other rights such as marriage, voting and consumption of alcohol is equivalent in the criminal law. Kelsey Shust argues that the bright line concept inappropriately equates the right not to be excessively punished with affirmative rights to engage in certain conduct.[21] The context in which a decision is made can significantly affect the young adult's decision. While a young adult may have the ability to make informed decisions in circumstances such as voting, they cannot accurately weigh up risk and reward in stressful and volatile situations, such as situations of threat or violence. They are particularly susceptible to impulsivity in the context of provocation or stress because their frontal lobe is not fully developed.[22] This is crucial to keep in mind when assessing why a distinct response is required in the criminal justice system and perhaps not in other legislative areas that regulate behaviour and decision-making.

(2) Age-crime curve

Terrie Moffit observes that a small group of offenders are "life-course-persistent" offenders who engage in offending from childhood, while most offending is "adolescent-limited".[23] Criminologists often refer to the "age-crime curve", which demonstrates a peak in offending in early adulthood that subsequently decreases, irrespective of the age of onset.[24] Currently, of the young adult population imprisoned up to 20 years old, 42.5 per cent are more likely than the general prison population to be reimprisoned, and 62.6 per cent are more likely than the general prison population to be reconvicted within 12 months of release.[25] According to Laurence Steinberg, this period characterised as "extended adolescence", is an age of opportunity where the brain is susceptible to both risk-taking and rehabilitation.[26] This plasticity may be advantageous for rehabilitation if the system provides young adults with the appropriate and effective support to improve life outcomes. According to the age-crime curve, most offenders will develop a prosocial life without state intervention if the justice system's response does not undermine the process.[27] This explains the importance of diversion in young adulthood to enable community support and rehabilitative measures. For instance, the law should divert less serious offending to avoid catching young adults that commit low-level and non-violent offences in the "revolving doors" that lead to imprisonment.

A developmental framework has dominated youth justice policy.[28] David Brewster considers that policies within developmental "deficits-based" discourses focus on issues

20 Kelsey B Shust "Extending Sentencing Mitigation for Deserving Young Adults" (2014) 104 J Crim L & Criminology 667 at 690.

21 At 685.

22 Peter Gluckman *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 [17].

23 Terrie Moffitt "Adolescence-Limited and Life-Course-Persistent Antisocial Behaviour: A Developmental Taxonomy" (1993) 100 Psychological Rev 674 at 676.

24 Farrington, Loeber and Howell, above n 9, at 734.

25 Gluckman, above n 22, at [111].

26 Laurence Steinberg *Age of Opportunity: Lessons from the New Science of Adolescence* (Houghton Mifflin Harcourt, Boston, 2014) at 63.

27 Elizabeth Scott and Laurence Steinberg "In Defense of Developmental Science in Juvenile Sentencing: A Response to Christopher Berk" (2019) 44 Law & Social Inquiry 780 at 783.

28 David Brewster "Not Wired Up? The Neuroscientific Turn in Youth to Adult (Y2A) Transitions Policy" (2020) 20 Youth Justice 215 at 228.

within the individual rather than broader social structures, such as the employment and housing market, that impact their ability to thrive independently.[29] These frameworks do not address social systems that generate disproportionate conditions for specific groups. For instance, some individuals may be accelerating the assumption of adulthood responsibilities, such as moving out, while simultaneously experiencing social conditions that delay developmental maturity.[30] Therefore, the current developmental framework would benefit from a structural lens that considers social forces.

C *Welfare lens: Accessibility to young adulthood*

It is essential to place a young adult offender in the social context of their adolescence. In contrast to the legal binaries of youth and adulthood, sociologists recognise that these concepts are socially constructed and culturally negotiated over time and space.[31] A limitation is that the prior neuroscience and criminology frameworks are Western, and there may be differences among cultures in the developmental transition from adolescence to adulthood. This is particularly relevant in New Zealand, given the diversity in ethnic demographics. For instance, colonisation is a distinct feature not discussed in the literature on young adults.

Arguably, the rights and responsibilities conferred at 18 years of age are based on a privileged worldview of adulthood that assumes that every individual's brain has developed consistently in a well-supported environment that nurtured their development. It assumes, for instance, that young adults "try out different ways of living and different possible choices for love and work".[32] Not every young person has a period of exploration. Different groups experience different opportunities for traditional informal social controls and will be less likely to move towards "desistance by default".[33] A lack of support and meaningful opportunities keeps young offenders on the prison pipeline into adulthood, preventing them from exiting the criminal justice system.

Those from disadvantaged backgrounds are likely to experience a cliff edge in their transition to young adulthood. New Zealand longitudinal research distinguishes life-course-persistent offending youth to other adolescents by social inequity and neurological diversity.[34] High exposure to trauma, including sexual abuse and family violence, may compound issues and inhibit further development of executive functioning and emotion control.[35] These young people are often expected to move out of youth-focused programming at the age of 18 and transition into adulthood "over-night".[36] Consequently, they lack the desire to socially integrate in key areas such as education, employment and positive peer association.[37]

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29 At 219.
30 At 217.
31 At 216.
32 Jeffrey Jensen Arnett *Emerging Adulthood: The Winding Road from the Late Teens Through the Twenties* (2nd ed, Oxford University Press, New York, 2014) at 9.
33 Timothy Kang "The Transition to Adulthood of Contemporary Delinquent Adolescents" (2019) 5 J Dev Life-Course Criminol 176 at 197.
34 Gluckman, above n 22, at [30].
35 Mark Halsey and Melissa de Vel-Palumbo *Literature Review and Jurisdictional Analysis: Young Adult Offenders (Age 18 to 25 years)* (Department of Justice and Regulation, December 2016) at 14.
36 Kang, above n 33, at 177.
37 Halsey and De Vel-Palumbo, above n 35, at 14.

To conclude, brain and social development continue beyond the age of 18. This strongly justifies the distinct treatment of young adults in the criminal justice system.

III Care and Protection Involvement

This Part follows the prior discussion which demonstrates that the transition to adulthood is individualised and altered by an individual's economic, social and cultural background. In particular, this Part considers that young people with care and protection involvement are particularly vulnerable in respect of their outcomes compared to other young adult offenders. It is also imperative to discuss neurodiversity and Māori over-representation because they coincide with this care and protection group. This Part draws on research from youth justice literature because it is evident that young people carry their vulnerabilities to the adult justice system when they turn 18.

A *Who are they?*

Briefly stated, "[y]oung persons leaving care are among the most vulnerable people in New Zealand."[38] Sections 14 and 14AA of the OTA define a child or young person in need of care and protection as suffering, or is likely to suffer, serious harm including abuse (physical, emotional or sexual), deprivation, ill-treatment or neglect. For the purpose of this article, young people with care and protection statutory involvement includes both those who have had a care and protection Family Group Conference or a care and protection placement.[39] Placement comprises a diversity of living arrangements, including placement with wider family or residence with carers in either foster care or residential care settings.[40] Section 4 of the OTA sets out the Ministry's general purposes, which include promoting the wellbeing of the young person and their whānau, hapū and iwi by complying with a list of duties and obligations. However, Fitzgerald J asserts that agencies regularly and routinely breach cross-over children's rights with no state consequences.[41] Given the reported claims of suffering as acknowledged in the Royal Commission of Inquiry into Abuse in Care, it is unsurprising that young people experience isolation, insecurity and vulnerability in state care.[42]

Young adults who have left a care and protection placement have significantly poorer wellbeing outcomes. [43] A 2015 Ministry of Social Development interim report of the Expert Advisory Panel identified that nearly 90 per cent of children who had experienced state care born in 1990 or 1991 received a main benefit by the age of 21.[44] A common characteristic of youth with backgrounds in care and protection is disengagement from

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

39 Oranga Tamariki *Youth Justice Insights: Separating Misconceptions from Facts* (April 2020) at 8.

40 Baidawi and Sheehan, above n 2, at 8.

41 *New Zealand Police v LV* [2020] NZYC 117 at [73].

42 Elizabeth Stanley "From Care to Custody: Trajectories of Children in Post-War New Zealand" (2017) 17 Youth Justice 57 at 64.

43 Sarah Richardson and Duncan McCann *Youth Justice Pathways: An examination of wellbeing indicators and outcomes for young people involved with youth justice* (Oranga Tamariki, April 2021) at 18.

44 Modernising Child, Youth and Family Expert Panel *Modernising Child, Youth and Family – Expert Panel: Interim Report* (Ministry of Social Development, July 2015) at 36; and Ian Lambie and others, above n 4, at 39.

the education system from a young age.[45] 80 per cent of young adults left school with less than NCEA Level 2 qualifications compared to 30 per cent of young people who have not experienced state care.[46] This is supported by Elizabeth Stanley's New Zealand study of 105 respondents who spent time in residential care between the 1950s and 1990s. They reported multiple long-term disadvantages, including limited educational qualifications, poor employment conditions, inadequate housing, mental health problems and poverty.[47] Māori respondents highlighted the significant loss of cultural connection to iwi and marae.[48] While the respondents in Stanley's study reflect a different timeframe and social context, it nonetheless demonstrates the poor outcomes experienced by care leavers. These structural disadvantages make young adults particularly vulnerable and susceptible to offending as an alternative to poverty and isolation.

B *Neurodiversity and other complex needs*

In addition to high levels of deprivation, an individual with care and protection involvement is likely to have more complex needs than the overall youth justice population because they are likely to face significant mental health and substance abuse issues.[49] Neurodevelopmental and mental disorders associated with the increased risk of youth justice contact are frequently the result of maltreatment.[50] Between 50 per cent and 75 per cent of youth involved in the justice system meet the diagnostic criteria for at least one mental or substance use disorder (compared to 13 per cent of youth generally).[51]

The presence of neurodisabilities may severely affect cognitive and social functioning and hinder the developing young adult brain, which is already both deficient at assessing risk and susceptible to peer pressure.[52] Both youth and adult offenders have disproportionally severe levels of neurodisabilities compared to the general population.[53] Neurodisabilities range from Foetal Alcohol Spectrum Disorder (FASD), Traumatic Brain Injury (TBI), attention-deficit/hyperactivity disorder, dyslexia and communication disorder.[54] The co-morbidity of neurodisabilities that may manifest in a single individual is a "pressing issue" in criminal law.[55] In particular, there are well-known links between damage to the prefrontal cortex and violent offending.[56]

Neurodisabilities can compound adverse family circumstances. For example, FASD can be intergenerational. There are estimates that FASD affects about 50 per cent of children

45 George, above n 3, at 23.
46 Modernising Child, Youth and Family Expert Panel, above n 44, at 36–37.
47 Stanley, above n 42, at 60.
48 At 60.
49 Baidawi and Sheehan, above n 2, at 2.
50 Baidawi and Piquero, above n 19, at 805.
51 Gluckman, above n 22, at 9.
52 Lambie, above n 16, at [2]–[3].
53 Nessa Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Neurodisabilities Forum, May 2016) at 3. See also Lambie, above n 16, at 6 for a comprehensive summary about higher rates of neurodiversity in justice-involved individuals.
54 Jan-Marie Doogue and John Walker "Proposal for a trial of Young Adult List in Porirua District Court: Procedural Fairness for the Young and the Vulnerable" (District Court of New Zealand, August 2019) at 4.
55 Stephen Woodwark and Nessa Lynch "'Decidedly but Differently Accountable'? — Young Adults in the Criminal Justice System" [2021] NZ L Rev 109 at 113.
56 Lambie, above n 16, at 15.

and young people in the care of Oranga Tamariki.[57] Furthermore, brain damage is not only genetic but may be acquired from adverse events. A New Zealand population-based incident study found that 70 per cent of first-time TBIs occur in children and young adults.[58] Post-traumatic stress disorder may arise in the context of exposure to trauma.[59] While there is no evidence linking maltreatment or parental incapacity to acquired neurodisability, research implies that a child with care and protection concerns is more susceptible to acquiring a condition that affects their cognitive skills.[60]

New Zealand has not yet conducted an extensive study on neurodisabilities in young people. Literature has generally overlooked the phenomenon of neurodisability in young people with care and protection backgrounds.[61] However, an Australian study that reviewed 300 Victorian children's court case files found around half of the crossover youth had been diagnosed with a neurodevelopmental or neurological condition.[62] Likewise, 61 per cent were formally diagnosed with a mental health condition.[63]

These statistics only encapsulate individuals who have been diagnosed. A key issue is that District Court judges dealing with young adults may not be suitably trained to recognise or screen for neurodisabilities. Many young adults may have undiagnosed and untreated conditions because social disadvantages, such as lack of regular schooling, limit the opportunity for screening and assessment.[64] Additionally, Māori, Pasifika and Asian families face barriers in accessing culturally competent disability and support services.[65] A lack of screening and intervention may result in inappropriate institutional responses to behavioural challenges in undiagnosed children.[66] Therefore, from an equity perspective, a justice response should support, rather than criminalise, social disadvantage when it is likely that institutional failure and its lack of support contributes to the cause of the offending. Indeed, the new YAL directly screens for and aims to address neurodisabilities. However, as will be discussed in Part IV, this initiative does not go far enough in addressing such individuals' underlying social background and complex needs.

C *The offending trajectory*

It is impossible to ignore that care and protection backgrounds are disproportionately represented in the justice system compared to the general population. Stanley's study confirms that care-experienced individuals are "far more likely to progress into prisons as a result of maltreatment, multiple care placements, damaging residential cultures, social disadvantages and psychological harms".[67] Statistics from Oranga Tamariki show that, out of 1,520 18-year-olds who had statutory involvement with youth justice, 590 had care and protection statutory involvement.[68] Furthermore, cross-over youth are more likely to offend as young adults than those with statutory youth justice involvement only and no

57 At 23.
58 Valery Feigin and others "Incidence of traumatic brain injury in New Zealand: a population-based study" (2013) 12 Lancet Neurol 53 at 61.
59 Baidawi and Piquero, above n 19, at 805.
60 At 805.
61 At 804–805.
62 Baidawi and Sheehan, above n 2, at 9.
63 At 10.
64 Lambie, above n 16, at [14].
65 At [9].
66 At [81].
67 Stanley, above n 42, at 57.
68 Oranga Tamariki, above n 39, at 9.

care and protection involvement.[69] About 60 per cent of the cross-over group in the 2021 Youth Justice Pathways report had a Corrections sentence between the ages of 17 and 21.[70]

An individual subject to care and protection is likely to begin offending earlier than other justice-involved young people.[71] This is significant because it relates to research showing that early age of onset offending is associated with a longer offending career.[72] The research also found that child maltreatment nearly doubles the risk of offending involving violence throughout adolescence and adulthood.[73] A longitudinal sample of cross-over young people over the transitional period of adolescence to young adulthood would provide a helpful analysis.

Furthermore, Susan Baidawi and Rosemary Sheehan's study of cross-over children identified a high prevalence of group-based offending.[74] It is not only serious offending that results in imprisonment but also the "revolving door" of imprisonment for less serious and non-violent offences.[75] While a welfare background does not cause or excuse offending, a justice framework that acknowledges the challenges individuals from care backgrounds face could effectively create sanctions that result in better outcomes for the individual and their community.

D *Māori and Pasifika overrepresentation*

Young Māori adults are likely to benefit significantly from a distinct response because the criminal justice system affects Māori at disproportionate rates. The Ministry of Justice's 2020 report indicates significant discrepancies between Māori and non-Māori in the youth justice system. For instance, the Youth Court appearance rate for young Māori was 8.3 times higher than that of non-Māori.[76] Young Pasifika people are also overrepresented in violent offending.[77] Māori account for 65 per cent of youth in the prison population.[78] These concerning statistics in the youth justice sector are inevitably reflected in the prison pipeline to the adult justice population.

Furthermore, Māori youth disproportionately experience risk factors for offending.[79] The structural disadvantages identified in the previous Part are likely exacerbated for Māori. Representation in the criminal justice system is "part of a larger narrative around colonisation, dispossession, suppression of culture, under-education and poverty".[80] The continuing impact of Western public policies and institutional practices have placed

69 At 13.
70 Richardson and McCann, above n 43, at 2.
71 Baidawi and Sheehan, above n 2, at 11.
72 Farrington, Loeber and Howell, above n 9, at 734.
73 At 804.
74 Susan Baidawi and Rosemary Sheehan "Maltreatment and Delinquency: Examining the Contexts of Offending Amongst Child Protection-Involved Children" (2020) 50 Br J Soc Work 2191 at 2204.
75 Stanley, above n 42, at 62.
76 Ministry of Justice *Youth Justice Indicators Summary Report* (December 2020) at 7.
77 Gluckman, above n 22, at [92].
78 Department of Corrections *Topic Series Report: Young Offenders* (April 2015) at 3.
79 Gluckman, above n 22, at [84].
80 Khylee Quince "Rangatahi Courts" in Antje Deckert and Rick Sarre (eds) *The Palgrave Handbook of Australian and New Zealand Criminology, Crime and Justice* (Springer Nature, Cham, 2017) 711 at 713.

Māori whānau, hapū and iwi as outliers.[81] According to Len Cook, "[t]he expansion of State custody has affected particular birth cohorts of Māori".[82] Since 2000, there has been a higher incidence of tamariki Māori in state care compared to European, Pasifika and other ethnic groups.[83] Colonisation processes have an intergenerational impact that weakens whānau bonds and social structures crucial to adult development. Len Cook's research demonstrates that from the 1970s to about 1988 (prior to the implementation of the OTA), Māori tamariki experienced New Zealand's "worst period" of disparity in state care.[84] In 1990, the high rates of Māori adult imprisonment was strongly associated with the ageing of the 1970s State care generation.[85]

Regarding neurodisability, Valery Feigin's study found that Māori people sustain TBIs more often than people of European origin.[86] Regarding care and protection, as of 30 September 2021, Māori constitute 57 per cent of children and young people in the custody of the Chief Executive for care and protection concerns.[87] A further 11 per cent are both Māori and Pasifika, while 6 per cent are Pasifika.[88]

While there is still room for improvement in this realm, the youth jurisdiction arguably offers a more culturally appropriate response to Māori offenders than the general adult jurisdiction. The Sentencing Act 2002, for example, is limited to s 27 cultural reports and the s 8(i) requirement to take into account the offender's personal, family, whānau, community and cultural background. However, the application of these provisions relies primarily on the judge's discretion. In contrast, the recently implemented s 7AA provision in the OTA impose specific duties on the Chief Executive of Oranga Tamariki to "recognise and provide a practical commitment to the principles of the Treaty of Waitangi (te Tiriti o Waitangi)".[89] The new section aims to reduce disparities in outcomes for tamariki Māori and their whānau, as well as to provide the necessary and practical support required in their transition to adulthood.[90] The principle of equity in art 3 of Te Tiriti o Waitangi is directly relevant because Māori are disadvantaged across multiple spheres. Therefore, criminal law must play a pivotal role in ensuring equitable outcomes.[91] While the reforms discussed in Part V are designed for the general young adult population, a distinct young-adult response may reduce ethnic disparities and ensure a meaningful commitment to Te Tiriti.

Overall, young adults with backgrounds in care and protection have multiple needs that persist into adulthood. These vulnerabilities make them more likely to experience a cliff edge in their transition to independence, and a well-coordinated response is required.

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81 Len Cook *A Statistical Window for the Justice System: Putting a Spotlight on the Scale of State Custody across Generations of Māori* (Institute for Governance and Policy Studies, Working Paper 20/02, January 2021) at 5.

82 At 5.

83 Len Cook *Examining the over-representation of Māori in prisons: 1910 to 2020* (Institute for Governance and Policy Studies, Working Paper 21/18, December 2021) at 27.

84 Cook, above n 81, at 32.

85 At 32 and 39.

86 Feigin and others, above n 58, at 62.

87 Oranga Tamariki "Care and protection – statistics" (26 November 2021) <www.orangatamariki.govt.nz>.

88 Oranga Tamariki, above n 87.

89 Oranga Tamariki Act 1989, s 7AA(1).

90 Oranga Tamariki *Service Specifications: Transition to Adulthood* (June 2019) at 13.

91 Quince, above n 80, at 713.

IV Current Legal Landscape

Before proceeding to reform, this Part analyses the current legal landscape in acknowledging young adulthood and systemic deprivation, focusing on Court of Appeal sentencing judgments and the YAL pilot scheme. The purpose is to assess whether the current approach is sufficient to meet the needs and experiences of young adults leaving care.

A *Legislative development*

Given that the state has the primary care of young people in care or youth justice residential placements, this responsibility must extend to assist their transition into early adulthood. The Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017 addressed a considerable gap in the system where young people with a care and protection background had limited access to the usual support expected from their families for a successful transition to independence.

Sections 386AAA through 386C of the OTA set out the new legislative provisions that increase support for young people to prepare for their transition if they have been in a placement arrangement for a continuous period of at least three months, including a care and protection placement or residential youth justice placement (including remand).[92]

First, new purposes and principles require decision-makers to consider the needs of young adults leaving care. Under s 386AAB, the essential purposes include preparing the young person to thrive as an independent young adult, ensuring young persons have enduring relationships with caregivers and trusted adults into adulthood, and enabling access to government and community support during their transition. Under s 386AAC, principles include enabling a young person to increasingly lead decisions about matters affecting them and addressing any impact of harm with priority to support the stability of their education.

Secondly, s 386AAD creates an entitlement for the young person to live with their caregiver up to the age of 21, including a right to receive support, in the form of financial assistance, from the Chief Executive to decide whether to remain or return to living with a caregiver. The caregiver will assist the young person in their transition to independence. Furthermore, s 386C requires that the Chief Executive make reasonable efforts to maintain contact with the young person up to 21 years.

Finally, under s 386A(4), young adults are entitled to advice and assistance for transition to independence from the Chief Executive up to the age of 25 years. Under s 386B(2), advice and assistance may include financial, accommodation, education, employment and counselling assistance. This assistance is available even when the young adult has decided to live independently.[93]

These provisions signal a shift towards acknowledging the cliff edge of support for vulnerable young adults leaving state care. They are consistent with s 208(2)(b) of the OTA that the law should not institute proceedings against a young person to provide any assistance or services to advance their wellbeing. Instead, the law should enable a gradual transition to adulthood and prevent disruption to any progress a young person has made before their 18th birthday.

92 Oranga Tamariki Act, s 386A.

93 Oranga Tamariki*,* above n 90, at 22.

B *Judicial recognition*

(1) Overview

With the exception of the YAL, which is currently limited to the Porirua District Court, the treatment of young adults in the adult criminal justice system is similar to those of any other offender. Charges will be laid before a District Court judge trained to operate through adversarial processes and to treat the offender as a mature and fully functioning adult.[94] There is no record of youth justice history, including Alcohol and Drug assessments, psychological reports, cultural reports, nor their Family Court file.[95] The recognition of young adulthood and personal background is delayed until the sentencing stage and is limited to the discretionary application of discounts.

(2) Purposes and principles of sentencing

The Western criminal justice system is premised on the assumption that people are rational when making decisions. Neurodevelopmental evidence in Part II implies that the purposes contained in the Sentencing Act are less relevant for young adults. Deterrence depends on the person responding rationally to risk versus reward.[96] The prospect of a prison sentence will logically have less of a deterrent effect where the decision to offend is impulsive and based on an overvaluation of immediate reward. Furthermore, young adults are peer-driven and more vulnerable to external coercion, limiting a specific deterrence rationale.

Additionally, retribution, or the "just deserts model", relates to the offender's culpability and is limited when a young adult is less likely to appreciate the severity when offending. Furthermore, despite the science, denunciation and deterrence are less easily set to one side in cases of serious offending. In *Churchward*, the Court of Appeal accepted that impulsivity and propensity to risk-taking may well heighten the need for denunciation and deterrence in some cases.[97]

Finally, if the goal is incapacitation, the effect is a sentence that does not account for the young adult's developing maturity and assumes that behaviour in young people is fixed. Evidence shows offending behaviour is transient if the state does not undermine an individual's ability to desist.[98]

While punishment and deterrence are legitimate goals to maintain the criminal justice system's integrity, they do not promote the prosocial rehabilitation and reintegration that young adults are more amenable to grasp during this critical development period.

(3) Guideline judgments and consistency

The current two-step approach to sentencing involves adopting a starting point for the offending and then mitigating the starting point with factors personal to the offender.[99]

94 Michael Johnson "Administering justice in a different way at the Young Adult List Court in Porirua" (2021) 947 LawTalk 50 at 52.
95 At 52.
96 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [92].
97 *Churchward v R*, above n 15, at [84].
98 Shust, above n 20, at 695–696.
99 *R v Taueki* [2005] 3 NZLR 372 (CA) at [28]–[30].

The Crimes Act 1961 provides for minimum non-parole periods for some offences.[100] More frequently, guideline judgements are used by judges to ensure consistency in sentencing and parity among defendants for specific types of offences. They contain sentencing bands that identify minimum sentencing ranges for any aggravating or mitigating factors that may be present. While recent judgments such as *Zhang v R* recognise that sentencing bands are flexible, [101] it would take an exceptional set of facts for a judge to step outside the bands without their decision being appealed or subject to public scrutiny.

The concern is that the first stage of sentencing does not acknowledge inherent differences in young adulthood.[102] This results in the starting point being too high for the actual culpability of young adults. For instance, in *Diaz v R*, the Court of Appeal was restricted to applying *R v Taueki*, the guideline judgment for injury with grievous bodily harm, which attracted a starting point of five to 10 years' imprisonment for band two offending.[103] Thomas and Wylie JJ noted that the Court could not reach a principled basis on which to suggest that the offending should attract a starting point below the band despite the presence of self-defence.[104] The issue with setting a high starting point is that even with a mitigating discount, a sentence of imprisonment is inevitable for a young adult.

(4) The impact of youth and vulnerabilities in sentencing

(a) Overview

This section reviews five sentencing decisions between 2018 to 2021 in the New Zealand Court of Appeal to ascertain how the Court has acknowledged the young adult offender's youthfulness and any vulnerabilities in their background.

Under the Sentencing Act, s 9(2)(a) recognises age as a mitigating factor. This provision refers to biological age rather than developmental maturity. It is entrenched in New Zealand precedent that there are three fundamental reasons for a youth discount: lack of maturity due to age-related neurological development, the effect of long sentences of imprisonment, and potential for change and rehabilitation.[105] The Court of Appeal in *Rolleston v R* recently endorsed this and noted "a very real benefit to the community from achieving such an outcome in a person so young".[106]

There is no fixed percentage for youth as a mitigating factor. The Court of Appeal in *Pouwhare v R* explains that the approach to mitigation for youth is a discretionary exercise.[107] It is for the judge to weigh the young person's age and the reasons they offended against the seriousness of their offending.[108] The variability in discretion suggests that youth alone does not alter the final sentence.

Probation services prepare information about the offender in the form of a pre-sentence report. Additionally, a separate cultural report may be prepared under s 27 of the Sentencing Act to consider "the way in which that background may have related to the

100 See, for example, Sentencing Act 2002, s 103(2), which requires the imposition of a minimum 10 years of imprisonment for murder.
101 See *Zhang v R*, above n 96, at [120].
102 Woodwark and Lynch, above n 55, at 127.
103 *Diaz v R* [2021] NZCA 426 at [30].
104 At [31].
105 *Churchward v R*, above n 15, at [77]–[78].
106 *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79 at [28].
107 *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [83].
108 At [83].

commission of the offence".[109] Recently, the Court of Appeal in *Zhang* acknowledged that social, cultural and economic deprivation may impair choice and diminish moral culpability.[110] Subsequently, in *Carr v R*, the Court of Appeal acknowledged that while background does not need to be the proximate cause, there must be a nexus between the background and the offending.[111] However, the Court in *Carr* also warned against providing "[e]xcessive discounts" to offenders with disadvantaged backgrounds given the criminal law's principles of human agency and choice.[112] Moreover, other issues with s 27 reports include resource and funding limitations, and capable report writers.[113] This means not every judge will benefit from s 27 information about an offender's background.

(b) Sentencing judgments

In *Rolleston v R*, sentencing involved two appellants aged 18 and 19 convicted of rape and sexual violation of a 15-year-old girl.[114] While emphasising the seriousness of the offending, the Court of Appeal noted that "past denials of guilt and lack of insight do not preclude their potential for rehabilitation".[115] Instead, it is illustrative of their youthful immaturity in understanding the extent of the situation.[116] The Court found that the discount for the appellants' youth was too modest despite an acknowledgment that the sentencing judge had presided over the ten-day trial and was well placed to judge the maturity.[117] The emphasis on denunciation and deterrence, given the seriousness of the offending, was already encapsulated in the starting point.[118]

In 2019, the Court of Appeal in *Millar v R*[119] considered *Gacitua v R*, the leading case on reckless driving causing death, where a collective discount of 20 per cent acknowledged the relative youth of the 25-year-old defendant, no previous convictions and genuine remorse.[120] The Court in *Millar* noted that past decisions provide limited assistance because most judges treat youth as contributing to a group of mitigating factors for a global discount rather than a separate discount.[121] In this case, youth made up 15 per cent of the overall 25 per cent discount for a group of mitigating factors which also included previous good character, the injuries Mr Millar suffered, remorse and reparations.[122]

Recently, the Court of Appeal has considered youth in assessing culpability. In *Woodstock v R*, the High Court gave no discount for personal circumstances when sentencing the offender.[123] However, on appeal, a discount of approximately 15 per cent

109 This reflects s 8(i) of the Sentencing Act, which requires the sentencing judge to consider "the offender's personal, family, whanau, community, and cultural background".
110 *Zhang v R,* above n 96, at [159].
111 *Carr v R* [2020] NZCA 357 at [64].
112 At [66].
113 Rod Vaughan "Costs balloon for offenders' cultural reports" (16 April 2021) Auckland District Law Society <https://adls.org.nz>.
114 *Rolleston v R (No 2)*, above n 106.
115 At [39].
116 At [36].
117 At [40]–[42].
118 At [36].
119 *Millar v R* [2019] NZCA 570.
120 *Gacitua v R* [2012] NZHC 2542; and *Gacitua v R* [2013] NZCA 234.
121 *Millar v R*, above n 119, at [29].
122 At [29]–[30].
123 *Woodstock v R* [2020] NZCA 472.

reflected his social and economic deprivation and his prospects for rehabilitation.[124] The Court of Appeal discussed at length his disadvantaged upbringing, which included exposure to violence, lack of education and poverty.[125] The Court acknowledged the Porirua YAL and cited Andrea Păroșanu and Ineke Pruin in deciding that, although Mr Woodstock is 23 and therefore no longer a youth, he is still a young adult and is less likely to be able to resist peer influence and make sound decisions.[126]

Subsequently, in *Wira v R*, the Court of Appeal applied the observations in *Woodstock* regarding youth and stated that while they do not excuse his conduct, it is helpful "in explaining why Mr Wira acted in the way that he did".[127] This is a signal that more recent judgments reflect an understanding that age affects an offender's actual criminal culpability rather than merely constituting a mitigating factor. The 23-year-old offender had been directly exposed from a young age to violence, serious abuse, gangs, head trauma, multiple care placements since he was eight years old, and suffered from ADHD, PTSD and substance abuse.[128] This led the Court of Appeal to acknowledge that the lack of a stable and supportive environment had compromised his ability to make sound decisions and mitigated his culpability.[129] Comparing Mr Wira's background to Mr Woodstock's, the Court found that a global discount of 20 per cent reflected his personal circumstances and vulnerabilities. This judgment is favourable precedent for extending a welfare-based approach for young adults.

In the recent decision of *Diaz v R*, the Court of Appeal was unanimous in concluding that youth was the driving factor of the 17-year-old defendant for grievous bodily harm offending.[130] The Court gave a significant reduction of 67.5 per cent for mitigating factors, including youth, remorse, rehabilitative prospects and hardship of imprisonment. This included 30 per cent for youth alone, which was significantly higher than 18 per cent in the lower Court.[131] This discount is also substantially higher than previous Court of Appeal decisions in recent years. However, there is no reference in this judgment to the offender's background other than that he was known as "a fighter" by his family, and was already a father of two children.[132]

Goddard J's judgment in *Diaz* notes that in borderline cases such as the present one, a sentencing judge who considers that home detention is appropriate for the defendant "may of course be tempted to reverse engineer the available discounts to arrive at their preferred result".[133] The lack of transparency is problematic. The absence of strict guidance means that the integrity of mitigating factors is subject to arguments of counsel and judicial discretion in an adversarial system. Indeed, Stephen Woodwark and Nessa Lynch assert that considering youth in mitigation is "too late in the process".[134] Furthermore, the Sentencing Act is silent as to how these mitigating factors influence the

124 At [35].
125 At [21]–[31].
126 Andrea Păroșanu and Ineke Pruin "Young adults and the criminal justice system" [2020] NZLJ 296 as cited in *Woodstock v R*, above n 123, at [32], n 22.
127 *Wira v R* [2021] NZCA 98 at [39].
128 At [22]–[30].
129 At [34]–[38].
130 *Diaz v R*, above n 103.
131 At [40] and [48].
132 At [40].
133 At [62].
134 Woodwark and Lynch, above n 55, at 127.

type of sentence. A lack of direction results in young adults being subject to an adult sentence when they are biologically and socially different from them.

Overall, these cases demonstrate the judicial endorsement of the considerations set out in *Pouwhare* and its application to young adult offenders,[135] despite being outside the definition of a young person in the OTA. Essentially, a new approach would recognise the recent developments in the Court of Appeal, which recognise that young adults have less maturational development than adults and their prospects of rehabilitation. The scope of this judicial endorsement may be limited because senior court judgments generally deal with offending in more serious or complex instances where imprisonment is often an issue. Judgments from the lower courts, where the majority of young adults are sentenced, may produce variable outcomes depending on the information available before the judge. This exacerbates the concern of discretion in the general adult jurisdiction in the absence of strict guidelines. Even where judges already recognise youth as a mitigating factor in sentencing and perhaps reverse engineer sentences to get down to home detention, it is better to be transparent and encourage a welfare-based approach outright.

(c) Seriousness of offending

The Court is more likely to accept the hallmarks of youth and a vulnerable background in low-level offending, while the sentiment "adult time for adult crime" is more prevalent for serious offending. Although the Court of Appeal has acknowledged that seriousness is provided for in the starting point, judges have not acknowledged the young adult's vulnerabilities in High Court decisions concerning reckless driving.[136] The Court limits the scope for a youth discount in serious offending due to the weighing of public safety concerns, even where significant matters of maturity, trauma, and abuse are prevalent.[137]

(5) Implications of the Court of Appeal judgments

While courts acknowledge youth and background in sentencing, the strongest argument against maintaining the current legal framework is that it fails to adequately address the offender's needs. The reason is perhaps that probation services are not inclined to consider the welfare needs of the individual, which a multi-disciplinary team in the youth jurisdiction would prioritise. For young people involved in youth justice services, any progress is interrupted by the cliff edge of being transferred to the adult system. Tracy Velazquez points out that justice involvement, particularly incarceration, is "criminogenic" in increasing recidivism.[138] Socialising with other offenders, the limited institutional and educational opportunities, and the prison environment, contribute to criminal behaviour.[139]

Woodwark and Lynch argue that even where the judge reduces sentences to reflect the offender's maturity, the sentence—likely imprisonment—is not fully mitigated.[140]

135 *Pouwhare v R*, above n 107, at [96].

136 There are several cases involving young adults and reckless driving. See, for instance, *R v Cossey* [2018] NZHC 887; and *R v Makoare* [2020] NZHC 2289.

137 See, for example, *Carr v R*, above n 111, at [67]; and *Gacitua v R* (CA), above n 120, at [44].

138 Tracy Velazquez "Young Adult Justice: A new frontier worth exploring" *The Chronicle of Social Change* (online ed, Los Angeles, 3 May 2013) at 2.

139 At 2.

140 Woodwark and Lynch, above n 55, at 126.

Therefore, an effective approach would require the Court to consider the type of sentence instead of applying a formulaic methodology.

Rehabilitative and diversionary measures exist in the adult justice system.[141] There are 13 specialist courts, including the Alcohol and Other Drug Treatment Court. Chief District Court Judge Heemi Taumaunu has mentioned implementing the community-connected Te Ao Mārama model, which incorporates solution-focused specialist courts' features across the entire District Court system.[142] This model is a welcome step, but it does not directly address the developmental needs of young adults and their coinciding vulnerabilities as they transition into adulthood. Additionally, s 25 of the Sentencing Act enables the Court to adjourn proceedings for a rehabilitative programme. However, this provision does not consider the lack of developmental programmes available for young adults in the adult court. Furthermore, the seriousness of the offending is very hard to ignore in the adult jurisdiction when balancing rehabilitative and diversionary measures.

Finally, a significant consequence of the adult criminal court is the stigma of a criminal conviction.[143] Labelling theory denotes that a conviction or label can reinforce a criminal identity.[144] Convictions from the District Court generally remain on the young adult's record,[145] impacting reintegration efforts, employment and travel opportunities. As a result of these barriers to prosocial activity, young adults may turn further towards anti-social behaviour patterns.[146]

C *Pilot Young Adult List*

In the 2019 proposal to create a young adult list, Principal Youth Court Judge Walker asserted that "[t]hose aged between 17-24 account for 14 [per cent] of the general population, but 40 [per cent] of criminal justice apprehensions."[147] The YAL is a "local discretionary initiative" that operates within the Porirua District Court in Wellington.[148] It excludes serious offending transferred to the High Court, such as murder and manslaughter.

The YAL focuses on the high percentage of young adult defendants with neurodisabilities. The emphasis is on procedural justice to ensure engagement and participation in the court process.[149] The team provides wrap-around support from support services, including Māori, Pasifika and Ethnic Services, and Bail Support Officers. Such individuals are specially trained to work with young adults and create an individualised plan that addresses their particular needs.[150] There is also information sharing between the Youth, Family and District Courts. Another aspect of the YAL is keeping whānau involved to assist the young adult.

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141 See, for instance, New Zealand Police "About the Adult Diversion Scheme" <www.police.govt.nz>.

142 Heemi Taumaunu "Transformative Te Ao Mārama model announced for District Court" (press release, 11 November 2020).

143 See Ministry of Justice "What is a criminal record" (17 January 2022) <www.justice.govt.nz>.

144 Kevin Lapp "Young Adults and Criminal Jurisdiction" (2019) 56 Am Crim L Rev 357 at 380.

145 Subject to the Criminal Records (Clean Slate) Act 2004.

146 Lapp, above n 144, at 380.

147 Doogue and Walker, above n 54, at 2.

148 Woodwark and Lynch, above n 55, at 136.

149 Judy Paulin and others *Formative and Short-term Outcome Evaluation of the Porirua District Court Young Adult List Court Initiative* (Ministry of Justice, July 2021) at 1.

150 At 1.

The Ministry of Justice produced a formative and short-term outcome evaluation of the initiative in July 2021. While this report is limited by the short time frame and small sample size, the 30 participants from the review who encountered the YAL found that they generally have a greater understanding of processes and communication with the judge.[151] The report found that links with the Porirua community and locally-based community services contribute to the YAL's successful implementation.[152] The foundation for a solution-focused approach already existed, which raises the question of whether the YAL can be mainstreamed across other courts in New Zealand, who will have different relationships with the local community and iwi. This may result in postcode justice, where the provision of a specialist court depends on its location.

The YAL requires additional time and resources. In the twelve-month evaluation period from March 2020 to February 2021, the YAL took on average 140 days to resolve each case, about one and a half times longer than equivalent cases resolved through the Comparison District Court.[153] This is not a significant weakness, as "turning a first appearance into a last appearance" will have benefits in the long run.[154] While information sharing occurs between courts, file preparation for young adults in YAL took longer, with one stakeholder commenting: "We have to refer to Youth Court, we have to look for this, we have to [l]ook for that".[155] On the other hand, the Youth Court has allocated resources to allow ample preparation time compared to the District Court.

D *Conclusion*

While the Court of Appeal judgments validate developmental science and acknowledge the reduced culpability of a young adult, the "justice model" in the criminal Court is not suitable for those with welfare needs. The YAL is also limited in its approach. The status quo is unconvincing and subject to the discretionary application of the judge at a delayed stage. A criminal system that assumes every young adult has the necessary resources at their disposal before, during and after sentencing is inadequate. The next Part will highlight evidence to take a welfare-based approach that provides certainty of protection through a legislative mechanism.

V Reforming the Criminal Justice System for Young Adult Offenders with Care and Protection Backgrounds

Having established that the current approach to dealing with young adult offenders in their transitional period is inadequate, this Part turns to court-based responses that aim to divert this group from the adult justice system. While many scholars from New Zealand and abroad recognise early intervention and prevention approaches to address children's development and behaviour,[156] broad policy change depends on the government's bureaucracy and resource allocation. The criminal justice arena has little control over socially entrenched problems to offending, including poverty. Sir Peter Gluckman's research "highlight[s] that it is never too late to make a difference" and that a justice

151 At 4.
152 At v.
153 At 12.
154 At 21.
155 At 22.
156 See, for example, Gluckman, above n 22, at [8].

system should encapsulate an "exit" pathway to respond to those who have begun some engagement with the criminal justice system.[157]

This Part considers the implications of developmental science from a welfare perspective. It is significant to recall the social context of young adults with a care and protection background that contribute to their vulnerability and prevalence in the criminal justice system. An effective welfare-based approach should focus on their vulnerabilities and avoid the cliff edge of support in their transition to adulthood. There are two possible approaches on this basis. First, establishing a "third system" within the existing framework of justice that results in a distinct Young Adult Court, and secondly, encompassing young adults within the youth justice system by extending the upper age of the youth jurisdiction.

Both are progressive reforms and serve as a starting point to the discussion in New Zealand about how we can better meet the needs of young adults with care and protection backgrounds. The challenge for the criminal justice system is to balance their backgrounds of vulnerability while ensuring their offending demands accountability.[158] The majority of this Part discusses the possibility of extending the youth justice jurisdiction through a "refer down" mechanism.

A *Young Adult Court*

Creating a "third system" of justice is consistent with Arnett's argument that young adulthood is a "new and historically unprecedented stage of the life course, so it requires a new term and a new way of thinking".[159] Woodwark and Lynch posit that a New Zealand approach would "operat[e] within the current legislative framework and mainstream court system, but drawing off the principles underlying the youth system".[160] The principal aim would be "to facilitate the transition from adolescence to adulthood", emphasising diversion before sentencing.[161] Their main argument for a distinct system within the existing justice framework is the ability to facilitate the transition to adulthood through developmental programmes.[162]

(1) Pilot Young Adult List

The YAL is a prime case study of a third justice system. The most compelling strength of the YAL is shifting the focus from whether youth is a mitigating factor to the offender and the offending itself:[163]

> Specific focus on young adults is an opportunity for the courts to assess whether the offending is transient, as with adolescent limited offending, or whether there is a risk of more ingrained offending behaviour.

Despite this emphasis, the main weakness of the YAL is that it still sits within the adult jurisdiction and only adopts some Youth Court adaptions. Adult courts are trained to deal

157 At [9].
158 Andrew Becroft "It's All Relative: the Absolute Importance of the Family in Youth Justice (a New Zealand Perspective)" (paper presented to the World Congress on Juvenile Justice, Geneva, 26–30 January 2015) at 26.
159 Arnett, above n 32, at 2.
160 Woodwark and Lynch, above n 55, at 134.
161 At 135.
162 At 140.
163 At 135.

with offenders through an adversarial process. An issue faced in the Netherlands is the low number of young adults sentenced under youth law. In the first year of the new reform for young adults, from 2014 to 2015, the proportion of young adults sentenced under youth law only rose from about 2 per cent to 4 per cent.[164] Pǎroşanu and Pruin posit that adult court judges who sentence young adults are not sufficiently trained in applying youth-specific principles.[165] This makes an extension of the youth jurisdiction favourable to encompassing young adults within the youth justice system.

Furthermore, the YAL is currently limited to addressing the prevalence of neurodisabilities rather than providing an age-based response.[166] A practical addition would be incorporating developmental frameworks from neuroscience and social welfare perspectives as discussed in Part II. However, an evidence-based premise is likely to take a substantial amount of administration and resources to justify a separate response. Indeed, Elizabeth Cauffman argues there is no significant advantage to establishing a third, separate court system because developmentally appropriate sentencing and treatment options are already available to the criminal jurisdiction.[167] While it may be cost-beneficial in the long run, it is difficult to justify the cost to create, train and maintain an entirely new criminal justice institution.[168] Indeed, it seems almost futile when the well-established youth jurisdiction is also available.

The long-term outcomes of reduced recidivism are unclear due to the short time frame of the Pilot YAL. While the YAL represents a step towards acknowledging the distinct group of offenders, it arguably does not go far enough in providing direction to the judiciary in addressing vulnerability issues and assisting their transition to adulthood.

B *Extending the jurisdiction of the Youth Court*

Considering that the status quo is insufficient and a third justice system appears inadequate, this section considers four fundamental features of the youth justice system to address whether the youth jurisdiction should encompass certain young adults with vulnerabilities. This is a radical approach for New Zealand, given that only recently, in July 2019, the Youth Court expanded its jurisdiction to include 17-year-olds, except those charged with serious offending.[169] Reform in New Zealand will not entail an automatic extension of the youth jurisdiction to all young adult offenders. However, referring eligible young adults to the youth jurisdiction is consistent with the amended provisions in the OTA that treat 18–25-year-olds with care and protection backgrounds as a young person for the purposes of their transition to independence and the judicial endorsement contained in recent Court of Appeal sentencing decisions.

Furthermore, an extension of the youth jurisdiction is not a novel idea overseas. Currently, most European countries have legislation that specifically provides for young adults, such as applying youth justice measures under general criminal law.[170] For instance, in Croatia and the Netherlands, youth court sanctions are available for young

164 Pǎroşanu and Pruin, above n 126, at 298.
165 At 298.
166 Woodwark and Lynch, above n 55, at 137.
167 Elizabeth Cauffman "Aligning Justice System Processing with Developmental Science" (2012) 11 Criminol Public Policy 751 at 754.
168 Lapp, above n 144, at 397.
169 Oranga Tamariki Legislation Bill 2019 (121-1). See now Oranga Tamariki Act, s 2 definition of "young person".
170 Pǎroşanu and Pruin, above n 126, at 298.

adults up to the age of 23.[171] In Germany, the Youth Court has been available for young people up to the age of 21 years since 1953. More recently, Germany has legislated that youth justice sanctions must be applied to young adults up to the age of 21 years if the youth's "moral and intellectual development" was "equivalent to a juvenile", or if the totality of the offence "constituted youth misconduct".[172] Notably, in Germany, the more serious cases are dealt with within the youth jurisdiction, while minor offences, particularly traffic offences, are dealt with within the adult system.[173] This implies that the seriousness of offending does not dictate where a young adult is dealt with but rather the extent to which a system can address their needs and facilitate reintegration. Recently, some United States jurisdictions such as Massachusetts, Connecticut, Illinois and Vermont, raised the age of the application of juvenile law to include 18- to 25-year-olds.[174]

The following section builds upon the discussion in Part IV regarding the current legal landscape and compares and contrasts the youth jurisdiction with the adult criminal justice system.

(1) The proposed regime: Ability of District Court judges to refer down to Youth Court

A referral is not an automatic transfer of all cases involving young adult offenders aged 18–25 years to the Youth Court. Instead, it is a recognition that the youth jurisdiction can better deal with eligible cases.

An Expert Panel at the 2016 Neurodisabilities Forum recommended a "refer down" mechanism or a "halfway-house" jurisdiction for 18- and 19-year-olds to be directed down to the Youth Court, including Ngā Kōti Rangatahi and Pasifika court processes where appropriate.[175] The Panel's focus here is concerning individuals with specific neurodisabilities. This idea can be applied to young adults with care backgrounds up to the age of 25. This referral mechanism has similarities to s 280A of the OTA's "push-back" mechanism in the Youth Court which empowers the judge to refer a child aged 12 or 13 to the Family Court. The provision is a two-stage consideration which involves first, whether the offender may be in need or care and protection and secondly, whether this would "serve the public interest" better than a Youth Court order. Lynch describes s 280A as a "safety valve" to ensure children who offend with significant care and protection needs are dealt with accordingly.[176] Ultimately, the decision lies with the person who commenced the proceedings which, in most cases, is the police.[177]

Given the focus of this article, this proposed "refer down" mechanism is limited to offenders aged between 18–25 years with care and protection backgrounds. This is in line with developmental science and Oranga Tamariki's legislative recognition of the challenges faced during the transition to adulthood. As discussed above, the presumption is that a young adult defendant with a care and protection background is considered vulnerable, given that the causes of offending and care and protection are likely to stem from the same pathway. They are also likely to have coinciding vulnerabilities such as neurodisabilities. Therefore, the public interest is best served through a welfare-based

171 At 298.
172 Youth Courts Act 1974 (Germany), s 105(1).
173 Velazquez, above n 138, at 6.
174 Pa̍roṣanu and Pruin, above n 126, at 296.
175 Lynch, above n 53, at 14.
176 Nessa Lynch "The 'pushback' of child offending cases to the Family Court" (2013) 7 NZFLJ 273 at 273.
177 At 273.

approach focusing on the features of the youth jurisdiction, such as therapeutic jurisprudence and diversion, in contrast to the justice model. In comparison to the current legal landscape in sentencing—which requires the defendant to adduce evidence of their background and draw a causal nexus to the offending[178]—a presumption works in favour of the young adult. The prosecution can rebut this presumption with evidence to the contrary. Similar to the s 280A mechanism, the determination of public interest involves a consideration of purposes and principles in the Sentencing Act, including the protection of the community, the gravity of the offending and the culpability of the offender.

This referral aims to draw on the fundamental features of the youth justice system which include diversion, therapeutic principles, flexibility of the Youth Court judge and continuity of care. The type of offending referred down to the Youth Court is qualified by the provisions in the OTA that transfer cases of murder and manslaughter, or where the young person elects jury trial for a category three or four offence directly to the District Court or the High Court.[179] The Court of Appeal made it clear that the youth justice principles displace the Sentencing Act purposes, principles, and aggravating and mitigating factors once a young person is transferred to the District or High Court.[180]

There may be scope for broadening the eligibility of referral cases. In practice, it may be difficult to delineate between groups due to the coinciding vulnerabilities of care-experienced young adults identified in Part III. Extending the eligibility may open the floodgates, entailing an automatic extension of every young adult offender. Given the overrepresentation of groups such as neurodiverse, Māori and Pasifika in the youth justice system, groups like these are more likely to come to the attention of the care and protection system. At the same time, some young adults who have the equivalent needs of care and protection individuals, such as low socioeconomic backgrounds or experience of abuse, do not come to the attention of Oranga Tamariki and will miss out on the benefits of the proposed regime.

Young adults with backgrounds in state care are arguably distinct from these groups, given their prior involvement and progress with Oranga Tamariki and its support services. The OTA acknowledges that the pathways to each system stem from the same underlying needs and circumstances. The development of a cross-over list in the Youth Court enables judges to address both care and protection, and youth justice issues for the young person and their families in the same hearing.[181] The cross-over list recognises the additional vulnerabilities of this group to allow a coordinated response to address welfare issues promptly and correctly identify reoffending risk.[182] Given the recent amendments recognise that an individual leaving care and protection placement or residential youth justice residential placement may still require care up to the age of 25, the youth jurisdiction is well suited to deal with them in their transitional period.

(2) Welfare-oriented justice: Features of the youth jurisdiction

The basis for this reform is that a young person on their 18th birthday does not suddenly lose all their vulnerabilities that the youth justice system attempts to address. This is

178 *Zhang v R*, above n 96, at [162].
179 Oranga Tamariki Act, ss 272, 275 and 283(o).
180 *Pouwhare v R*, above n 107, at [74].
181 Becroft, above n 158, at 28.
182 Tony Fitzgerald "Children in Both Youth and Family Courts: New Zealand" (2018) 1 IAYFJM Chronicle 15 at 19–20.

exacerbated for individuals with care and protection backgrounds who arguably require more support.

At its core, the Youth Court turns the focus from the "deed" of the offending, to the "need" of the offender.[183] It is designed to prevent the long-term effects of interaction with the criminal justice system. Under s 4A of the OTA, the four primary considerations concerning youth justice issues are the wellbeing and best interests of the young person; the public interest, including public safety; the interests of victims; and the young person's accountability for their behaviour. A hierarchy of sentences counteracts concerns about offenders being dealt with leniently under the youth justice system. Section 283 sets out a range of tariff orders from fines, reparation and restitution on the lower end, to supervision, community work and supervision with residence order at the higher end. Section 284(2) prevents the Youth Court from imposing orders on the higher tariff orders merely if the Court considers the young person requires care or protection.[184] These sentences are tailored to the individual and counteract the harsh measures prevalent in the adult system. While it is recognised that the youth justice system is not perfect, this article argues that the youth justice system is more successful in addressing causes of offending particularly for young people from care and protection backgrounds.

(a) Diversion

The touchstone of the youth jurisdiction is diversion before trial or at sentencing. The forward-looking principle of not charging and providing an alternative means to deal with young people under s 208(2)(a) recognises the harmful effect of being labelled "criminal". The strength of such an approach is that young people remain connected to their family and community while providing an opportunity for intervention. Most importantly, it avoids the stigma of a formal conviction.

Sentencing in the Youth Court is different "to the formulaic, mathematical, tariff and precedent driven approach of the District Court".[185] Section 281B of the OTA enables the Youth Court judge to adjourn proceedings at any time, and to direct that a Family Group Conference take place to discuss matters relating to the young person. Section 16(1) of the Sentencing Act requires a Court to regard the desirability of keeping offenders in the community as far as is practicable and in line with public safety. The OTA goes even further by requiring that offenders should be kept in the community, that sanctions should take the least restrictive form and by promoting development within the family group.[186] A benefit in dealing with young adults in the youth justice system is avoiding the constraints of the guideline judgments and the minimum sentences for serious offending identified in Part IV. Given the reconviction and recidivism rates, it is in the interests of the public for young adults to avoid the "seemingly inevitable journey from early offending to eventual adult prison".[187]

Together with confidentiality measures, the s 282 absolute discharge outcome provides young people with a second chance as they go into adulthood, even in cases of serious offending. In *New Zealand Police v [HX]*, Fitzgerald J noted that while a s 282

183 Andrew Becroft "10 Suggested Characteristics of a Good Youth Justice System" (paper presented to Pacific Justices' Conference, Auckland, 5–8 March 2014) at 11–12.

184 See also Oranga Tamariki Act, s 208(b), which prevents using criminal justice proceedings to merely duress welfare concern.

185 *New Zealand Police v [HX]* [2019] NZYC 548 at [16].

186 Oranga Tamariki Act, s 208(a).

187 Gluckman, above n 22, at [5].

outcome is unusual for serious offending, it is not inconceivable.[188] According to Fitzgerald J, it is not uncommon for young people showing positive signs of engagement to advance on a social worker's plan with sentencing deferred, especially where monitoring may occur in the Rangatahi and Pasifika Courts.[189]

In contrast, the adult justice system is less concerned with front-end diversionary measures and more focused on punishing past actions. It is unlikely the criminal court and corrections facilities are suitable for the service-heavy and community-based dispositions that would be most beneficial to young adults.[190] Furthermore, they are unlikely to be trained in research about developmental theories and address developmental needs.

If a young adult offender already has an offending history in the Youth Court, one can argue that the youth jurisdiction already honoured diversion. However, intervention through diversion cannot be a one-off response for young adults with compounding and cumulative issues. There is often a cycle of care and protection offending that may be intergenerational.[191] Persistent offenders with care and protection backgrounds will still benefit from aspects of the youth justice system, including specialist services. Therefore, intervention cannot be limited to a single incident. Consistent and therapeutic approaches which enhance prosocial behaviour are required while young adults are still developing.

(b) Therapeutic potential

It is impossible to deny that young adult offenders are often a result of their environment. Following a 2010 amendment to the OTA, measures must address the causes underlying a young person's offending so far as is practicable.[192] However, the youth justice system undercuts these therapeutic efforts when it hands over their most vulnerable young people to the adult system. Therapeutic jurisprudence focuses on reducing harm to the offender by minimising the anti-therapeutic consequences of the law.[193] This solution-focused approach seeks to provide an individual treatment plan for offenders. A therapeutic approach is arguably more beneficial for the young adult than applying the law in a formulaic manner that results in sentencing a young adult, without guaranteeing rehabilitative support. While there are therapeutic courts in the adult justice system, the OTA statutorily enshrines these therapeutic principles.

It is particularly problematic that "the peak of offending occurs across the very divide of the age bands between 'youth' and 'adult' services".[194] Gluckman points out that support services offered to vulnerable adolescents, including mental health, education and other care and protection services, often dissipate once they are 18 years of age. [195] As demonstrated, a young adult with a care and protection background has several vulnerabilities, so turning 18 must not automatically present a cliff edge for relying on statutory agencies for their needs.

188 *New Zealand Police v [HX]*, above n 185, at [15]. The young person faced charges of aggravated robbery.
189 At [17].
190 Lapp, above n 144, at 379.
191 George, above n 3, at 46.
192 Oranga Tamariki Act, s 208(2)(fa).
193 Ian Freckleton "Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence" (2008) 30 T Jefferson L Rev 575 at 577.
194 Gluckman, above n 22, at [19].
195 At [19].

The Youth Court comprises a coordinated, multi-disciplinary team which includes health workers, education workers, social development workers and police working collaboratively. The staff are trained in understanding the developmental features and identifying the needs of young offenders. While this may require additional training for young adults, staff are skilfully primed to identify these issues. For example, the newly created Oranga Tamariki role of Transition Workers, which targets young adults moving to independence, are trained in building rapport and knowledge regarding the impact of trauma, brain development and youth development approaches.[196]

Since the system diverts most offending, and only the most complex cases reach the Youth Court, screening processes are effective. The presence of the Youth Forensic Services and Education Officers means that staff identify neurodisabilities and other causes of offending.[197] Lynch notes that Youth Court judges increasingly order s 333 health assessor reports to understand the young person's characteristics and inform decision-making.[198] Therefore, the youth system recognises their vulnerabilities and includes specific protections from future desistance.[199]

The involvement of whānau is pertinent in the OTA, which supports families, whānau, hapū and iwi to develop their own measures to deal with the offending.[200] A young person with a care and protection status may challenge this provision on the basis that it over-idealises the reality of a stable and supportive family. While the provision is broad enough to include wider whānau, this arguably stereotypes Māori social ordering and assumes that Māori post-colonisation maintain collectivism in a hapū or iwi context. A lack of whānau support reinforces the requirement for a coordinated, multi-disciplinary team to address the needs of the young adult, especially in cases where the state becomes the legal guardian. Allowing a case to be resolved in the Youth Court enables the consideration of family circumstances that may play a role in the offending.

(c) Cultural responses

Ngā Kōti Rangatahi, established in 2008, can enable positive cultural identity and strengthen links with family and community.[201] Following screening in the Youth Court, any young person can elect to have their appearances and monitoring processes conducted on a marae.[202] These courts recognise that Māori male offenders constitute the majority of those referred to in the Youth Court that go on to reoffend in adulthood, and that a tailored response addressing their needs and identity is required.[203]

There are currently 15 Rangatahi Courts across New Zealand. The judges who preside over the courts are Māori, some which have whakapapa to the marae.[204] Locating the response to offending on the marae serves to connect young people to their tangata whenua[205] and te reo me ona tikanga.[206] This is particularly beneficial for those who have

196 Oranga Tamariki, above n 90, at 14–15.
197 Lynch, above n 53, at 8.
198 At 8.
199 Becroft, above n 183, at 1.
200 Oranga Tamariki Act, ss 208(2)(c)(i)–208(2)(c)(ii).
201 Quince, above n 80, at 717.
202 At 718.
203 At 714.
204 At 717–718.
205 Local people.
206 Māori language and customs. See Quince, above n 80, at 716.

backgrounds in state care to integrate into a community, learn about their whakapapa and foster a stronger sense of identity transitioning into adulthood.

(d) The Youth Court judge

The Youth Court judge plays a paramount role in monitoring behaviour change and compliance. They can provide procedural justice by ensuring the young person understands the language and processes. Emily Buss argues that juvenile judges can play an essential role in helping to prepare foster youth for independence by engaging them in meaningful participation.[207] While Buss writes in an American context—the welfare system is monitored by the judiciary—Youth Court judges perform evaluative reasoning based on tailored information prepared by a multi-disciplinary team rather than legal principles.[208] This evidence-based approach enables greater consistency in decisions compared to the adult court.

(e) Continuity of care

It is significant that many young adults have had contact with Oranga Tamariki for care and protection concerns. An international review of the literature on best practice rehabilitation found "continuity of care" for young offenders aged 18 to 25 to be a good practice principle.[209] This principle involves ensuring previously established and productive links with trusted and effective personnel (such as caseworkers and mentors) be maintained as far as practicable. Furthermore, the continuity of judges is central to their prospects of rehabilitation. The review found that young adults often lament the loss of contact with previous professionals:[210]

> Trust and legitimacy are rare commodities in the lives of young adult offenders so any alliances established as juveniles need to be maintained rather than abruptly severed at adulthood.

Overall, the Youth Court is already equipped with the resources and experience necessary to deal with young people who have care and protection backgrounds. Going through the youth justice system may significantly alter the substantive outcome for a young adult offender with a care background.

C *Addressing concerns about the proposed regime*

Several concerns arise from extending the youth jurisdiction to eligible young adult offenders. These include whether there would be an unwarranted level of judicial discretion as with the current approach, if this would result in being "soft on crime", and whether reform would undermine the integrity of the youth and adult justice systems. Furthermore, there is also the concern of how limited resources should be allocated.

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207 Emily Buss "Juvenile court for young adults? How ongoing court involvement can enhance foster youths' chances for success" (2010) 48 Fam Ct Rev 262 at 272.

208 Katey Thom "New Zealand's Solution-Focused Movement: Development, Current Practices and Future Possibilities" in Warren Brookbanks (ed) *Therapeutic Jurisprudence: New Zealand Perspectives* (Thomson Reuters, Wellington, 2015) 325 at 332.

209 Halsey and De Vel-Palumbo, above n 35, at 38.

210 At 38.

(1) A lenient approach? Competing interests

The justice system needs to balance multiple competing interests. There may be a concern for the lack of consideration for victims because the youth justice system focuses on the individual. However, it is worth pointing out the victimhood of young adults who have had contact with the care and protection system, including the high rates of abuse and neglect, often from infancy.[211] Elizabeth Scott, Richard Bonnie and Laurence Steinberg argue that a system committed to leniency is unsatisfactory in dealing with offenders.[212] However, it is incorrect to argue that young adults are more dangerous than their younger counterparts when they are similarly immature and on the same development trajectory. Furthermore, these authors write from the United States, where public and political acceptance of affording special status to groups has been tentative. In New Zealand, public sentiment tends to support rehabilitative and systemic approaches.[213]

Woodwark and Lynch assert that "[a] truly principled model would recognise that young adults require differentiation", no matter how serious the offence.[214] Similarly, Doogue and Walker JJ claim that an approach that properly engages with the young person means that the law recognises accountability and promotes public safety, while addressing the offender's needs.[215] Disqualifying young people who commit serious offending from the protection of the youth justice process and sentencing them "like any other person" is contrary to producing substantive outcomes that account for their vulnerabilities.[216]

Furthermore, if employing the principles of the youth justice system facilitate rehabilitation and reintegration, and prove to be more effective, this would be beneficial for society at large. David Farrington, Rolf Loeber and James Howell propose that cost-benefit analyses to quantify the benefits would be helpful to prompt legislative change.[217] In response to this proposition, Cauffman is less optimistic about prioritising objective data over emotion given the legislative history of ensuring the criminal justice system's goals.[218] Public sentiment may depend on the features of the offence, such as seriousness or victimhood, and the offender, for example, if they have a previous criminal history.

Furthermore, the Youth Court is familiar in dealing with relatively serious offending and persistent offenders, given that most youth offending is diverted.[219] While "deterrence" is not explicitly stated in the OTA, the principles and processes have the same sentiment. For instance, the process of "denied and not denied" allows the young person to admit to the offending. The youth justice system is innovative as the procedure encapsulates deterrence and accountability in its processes before the formal punishment sanction. Therefore, the Youth Court will balance the competing purposes in s 4A to promote meaningful accountability of young offenders and their welfare needs.

211 Gluckman, above n 22, at [23].
212 Elizabeth S Scott, Richard J Bonnie and Laurence Steinberg "Young Adulthood as a Transitional Legal Category: Science, Social Change, and Justice Policy" (2016) 85 Fordham L Rev 641 at 665.
213 Craig Barretto, Sarah Miers and Ian Lambie "The Views of the Public on Youth Offenders and the New Zealand Criminal Justice System" (2016) 62 Intl J Offend Therapy Comp Criminol 129 at 139.
214 Woodwark and Lynch, above n 55, at 140.
215 Doogue and Walker, above n 54, at 1–2.
216 *Pouwhare v R*, above n 107, at [81].
217 Farrington, Loeber and Howell, above n 9, at 740.
218 Cauffman, above n 167, at 755.
219 Around 80 per cent. See John Walker, Principal Youth Court Judge for New Zealand "When the Vulnerable offend — whose fault is it?" (speech to the Northern Territory Council of Social Services Conference, Darwin, 27 September 2017).

Finally, Buss argues that while a Youth Court hearing may be more lenient, it plays a unique development role in the individual's transition to adulthood.[220] The emphasis on meaningful participation provides an opportunity for the young adult to practice decision-making, articulate needs, take responsibility, and interact with adults in a supportive environment. This reinforces their perception of themselves as mature individuals who have both responsibilities and opportunities.[221] Indeed, in the formative evaluation of the YAL list, participants said they had appreciated being asked directly by the judge about their progress, and appreciated the judge's praise after a case review appearance.[222]

(2) The integrity of the youth justice system

On the other side of leniency is a punitive response. A problem with this proposed regime is that a distinct response may increase the punitive lens of the adult justice system by classifying those that remain as an "irredeemable remainder … who are not thought amenable to therapeutic or rehabilitative intervention".[223] This has the effect of reinforcing existing prejudices in the justice system.[224] Additionally, Woodwark and Lynch warn that the youth justice system would protect "deserving" young adults while continuing to transfer "undeserving" children and young persons to the adult system.[225] However, this argument is far-fetched in practice, as case law shows consistency in recognising the vulnerabilities of a young person and young adult in the High Court and Court of Appeal. The main emphasis of a referral mechanism to the youth jurisdiction is ensuring a well-coordinated response and allowing for individuals with care and protection backgrounds to continue being dealt with under the OTA.

A valid concern is how this will line up with the transfer of youth offenders to the District Court in cases of serious offending under s 283(o) of the OTA. For instance, in *Pouwhare*, the Court of Appeal suggests that the law considers youth offending is less serious and instead attributable to a lack of family support or a developmental injury, but that chronic, serious young offenders are equivalent to adult offenders.[226] Unfortunately, a referral mechanism does not change the transferral of young people charged with certain serious offences.

Woodwark and Lynch further raise the concern that expanding the youth jurisdiction to include young adults risks diluting youth programmes to become a "one-size-fits-all approach", which may be detrimental for both adolescents and young adults.[227] On a similar sentiment, Scott, Bonnie and Steinberg argue that it is unlikely a unitary justice system would promote the interests of either adolescents or young adults because they have different needs.[228] However, this concern disregards the high rate of cross-over individuals in the Youth Court who reappear in the adult court. Continuity of care is crucial. The integrity of the youth justice system is still maintained when the District Court decides to refer down the same young adults with the same underlying vulnerabilities.

220 Buss, above n 207, at 268.
221 At 271.
222 Paulin, above n 149, at 7.
223 Lapp, above n 144, at 397.
224 Brewster, above n 28, at 230.
225 Woodwark and Lynch, above n 55, at 133.
226 *Pouwhare v R*, above n 107, at [70].
227 Woodwark and Lynch, above n 55, at 133.
228 Scott, Bonnie and Steinberg, above n 183, at 664.

(3) Resource allocation

The Interim Report points out that children and young people with contact in state care account for almost half of the government's spending for the benefits scheme and corrections in early adulthood.[229] Indeed, improving child welfare outcomes, education rates, and socioeconomic status is critical in addressing the underlying causes of offending. Commentators may argue that trying to produce substantive outcomes for older young people is complex, and so resources should be invested in the early intervention stage—such as primary education—or at the very least on younger teenagers. For instance, Police Association President Chris Cahill opposed 17-year-olds being dealt with in Youth Court, as it would divert resources the justice system could use for younger children that would create a greater chance of reform before their offending turns serious.[230] The earlier the intervention, the more substantively effective and cost-effective the outcome.

Similarly, Cauffman argues that the priority should be eliminating mandatory transfers of minors to the adult court and developing appropriate treatments for youth offenders.[231] However, given that the peak rate of offending occurs in early adulthood, there may be first-time young adult offenders, so the law cannot dismiss a reactionary approach entirely. A referral to the youth jurisdiction is a preventative approach to a certain degree as it reduces the number of individuals entering the adult justice system.

Michael Wald and Tia Martinez support this argument by cautioning the use of prevention as a sole focus. While prevention will reduce the number of young offenders in the long run, a large number of young adult offenders are or will still become disconnected from the community.[232] A referral is not a second chance. It simply recognises that young adults are maturing over time. Their cognitive skills and independence grow as they acquire employment and other sources of social stability. Furthermore, if the law refrains from intervention, this will only reinforce existing disparities in the criminal justice system, including Māori over-representation. Early intervention is dependent on structural factors and is not accessible to every individual. The young adult may have missed opportunities for effective intervention to address their unmet needs if it is their first time appearing in a formal court. Additionally, assisting young adults in rehabilitation and acquiring life skills is especially crucial if they are also parents, as it will help to prevent an intergenerational effect. Incapacitating young adults before they are fully developed is contrary to their best interests.

To conclude, referring young adult offenders to the youth justice system would restrict the "care to custody" pipeline by avoiding the harmful effects of the adult jurisdiction. It meets the needs and socially produced challenges typical for those leaving state care. While this reform, as it exists in theory, may differ from practice, it is more favourable than maintaining the adult jurisdiction's status quo.

229 Falck, above n 44, at 105.

230 Meghan Lawrence "Big Read: Raising the youth justice age" *The New Zealand Herald* (online ed, Auckland, 4 November 2018).

231 Cauffman, above n 167, at 755.

232 Michael Wald and Tia Martinez "Connected by 25: Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds" (November 2003) William and Flora Hewlett Foundation <https://law.stanford.edu> at 4.

VI Conclusion

The essence of reforming the legal response to young adult offenders is addressing the over-representation of those most vulnerable in the criminal justice system. Most young adults with care and protection backgrounds face a cliff edge when they turn 18 and face a higher risk of being involved in the justice system. To avoid the arbitrary delineation, the focus should shift from the considerations of numerical age to addressing vulnerability, in addition to developmental science.

As discussed in this article, research shows that 18- to 25-year-olds with care and protection background require a distinct response given their developing brain, particular vulnerabilities, the likelihood of poor outcomes, and distinct needs. However, the immediate shift to the adult criminal justice system at 18 undermines efforts made by Oranga Tamariki, either in the past or at present during young adulthood, to support young people with care and protection backgrounds during a critical age of development and transition.

Despite the recent legislative and judicial trends, recognition of this group is currently limited to the judge's discretionary application of a sentencing discount and a pilot young adult list in one District Court. The law must take further steps to ensure substantive outcomes for young adult offenders. In particular, individuals with care and protection backgrounds, individuals with neurodisabilities and Māori are significantly overrepresented. This is not a developmental issue that infers that young adults can desist from crime over time, but a social issue that requires practical intervention.

A distinct response can promote a welfare-based approach compared to the current justice model. This article argues that the youth justice system should encapsulate offenders beyond the age of 17 up to 25 through a referral mechanism for eligible offenders. Eligibility operates on the presumption that young adults with care and protection backgrounds should be referred to the Youth Court. The key features and advantages of the youth jurisdiction make this approach viable. A "refer down" mechanism to the youth jurisdiction is not a "soft" approach that treats young adults as children but is a practical approach that utilises well-established procedures and responses that meet their welfare, social and developmental needs.

The criminal law should view the transition to adulthood for care leavers as an "exit pathway" opportunity rather than a criminogenic transition to the adult justice system. A referral mechanism is not a magic solution, it is just one way to advance the discussion of responding to young adults who offend. Over time, New Zealand may consider extending this proposed mechanism to other eligible young adult offenders. The recent amendments in the Orange Tamariki Act have recognised the vulnerability of young adults from care and protection backgrounds from a welfare perspective. The call is now for the criminal law to avoid leaving young adults hanging off a cliff edge.