

The Judicial Approach to the Youth Discount in Aotearoa New Zealand

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The youth discount represents the only specific legislative recognition of the relationship between the age of young adults and their offending. This article presents the first systematic review of the current judicial approach to youth as a mitigating factor. The review analysed 66 sentencing decisions involving young adults convicted of grievous bodily harm or burglary. The sentencing trends identified in the review demonstrate that the current judicial treatment of the youth discount is inconsistent. I argue this inconsistency is the result of some sentencing judges having misinterpreted the rationale that underpins this discount because of an artificial narrowing of the Court of Appeal's findings in Churchward v R [2011] NZCA 531. To address this inconsistency, I recommend introducing a guideline judgment to guide the use of the youth discount. This type of reform strikes an appropriate balance between flexibility and consistency in sentencing.

I Introduction

“Young adult” refers to the age group encompassing people aged 18 to 25 years old. This age group is plagued with underlying psychological and social vulnerabilities. Compared to the general population, young adults

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in New Zealand face higher rates of homelessness,¹ unemployment,² and mental health issues.³ Not surprisingly, there is a significant overlap between these factors and criminal offending. Exacerbating this relationship is the chasm between this age group and access to support services. After the age of 16 to 17 years old, access to funded social and health services declines.⁴ This combination of immaturity and limited social support creates a powder keg, which for many young adults will ignite into a period of criminal offending.

It is no wonder then that the offending rates for this age category are so alarming. Forty per cent of criminal apprehensions in New Zealand are of young people aged 15 to 24 years old;⁵ and recidivism rates for this age group also remain higher than any other.⁶ These statistics indicate that every year a significant number of young adults will interact with the criminal justice system and a significant number will go on to reoffend.⁷

Offenders aged 18 years and above are treated as adults by our criminal justice system. That means they will be sentenced under our adult regime (explained in part II) — compared to their younger counterparts who will reap the benefits of our youth justice system.⁸ The only specific legislative recognition of a young adult's age in the sentencing process is the potential availability of the youth discount — the discount provided in sentencing

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- 1 Baz Macdonald “NZ had around 19,000 homeless young people. Lockdown leaves them vulnerable to abuse and harm” (21 August 2021) Re: www.renews.co.nz.
 - 2 Statistics New Zealand “Youth unemployment rate three times national average” (2 December 2021) www.stats.govt.nz.
 - 3 A Wilson and M Nicolson *Mental Health in Aotearoa: Results from the 2018 Mental Health Monitor and the 2018/19 New Zealand Health Survey* (Te Hiringa Hauora | Health Promotion Agency, October 2020) at 1.
 - 4 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 [19].
 - 5 At [11].
 - 6 Department of Corrections “Prison facts and statistics — March 2020” (31 March 2020) www.corrections.govt.nz.
 - 7 In 2017 there were 25,268 unique offenders apprehended between the ages of 17 and 24. Referred to by Jan-Marie Doogue, Chief District Court Judge and John Walker, Principal Youth Court Judge in Jan-Marie Doogue and John Walker *Trial of Young Adult List Proposal in Porirua District Court: Procedural Fairness for the Young and the Vulnerable* (District Court of New Zealand, 29 August 2019).
 - 8 Andrew Becroft, Principal Youth Court Judge “Playing to Win — Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Justice System” (paper delivered at the Queensland Youth Justice Forum, Brisbane, 15 July 2015).

to recognise an offender's young age.⁹ Therefore, the application of this discount represents an important part of the sentencing process for young adults.¹⁰ In considering this discount, this article focuses on the sentencing of offenders aged between 18 and 25 years old, compared to younger offenders who are dealt with by the youth justice system.

Despite the inclusion of the principle of consistency in the Sentencing Act 2002, there is academic suggestion that the current use of the youth discount is inconsistent.¹¹ The purpose of this article is to offer the first systematic review of the judicial approach to youth as a mitigating factor. In part III, I present the findings of my review of the sentencing notes of 66 decisions for young adults convicted of burglary and grievous bodily harm.¹² In short, the review shows that the current judicial use of the youth discount is inconsistent. This inconsistency is present in both the decision to provide the discount and the extent of that provision.

In my view, this inconsistency is caused by a collection of sentencing judges having misinterpreted the rationale that underpins the youth discount as a result of a narrow reading of *Churchward v R*.¹³ That misinterpretation has caused these judges to determine the availability and extent of the youth discount by assessing whether the offending is "youthful". That approach, however, does not align well with the rationale for this discount. A discount for youth exists to recognise the causal relationship between an offender's age and their offending (detailed in part II). According to that rationale, the offending is mitigated by a person's *age*, not by the nature of their conduct. Therefore, the focus of the assessment should be on the *age* of the offender, not on whether their conduct appears "youthful".

In part IV, I recommend reform of the youth discount by introducing a guideline judgment. This judgment would direct sentencing judges to provide a discrete discount for youth. The extent of that discount would be determined according to two presumptive ranges depending on the offender's age and maturity. This type of reform strikes an appropriate balance between the need for both flexibility and consistency in sentencing.

9 Sentencing Act 2002, s 9(2)(a). See also Stephen Woodwark and Nessa Lynch "Decidedly but Differently Accountable"? — Young Adults in the Criminal Justice System" [2021] NZ L Rev 109 at 123.

10 I note that the initiatives around Te Ao Mārama and the Young Adult Sentencing List will apply to this age group. However, those reforms relate to procedural changes concerning this age group — they do not substantively address the content of sentencing for these offenders.

11 Woodwark and Lynch, above n 9, at 125.

12 This includes offences under ss 188 and 189(2) of the Crimes Act 1961.

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

II Background

A General legislative framework for the sentencing of young adults

After a person turns 18 years old, they will be treated as an adult in New Zealand's criminal justice system. The inclusion of an offender's age as a mitigating factor is the only statutory provision requiring a sentencing court to consider the relevance of a young adult's age to their offending.¹⁴ This provision sought to codify the long-standing judicial approach of referring to youth as a mitigating factor in sentencing.¹⁵ In doing so, Parliament did not provide any further guidance about the application of the youth discount.

The current judicial approach to sentencing a young adult is as follows. The judge will determine an appropriate starting point as they would have had the offending been committed by an adult.¹⁶ This will include reference to any applicable guideline judgments.¹⁷ Once the starting point has been set, the court will consider any relevant aggravating and mitigating factors that are personal to the defendant. Section 9(2)(a) of the Sentencing Act identifies that the age of an offender is a mitigating factor that must be considered to the extent that it is relevant. This shows that the age of an offender is a factor personal to the defendant and not a feature of the offending itself.¹⁸ This means that the objective seriousness of an offence (the focus of setting a starting point) is not tempered by an offender's age.¹⁹

Beyond s 9(2)(a), there is no statutory guidance as to how a discount for an offender's age applies. Instead, a body of case law has developed to guide the judicial use of a discount for youth. Importantly, there is no specific guideline judgment dealing with this discount.

14 Woodwark and Lynch, above n 9, at 123.

15 Geoff Hall "The Sentencing Act 2002 — new bottle, same wine?" (2002) 583 *LawTalk* 20 at 21.

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

17 *Overton v R* [2011] NZCA 648 at [22]. See also *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [40].

18 This is an important point when we consider the way *Churchward v R*, above n 13, has shaped the use of the youth discount. As this article explains, there is a trend now for some judges to grant the discount where the offending is "youthful" — in some ways, that is a comment on the nature of the offending, not about the offender.

19 *Pouwhare v R*, above n 17, at [91].

B Relevant case law for the youth discount

The case law establishes that there is no fixed discount for youth.²⁰ In some cases, it may have a significant effect on the end sentence, while in others the discount might be minimal or even denied.²¹ The decision to grant the discount, and its relative size, is primarily a factual inquiry that should also have regard to comparative cases.²² A sentencing judge must weigh the young person's age and the reasons for their offending against the objective seriousness of the offending and the prospects of rehabilitation.²³ Therefore, youth as a mitigating factor does not enjoy presumptive, or even paramount, weight over the final sentence.²⁴

In *Churchward*,²⁵ the Court of Appeal was asked to consider the appeal of two offenders sentenced for murder. They were aged 14 and 17 years old at the time of the victim's death. In the judgment, the Court summarised the reasons why youth had been held to be relevant to sentencing.²⁶ This was preceded by the Court's review of domestic case law, international sentencing guidelines for youth and relevant psychiatric evidence. The Court concluded:²⁷

Youth has been held to be relevant to sentencing in the following ways:

- (a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.
- (b) The effect of imprisonment on young people, including the fact that long sentences may be crushing on young people.
- (c) Young people have a greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult. (footnotes omitted)

20 *Diaz v R* [2021] NZCA 426 at [39].

21 *Pouwhare v R*, above n 17, at [96].

22 At [42].

23 At [83].

24 At [96].

25 *Churchward v R*, above n 13.

26 The Court of Appeal was not referring specifically to the application of the youth discount here. The appeal in this case concerned the relevance of youth in the decision to impose a life sentence and minimum period of imprisonment.

27 *Churchward v R*, above n 13, at [77].

In early 2023, the Court of Appeal released its decision in *Dickey v R*.²⁸ In this judgment the Court considered the sentencing appeals of three young people sentenced for murder with a minimum period of imprisonment of 10 years. At the time of their offending, each of the appellants was aged between 16 and 20 years old. Each appellant argued that their circumstances, including “their age, social deprivation and psychological conditions, render[ed] their sentence manifestly unjust”.²⁹ Within the decision, the Court considered the growing body of psychological research that relates to young offenders. The Court summarised the research findings that have arisen since the Court issued its decision in *Churchward*.³⁰

- (a) Adolescent behaviour reflects the slow pace of the development of those parts of the brain that control higher-order executive functioning, such as impulse control, risk assessment and planning ability. Young people behave and react differently from adults due to biological rather than behavioural or personality factors. As Ms Brook for the Crown said, “[a]ll young people suffer from these cognitive deficits; and all will eventually develop fully to overcome them (assuming no cognitive impairment exists)”.
- (b) Neurological development may not be complete until the age of 25.
- (c) Young persons who commit serious offences frequently exhibit other characteristics which also tend to mitigate culpability, notably intellectual deficits, mental illness and experiences of abuse or other childhood trauma.
- (d) Young people are more receptive to treatment and therefore have better prospects of rehabilitation than adult offenders, who find it more difficult to alter entrenched behaviours.

The Court went on to consider whether the research on adolescent brain development justifies greater weight being given to youth in murder sentencing. The Court concluded that although youth alone will not establish manifest injustice, young persons might present with a combination of mitigating circumstances that together might be capable of establishing that finding.³¹ However, the Court emphasised that the judgment was not to be treated as a guideline for the sentencing of young people convicted of murder.³² It is also important to acknowledge that this decision did not

28 *Dickey v R* [2023] NZCA 2 [2023], 2 NZLR 405.

29 At [4].

30 At [86].

31 At [177].

32 At [7].

substantively consider the relevance of these psychological findings to the application of the youth discount more generally. Given the extent of the inconsistency present in the judicial approach to the youth discount, I consider that this decision is unlikely to resolve the concerns my research has identified.

No substantive authority has been handed down by the Supreme Court regarding the application of the youth discount. However, in *Mehrok v R* — where the appellant had been sentenced for manslaughter — the Court denied an application for leave to appeal that concerned the provision of the discount.³³ In that decision, the Supreme Court made several interesting comments about this area of law.³⁴ A ground of appeal was that the sentencing Judge had erred in reducing the youth discount for lack of remorse and poor prospects of rehabilitation.³⁵

The appellant in *Mehrok* submitted that the earlier decisions had wrongly conflated the youth discount with discounts for remorse and efforts at rehabilitation. The Supreme Court acknowledged that it is likely it would need to consider this issue in the future. The present case was not an appropriate opportunity to do so, however, because the Court found the facts offered insufficient prospects of success.³⁶ This recognition by our highest court that there are difficulties with the law relating to the youth discount requiring revisiting makes it all the more important to examine its current application.

C The current psychological evidence surrounding this age group

Leading developmental psychology and neuroscience research conclusively shows that adolescents and young adults are different to adults.³⁷ In this part of the article, I summarise the key findings in the psychological literature relating to offending in young adulthood.

33 *Mehrok v R* [2021] NZSC 155.

34 His appeal against the sentence was dismissed by the Court of Appeal, *Mehrok v R* [2021] NZCA 370.

35 At [5] and [43].

36 At [21]. The Supreme Court found that the seriousness of the index offence, his age (he was 24 years old) and the fact he had assaulted children before the fatal attack all supported this conclusion.

37 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.

(1) Why do young people offend?

Offending in a person's youth is best understood from a developmental perspective.³⁸ The developmental stage of "emerging adulthood" is a period of transition for all young adults.³⁹ During this time, a lot of young people will face limited access to funded support services and an absence of protective factors (such as employment and marriage). Importantly, this period of social transition occurs at a time when a young person has not yet reached psychological maturity. The areas of the brain that are implicated in higher-order executive functioning are not fully developed until the age of 25.⁴⁰ These areas are responsible for impulse control, risk assessment and planning ability. We also know that young people are more susceptible to social influence than adults.⁴¹ Research indicates that there is a relationship between this social tendency and brain physiology in young adulthood. In other words, the gradual maturation of the prefrontal cortex is implicated in the ability of a person to engage in more complex and controlled responses to social information (such as peer pressure).⁴²

These findings suggest that a young person's offending may not be as culpable as an adult because of their impaired psychological functioning and limited social support. The causal relationship between a young adult's neuropsychological development and their offending is now well documented. Interestingly, the patterns identifiable in national crime rates support the proposition that there is a causal relationship between neurological development and offending in young adulthood.

The age–crime curve refers to the bell-shaped relationship between offending and age that is found in all western countries.⁴³ The prevalence

38 Laurence Steinberg and Elizabeth S Scott "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty" (2003) 58 *American Psychologist* 1009 at 1011.

39 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 & Public Policy* 729 at 730.

40 Anne-Marie R Iselin, Jamie DeCoster and Randall T Salekin "Maturity in Adolescent and Young Adult Offenders: The Role of Cognitive Control" (2009) 33 *Law & Hum Behav* 455 at 455.

41 Ian Lambie and Isabel Randell "The impact of incarceration on juvenile offenders" (2013) 33 *Clinical Psychology Review* 448.

42 Eric E Nelson and others "The social re-orientation of adolescence: a neuroscience perspective on the process and its relation to psychopathology" (2005) 35(2) *Psychol Med* 163.

43 Rolf Loeber and others (eds) *Persisters and Desisters in Crime from Adolescence into Adulthood: Explanation, Prevention and Punishment* (Routledge, London, 2016).

of offending increases from late childhood, peaks in adolescence and early adulthood, before declining after the early twenties.

Broadly speaking, there are two general trajectories of delinquency:⁴⁴

- The life-course persistent pattern is the result of the interaction between certain neurodevelopmental deficits and maladaptive environmental factors. This pattern is characterised by an early onset of offending that continues throughout the stages of development. Without successful intervention, these individuals are likely to continue offending throughout their lifespan.
- The adolescent-limited pattern is the more common trajectory, and it represents most young offenders. It is characterised by a short-lived period of antisocial and criminal behaviour during a person's adolescence and early adulthood.

These patterns demonstrate that during emerging adulthood young people all labour under a psychological deficit that can result in a period of criminal offending. Physiological maturation and increased social support then play an important role in a young adult's desistance from offending.

(2) Why do young people stop offending?

The literature shows that offenders on both trajectories of offending (life-course and adolescent-limited) are likely to reduce their rate of offending as they age.⁴⁵ The offending curve markedly drops off across a person's twenties.⁴⁶ At this time, the areas of a young person's brain that are implicated in higher executive functioning become more developed. Consequently, a young adult becomes more apt at impulse regulation, social control and decision-making. During the same period, social protective factors that are associated with desisting from offending often come into play; for example, employment, child-rearing and marriage.⁴⁷ Importantly, this neurological development and social transition eventually occurs for most young adults, which explains why a natural desistance takes place for most young offenders as they mature out of this age group.

44 Margaret C Baughman and others "Delinquency and Violent Behavior" in Thomas P Gullotta, Robert W Plant and Melanie A Evans (eds) *Handbook of Adolescent Behavioural Problems: Evidence-Based Approaches to Prevention and Treatment* (2nd ed, Springer, New York, 2014) at 450.

45 At 451.

46 Farrington, Loeber and Howell, above n 39, at 741.

47 Baughman and others, above n 44, at 451.

The psychological literature clearly shows why offending in early adulthood should be viewed as less culpable than offending in later life. A person's youth is causally implicated in their offending and therefore the age of the offender directly mitigates their offending. This is the rationale for the provision of a youth discount.

III Case Review

A *Justification for the review*

The case law emerging from the *Dickey* and *Mehrok* decisions supports the growing recognition of the relevance of youth in sentencing decisions. The case law also suggests, however, that the provision of the youth discount should be tempered by the seriousness of the offence committed.⁴⁸ In light of the tension between these two propositions, I wanted to investigate whether the current judicial treatment of the discount differed according to the seriousness of an offence.

To do so, I considered the judicial treatment of the youth discount in cases of both serious violent offending and less serious offending. Grievous bodily harm ("GBH") was selected as part of this review because it represents a form of serious violent offending that is not subject to substantial legislative restrictions on sentencing discretion.⁴⁹ Without legislative restriction, any trends found in the application of the discount are more likely to be indicative of judicial sentencing practices more broadly. To represent cases involving less serious offending, I included burglary sentencing decisions in this review. This comparison allowed me to form generalised conclusions about the judicial treatment of the youth discount. This research can support the judicial development of sentencing practices applicable to young adults.

B *Methodology of the case review*

The case review began with identifying an appropriate body of cases. The parameters of the review were cases where an offender was aged between

48 *Pouwhare v R*, above n 17, at [96]; and *Rapira v R* [2003] 3 NZLR 794 (CA) at [120].

49 GBH offending was subject to the three-strikes mandatory requirements during the period of my case review. The Three Strikes Legislation Repeal Act 2022 did not come into force until 16 August 2022. Six cases in the GBH review refer to these requirements. I decided to include these judgments because they offered insight into the way sentencing judges treat an offender's age in circumstances where Parliament had indicated that the offending is particularly serious.

18 and 25 years old at the time of the offending and was being sentenced for GBH or burglary as either the sole or the lead offence. Where the decision had been appealed, only the appeal was considered. Sentencing decisions were sourced from commercial legal databases using keyword searches.

Thirty-six GBH sentencing decisions were identified. Twenty-two of the cases were first-instance decisions. Twenty-nine burglary decisions were identified. Twenty-eight of these cases were appeals.⁵⁰

The age range of the offenders for each type of offence is shown below.

Age	18	19	20	21	22	23	24	25	Not stated	Totals
GBH	5	4	14	3	3	5	1	1	0	36
Burglary	7	5	4	1	4	1	3	3	1	29

After collating these cases, I read each of the sentencing notes. Each decision was then summarised within a table that identified the case name, offender’s age, charges, starting point, aggravating/mitigating factors of the offending, aggravating/mitigating factors personal to the offender, and end sentence. The table also included every quote from the cases that related to the offender’s age. From this table, I prepared the quantitative information that is presented in the figures below.⁵¹

I then conducted a thematic analysis of the quotes included in the table to identify the trends present in the judicial approach to sentencing young adults. Thematic analysis is the process of identifying patterns within qualitative data. From the quotes included in the table, I was able to identify the repetitive patterns that emerged in the sentencing notes regarding the treatment of an offender’s age in sentencing.

In combination, the quantitative and qualitative findings of the case review shed light on the current judicial approach to the youth discount.

C What is the current judicial approach to the youth discount?

In this section, I will demonstrate that the current judicial approach to the youth discount is inconsistent. This inconsistency is present in both the decision regarding whether to grant the discount and in deciding the extent of a discount to apply. When a youth discount is applied, we can see

50 *R v Lasike* HC Auckland CRI-4-44-7103, 7 September 2006 is the only first-instance decision.

51 Best efforts have been made to ensure the accuracy of the information and numerical data presented within the tables included in this article. Any mistakes remain the author’s own.

inconsistency in the form of that discount (whether it is discrete or combined with other mitigating factors), the way an offender's prior convictions are addressed, and in the treatment of other mitigating factors. Once I have shown that there is significant inconsistency in how this discount is used, I will argue that this inconsistency can be explained by some judges having misunderstood the rationale that underpins this discount as a result of a narrow interpretation of the *Churchward* decision.⁵²

(1) Inconsistency in determining whether the discount is available

In some instances, the availability of the youth discount is determined by a judge's discretion.⁵³

There is no fixed discount for youth and, by analogy with *Huata v R*, it was a legitimate exercise of the Judge's discretion to decline to give such a discount.⁵⁴ (footnotes omitted)

(22 years) — GBH

At 20 years of age a discount for youth was discretionary.⁵⁵

(20 years) — Burglary

However, other judges take the view that young offenders are *entitled* to receive the discount.

You were 18 at the time of this offending and you are entitled [to] a discount for youth.⁵⁶

(18 years) — GBH

You are still entitled to a discount for youth, you are still a very young man.⁵⁷

(20 years) — GBH

52 *Churchward v R*, above n 13.

53 *Diaz v R*, above n 20, at [39].

54 *Hukehuke v R* [2021] NZHC 817 at [38].

55 *Gardiner v Police* [2015] NZHC 1241 at [14].

56 *R v Walker* [2016] NZDC 21111 at [40].

57 *R v Douglas-Tera* [2019] NZDC 853 at [11].

This divergence of judicial opinion is worrying because it can result in an inconsistent availability of the youth discount. The table below breaks down the use of the discount for each offence. Broadly speaking, two-thirds of the cases resulted in the discount being granted (either discretely or in combination with other mitigating factors),⁵⁸ while a third of offenders were denied the discount.

Review	Discrete	Combined	Denied	Other
GBH	14	12	9	1 ⁵⁹
Burglary	9	10	10	0
Totals	23	22	19	1

The literature suggests that the gravity of the offence will play a significant role in determining the application of the youth discount.⁶⁰ If this is accurate, you would expect to see the youth discount being granted more frequently and in larger awards for burglary offending than GBH, given that GBH is intrinsically more serious offending. As my analysis will show, the seriousness of offending plays an inconsistent role in the application of the youth discount. This observation is supported by two key findings from the GBH cases. First, within those cases there are clear examples of offenders being granted a youth discount with serious offending. This undermines the claim that a denial of the discount is a result of a need to reflect the seriousness of the offending. Secondly, offenders who were denied the youth discount commonly received substantial discounts for other mitigating factors. If a sentencing judge was primarily concerned with the gravity of the offending, you would expect to see more reluctance to award any substantial discounts.

To demonstrate these findings, I have included tables below which compare GBH cases where the discount was denied with GBH cases where a discrete discount was granted. The cases are ordered by their starting points.

58 A discrete discount would see the youth discount awarded separately to other discounts. While a combined discount would provide a single discount for a combination of mitigating factors, including youth.

59 In *R v Hura* [2017] NZDC 3206 at [14] the sentencing Judge noted that the starting point was set with reference to the offender’s youth. Therefore, in this case a discount for youth was neither provided nor declined.

60 Geoff G Hall *Hall’s Sentencing* (online ed, LexisNexis) at [1.6.2(b)].

GBH offenders denied the youth discount

Starting point	Age	Discounts provided	Name
13yrs	23yrs	40% guilty plea, personal circumstances, and remorse	<i>Henry</i>
11.9yrs ⁶¹	21yrs	16.6% guilty plea	<i>Fane</i>
9yrs	19yrs	29% guilty plea, attempts to engage in restorative justice, and remorse	<i>Elisaia</i>
9yrs	23yrs	This was third-strike offending, so no youth discount was provided. However, the Judge noted that a combined discount of 23% would have been available for youth and guilty plea.	<i>Sanders</i>
8yrs	21yrs	30% guilty plea, mental impairment, and previous good character	<i>Cameron</i>
5.6yrs	24yrs	40% guilty plea and mental impairment	<i>Taylor</i>
5yrs	25yrs	25% guilty plea and personal circumstances	<i>Himiona</i>
4yrs	20yrs	No discounts provided	<i>Ponga</i>
2.2yrs	20yrs	27% guilty plea and time spent on electronically monitored bail	<i>Tapueluelu</i>

GBH offenders granted a discrete discount for youth

Starting point	Youth discount	Ages	Total discount (including youth)	Offender
15yrs	5%	23yrs	30%	<i>Roake</i>
10yrs	20%	20yrs	45%	<i>Su'a</i>
7yrs	7%	20yrs	22%	<i>Patiole</i>
6.10yrs	10%	19yrs	44%	<i>Heke</i>
6.6yrs	7%	20yrs	40%	<i>Ionne</i>
6.6yrs	33%	20yrs	41%	<i>Douglas-Tera</i>
6yrs	10%	20yrs	40%	<i>Forster</i>
6yrs	20%	18yrs	42%	<i>Karekare</i>
5.6yrs	20%	20yrs	40%	<i>Wiseman</i>
4.9yrs	5%	22yrs	50%	<i>Petera</i>
4yrs	16%	20yrs	26%	<i>Wotton-Kerr</i>
4yrs	20%	19yrs	52%	<i>Ihaia</i>
3.6yrs	20%	20yrs	48%	<i>Prasad (in Wiseman)</i>
3.2yrs	10%	19yrs	50%	<i>Kapene</i>

61 11.9yrs refers to a starting point of 11 years nine months' imprisonment. This numbering style is used throughout the tables.

By comparing these two tables we see that cases where a youth discount is denied do not represent the highest starting points in the GBH cases. Therefore, some judges are prepared to provide a youth discount even in cases of serious offending. This divergence in judicial approach was also reflected in the sentencing notes. Some judges adopted the view that serious offending prohibits the availability of the discount:

I agree with the Judge's view that the vicious attacks on the victims could not be mitigated by reference to Mr Hukehuke's youth. This was not impulsive, one-punch, reactive offending.⁶²

(22 years) — GBH

Meanwhile, other judges were still prepared to award a discount for youth, even when the offending was particularly grave or caused serious harm:

Despite the seriousness of the charge, the Judge was correct to acknowledge that all three of the factors mentioned in *Churchward* are engaged and relevant here.⁶³

(18 years) — GBH

Additionally, where an offender is denied the discount, it is not necessarily the case that they will receive relatively limited credit for other mitigating factors. There were numerous examples of offenders facing high starting points also receiving total discounts of more than 30 per cent, resulting in a substantial reduction in sentence. This undermines the claim that a refusal to grant the youth discount is the result of a judicial finding that the gravity of the offence requires a limited reduction in the sentence.

Therefore, the GBH cases have illustrated that the seriousness of the offence does not play a consistent role in the judicial treatment of the youth discount. In fact, a review of both the GBH and burglary cases reveals that the specific age of the offender plays a more significant role in the judicial decision to provide the youth discount. Within the cases, there is a trend for older offenders to be denied the discount or provided a limited discount for their youth.

⁶² *Hukehuke v R*, above n 54, at [37].

⁶³ *Taiapa v R* [2020] NZHC 3355 at [71].

Cases where a youth discount was denied

Age	Starting point	Discounts provided	Name
19yrs	9yrs	29% guilty plea, attempts to engage in restorative justice, and remorse	<i>Elisaia</i>
19yrs	4yrs	25% guilty plea	<i>Herewini</i>
19yrs	3yrs	20% guilty plea	<i>Te Hau</i>
20yrs	4yrs	No discounts provided	<i>Ponga</i>
20yrs	2.2yrs	27% guilty plea and time spent on electronically monitored bail	<i>Tapueluelu</i>
21yrs	12yrs	No discounts provided	<i>Fane</i>
21yrs	8yrs	30% guilty plea, mental impairment, and previous good character	<i>Cameron</i>
21yrs	5yrs	25% guilty plea	<i>Skipper</i>
22yrs	2.3yrs	10% guilty plea, and 2mths for remorse and rehabilitation	<i>Tinomana</i>
22yrs	Sentenced to 60hrs community work	On appeal, she was discharged without conviction	<i>Campbell</i>
23yrs	13yrs	40% guilty plea, personal circumstances, and remorse	<i>Henry</i>
23yrs	9yrs	This was third-strike offending, so no youth discount was provided. However, the Judge noted that a combined discount of 23% would have been available for youth and guilty plea.	<i>Sanders</i>
23yrs	4yrs	25% guilty plea and co-operating with police	<i>Barton</i>
24yrs	5.6yrs	40% guilty plea and mental impairment	<i>Taylor</i>
24yrs	2.9yrs	25% guilty plea	<i>Poole</i>
24yrs	22mths	25% guilty plea	<i>Anderson</i>
25yrs	5yrs	25% guilty plea and personal circumstances	<i>Himiona</i>
25yrs	4.6yrs	25% guilty plea, 11% for time spent on electronically monitored bail, 2mths for personal circumstances	<i>Singh</i>
25yrs	15mths	33% guilty plea and first custodial sentence	<i>Tipiwai</i>

Around the age of 20 years old, judges appear to be more likely to take a restrictive view of the discount's availability. Of the 19 cases that did not

provide a discount for youth, 16 offenders were aged above 20 years old. Therefore, the age of the offender looks to be playing a more significant role in determining the discount's availability than the seriousness of the offence.

However, even the age of the offender is not a reliable predictor of the discount's treatment. An analysis of the sentencing notes clearly shows that judges take different views on the influence that an offender's specific age should play in this assessment:

You were 21 at the time of the offending. This is certainly pushing the upper end of the qualifying range.⁶⁴

(21 years) — GBH

I account for your youth, your rehabilitative prospects and your background. At 23 years old, you are only a young man. Overall, I would have awarded a discount of 20 per cent in recognition of these factors.⁶⁵ (footnotes omitted)

(23 years) — GBH

In my view though, at 24 years of age you are not entitled to a discount for youth.⁶⁶

(24 years) — GBH

The mitigating features identified by the Judge were appropriate (although only modest credit could be given for his age since he was 24 at the time of sentence).⁶⁷

(24 years) — Burglary

However, at 25 years of age, Mr Singh can no longer be considered a youth. ... I do not consider that Mr Singh's age warrants a separate discount.⁶⁸ (footnotes omitted)

(25 years) — Burglary

It is troubling that judges who state that an offender's age precludes them from receiving the discount do not appear to have considered case law where a similarly aged offender was awarded the discount. Given the potential impact that this mitigating factor can have on the end sentence, it is important that a consistent approach is applied to the determination of the discount's availability.

64 *R v Cameron* [2016] NZHC 2604 at [31].

65 *R v Walford* [2022] NZHC 69 at [31].

66 *R v Taylor* [2020] NZHC 3174 at [28].

67 *R v Chin* CA43/04, 10 June 2004 at [40].

68 *Singh v Police* [2016] NZHC 1739 at [34].

Notably, these conclusions were reached from an assessment of sentencing notes where the discount is predominantly *explicitly* discussed. Within the review, however, there were examples of cases that did not mention the youth discount at all. Young adults who receive a sentence where the availability of the youth discount is not considered may choose to pursue an appeal against their sentence. Section 31 of the Sentencing Act sets out a general requirement for a sentencing judge to give reasons for the imposition of a sentence or for other means of dealing with an offender. However, s 31(4) clarifies that a failure of a court to mention a mitigating factor (such as youth) is not in itself grounds for an appeal. Therefore, an appellate court will only intervene in sentencing where the sentence imposed was manifestly excessive or involved a material error.⁶⁹ Where a sentencing judge has not referred to an offender's age, a successful appeal may occur where the appellate court finds that a youth discount is available. This is because the provision of an additional discount is likely to represent more than "tinkering" with the end sentence.⁷⁰ This will enable a finding that the initial sentence was manifestly excessive.⁷¹ While this process does allow for the eventual correction of a sentence that erroneously excluded a discount for youth, it must be viewed with some scepticism because the correction of a sentence thereby relies on the offender pursuing an appeal.

It is not desirable to rely on the appeal process to correct the erroneous omission to consider the availability of the youth discount. Within the case review, it was more common to see the availability of the discount being overlooked in the GBH cases, which had a much higher proportion of first-instance decisions (that had not been appealed) than the burglary cases (which were predominantly appeals). This suggests that a number of sentencing decisions each year may erroneously overlook the availability of the youth discount *and* these decisions are not necessarily being corrected on appeal. Accordingly, there is a need for the court to address the inconsistency present in the provision of the discount so that it will be appropriately considered at first instance.

(2) Inconsistency in the extent of the discount provided

Where a sentencing judge does decide that the youth discount is available, the extent and form of that discount is also inconsistently determined.

69 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [31]–[35].

70 *Maihi v R* [2013] NZCA 69 at [21].

71 Judges tend to determine whether a variation would be "tinkering" by reference to the proportionate reduction it would make in the end sentence, compared to the specific time adjustment involved. Therefore, it is more common for small variations to be made to the length of a short sentence than to longer sentences. See *Deslaurier v Police* [2022] NZHC 1078.

(a) *The form of the discount*

The significance of the form of the discount is that it affects the ability of counsel and judges to then compare the credit provided to comparative offenders. Where the youth discount is granted discretely a judge will provide the specific percentage or number of months that are to be deducted to reflect credit for youth. By contrast, a combined discount will provide a cumulative percentage or time reduction to reflect credit for a combination of mitigating factors. A combined discount can obscure the specific credit that is provided to an offender to reflect their youth. If comparison cannot occur between similar cases, the ability of a court to apply the discount consistently is undermined.

Within the cases reviewed, there did not appear to be a judicial preference towards a certain manner of providing the discount. There was an almost equal number of discrete discounts provided to combined discounts. There was also a trend for the largest discrete discounts to be provided to the younger offenders (specifically those younger than 20 years). The table below sets out the discrete discounts granted.

Cases providing a discrete discount

Youth discount	Age	Starting point	Total discount	Name
5%	22yrs	4.9yrs	50%	<i>Petera</i>
	23yrs	15yrs	30%	<i>Roake</i>
7%	20yrs	6.6yrs	40%	<i>Ionne</i>
	20yrs	7yrs	22%	<i>Patirole</i>
10%	19yrs	3.2yrs	50%	<i>Kapene</i>
	19yrs	6.10yrs	44%	<i>Heke</i>
	20yrs	3.2yrs	30–35%	<i>Matangi</i>
	20yrs	6yrs	40%	<i>Forster</i>
	Not stated ⁷²	3.9yrs	50%	<i>Price</i>
15%	18yrs	2.6yrs	40%	<i>Bracey</i>
	18yrs	3.2yrs	42%	<i>Woodmass</i>
	18yrs	3.6yrs	43%	<i>Leach</i>
16%	20yrs	4yrs	26%	<i>Wotton-Kerr</i>
18%	18yrs	2.9yrs	18%	<i>Rarere</i>

72 Although the judgment alludes to the fact that the offender is in their early twenties.

Youth discount	Age	Starting point	Total discount	Name
20%	18yrs	6yrs	42%	<i>Karekare</i>
	19yrs	4yrs	52%	<i>Ihaia</i>
	19yrs	4.6yrs	33%	<i>McAllister</i>
	20yrs	3.6yrs	48%	<i>Prasad (in Wiseman)</i>
	20yrs	5.6yrs	40%	<i>Wiseman</i>
	20yrs	10yrs	45%	<i>Su'a</i>
22%	20yrs	2.11yrs	43%	<i>Tuwhangai</i>
33%	20yrs	6.6yrs	41%	<i>Douglas-Tera</i>
Substituted sentence	18yrs	12mths	25%	<i>Tutakangaha</i> ⁷³

Here we can also see that the starting point of the sentence does not have a consistent effect on the size of the youth discount provided. For example, five per cent discounts were provided to offenders with very different starting points of four years nine months' imprisonment and 15 years' imprisonment (being *Petera* and *Roake* respectively).

This inconsistency supports the earlier observation that factors beyond the gravity of the offence play a significant role in the determination of the discount's availability. There are clear examples of serious offending, represented by high starting points, being granted a substantial youth discount. For example, the largest discrete discount (33 per cent) was provided to an offender who received a high starting point of six years six months' imprisonment — *Douglas-Tera* was 20 years old. By comparison, in *Bracey* an 18 per cent discount was provided to an 18-year-old offender who received a starting point of only two years and six months' imprisonment.

In a combined discount, the youth discount is provided alongside a range of factors including remorse, rehabilitative prospects, mental impairment and cultural deprivation. Twenty-two cases provided a combined discount. Seven of those cases contained a global discount to reflect all the personal mitigating factors present. The remaining 13 cases provided a combined discount (that included youth) and additional discounts for other discrete factors.⁷⁴

73 This appellate decision does not expressly set out the sentence that should have been provided. Instead, the Court determined that an appropriate sentence would have been less than the time already served. That finding resulted in a decision to commute the sentence to time already served. The Court did note, however, that an appropriate sentence would have provided a discount for youth.

74 Two cases in this table are difficult to classify given their departure from the sentencing methodology in *Taueki v R* [2005] 3 NZLR 372 (CA) and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583.

Cases providing a combined discount

Age	Combination	Combined discount	Total discount	Offender
18yrs	Youth, guilty plea, and tragic family circumstances	60%	60%	<i>Shaw</i>
	Youth, personal circumstances, and guilty plea	58%	58%	<i>Smaill</i>
	Youth, remorse, and rehabilitation	33%	53%	<i>Walker</i>
	Youth, mental impairment, and rehabilitation	30%	56%	<i>Taiapa</i>
	Youth and remorse	20%	45%	<i>Paraha</i>
	Youth, reparation, and remorse	16.6%	18%	<i>Potae</i>
19yrs	Youth, mental impairment, and guilty plea	35%	35%	<i>Tukaharaina</i>
	Youth, personal circumstances, and rehabilitative attempts	17%	50%	<i>Wood</i>
20yrs	Youth, personal circumstances, and guilty plea	30%	30%	<i>Gardiner</i>
	Mental impairment, youth, and restorative justice	20%	43%	<i>Ramirez</i>
	Youth and rehabilitation	20%	35%	<i>Milne</i>
	Youth and rehabilitation	15%	40%	<i>Westall</i>
	Youth and rehabilitation	5%	5%	<i>Goulton</i>
	In determining the totality of the offending, the Judge considered his youth and rehabilitative prospects.			
22yrs	Guilty plea and personal circumstances (including youth)	20%	20%	<i>Lasike</i>
	Youth and mental impairments	20%	40%	<i>Nelson</i>
	Rehabilitation, youth, addiction, and cultural factors	20%	45%	<i>Tai</i>
	Youth, previous good character, rehabilitation, and mental impairment	15%	45%	<i>Hukehuke</i>
23yrs	Personal background, rehabilitation, and youth	20%	35%	<i>Walford</i>
	Restorative justice, rehabilitation, and youth	5%	25%	<i>Nuku</i>
24yrs	Does not explicitly set a starting point or specific discounts. Mitigating features are that he was a secondary party, pleaded guilty, youth, moderate property lost, and lack of personal support. End sentence of 3yrs imprisonment imposed. Not corrected on appeal.			<i>Chin</i>
25yrs	Youth, rehabilitative efforts, and personal circumstances	2%	35%	<i>Moses</i>

(b) *Effect of prior convictions*

The effect of an offender's prior convictions is another area of inconsistency in the use of the youth discount. The current practice of referring to this factor in determining the discount's availability and extent risks double counting this aggravating factor. A growing body of psychological research also questions the validity of applying this uplift to young offenders.

Case law has established that the double counting of any aggravating factor should be avoided in sentencing. For example, it would be erroneous for a judge to refer to prior convictions when setting the starting point and to then apply an uplift for this factor.⁷⁵ An uplift for prior convictions should only be applied after the starting point is set.⁷⁶

Within the case review, it was common for judges to impose an uplift for an offender's prior convictions, particularly when these included similar offences. There was also a trend for judges to refer to an offender's prior convictions when determining the availability and extent of the youth discount.⁷⁷

[36] For a youth aged 19 years at the time of the offending, Mr Elisaia's prior criminal history makes disturbing reading. Having previously appeared on a number of occasions in the Youth Court, between 2011 and 2013, Mr Elisaia appeared frequently in the District Court. More recently, he has been sentenced to imprisonment on no fewer than 12 occasions, though some sentences were served concurrently. ...

[37] In those circumstances, Mr Elisaia must be regarded as someone from whom society needs protection. The Judge did not err in failing to give a discrete credit for youth.
(19 years old) — GBH

There was also a trend where some judges did not appear to consider the availability of the youth discount at all in cases where the offender had a long criminal history — even when the offender was particularly young.

In the present case the appellant at a regrettably young age has become an experienced criminal, showing little concern for the property of others.⁷⁸
(19 years) — No youth discount mentioned — Burglary

75 *Singh v R* [2011] NZCA 139 at [15].

76 *Stuart v R* [2021] NZCA 539 at [15].

77 *Elisaia v R* [2015] NZCA 516 at [36]–[37].

78 *Te Hau v Police* HC Auckland AP-55/01, 26 February 2002 at [6].

We are of the view that the Judge was entitled to sentence Mr Herewini on the basis that he is a recidivist. Although only 19 years old at the time of sentencing, this was his fifth appearance before the Court on burglary charges in a period of less than two years. In light of his prior offending and the nature of these offences, a term of imprisonment of four years, reduced to three years because of the guilty plea, is not considered by us to be manifestly excessive.⁷⁹

(19 years) — No youth discount mentioned — Burglary

These approaches involve the risk of double counting because prior convictions can be used to apply an uplift to the starting point and then also used to refuse or minimise the youth discount. The sentencing notes considered in the case review do not mention this risk. The current absence of a requirement for sentencing judges to consider the relationship between youth and aggravating factors enables this practice to exist unchallenged.

Additionally, a growing body of psychological research questions whether it is even appropriate for this uplift to be applied with young offenders.⁸⁰ The rationale that underpins an uplift for prior offending is not consistent with the research surrounding this age group.

The justification for applying this uplift relies on three established reasons. Prior convictions are thought to:⁸¹

- serve as an indication of character and therefore culpability;
- support a need for a greater deterrent response; and
- provide an indication of an offender's risk of recidivism.

The issue here, however, is that the weight of psychological evidence shows that young adults experience a natural desistance in offending as they reach full maturity. Maturation has been linked with impulse regulation, reliance on internal standards in making decisions, and the ability to evaluate the costs/benefits of actions.⁸² The underdevelopment of these skills is implicated in criminal behaviour. These findings indicate that a young adult offender may not be as culpable as an older adult because of their impaired psychological functioning.

We also know that offending will naturally decline after a certain age. As a person ages, they usually develop the skills necessary to regulate their own behaviour and they become less motivated to offend because of their

79 *R v Herewini* CA422/01, 2 May 2002 at [12].

80 This research was discussed earlier in part II(C).

81 *Reedy v Police* [2015] NZHC 1069 at [19].

82 Iselin, DeCoster and Salekin, above n 40, at 455.

stabilised lifestyle.⁸³ A small portion of young people will continue to offend into adulthood — this reflects the life-course pattern of delinquency. As explained in part II, however, the more common trajectory is the adolescent-limited pattern of delinquency. In early adulthood, recidivism rates for both patterns of delinquency can be reduced through the provision of wraparound support systems and individualised treatment.⁸⁴

The judicial approach of imposing an uplift for prior convictions with young adults does not reflect an understanding of this research. One of the justifications for uplifting the starting point is the belief that prior convictions reveal a general contempt for the law which escalates culpability.⁸⁵ This does not fit well with the research findings. A young person's prior offending is most accurately described as a reflection of their impaired maturity. Therefore, unlike an adult offender, their prior convictions should not be taken as indicating a flawed character. The research also supports that young people will naturally desist in offending once they reach a certain age or level of maturity.⁸⁶ That finding undermines the second rationale of this uplift — that prior offending suggests a need for a greater deterrent response. Prior convictions in this age group are not yet predictive of a future of criminal offending, because that natural desistence will occur for most of this group. That undermines the final rationale that prior convictions indicate a risk of recidivism. The research suggests that the incarceration of a young person has the effect of delaying the onset of the protective factors that are associated with a desistence from offending.⁸⁷ Interestingly, the sentencing notes revealed a judicial recognition of the relationship between imprisonment and recidivism for young people:

Furthermore, a sentence of imprisonment would likely be particularly difficult for the appellant, given his young age and challenges with adapting to that environment, an issue that is again augmented by his intellectual disability. The appellant's prospects for rehabilitation are also positive.⁸⁸

(18 years) — GBH

On the other side, a lengthy prison sentence will inevitably increase your exposure to, while still young and immature, gang influence. It borders on naïve to think that sending you into a world where brutality is idolised will do anything positive for your rehabilitation. On the contrary, gang

83 Farrington, Loeber and Howell, above n 39, at 730.

84 Gullotta, Plant and Evans, above n 44, at 455.

85 *R v Power* [1973] 2 NZLR 617 (CA) at 618; *Veen v R* [No 2] (1988) 164 CLR 465 at 478.

86 Farrington, Loeber and Howell, above n 39, at 741.

87 Lambie and Randell, above n 41, at 449.

88 *Taiapa v R*, above n 63, at [71].

recruitment of young Maori men in prisons is a matter upon which I can take judicial notice.⁸⁹

(18 years) — GBH

Unfortunately, it does not appear that this recognition has resulted in the development of a more nuanced approach to the treatment of prior convictions in sentencing young adults.

(c) *Relationship with other mitigating factors*

Judicial understanding of the relationship between youth and other mitigating factors is a further issue. The case review revealed that the youth discount is commonly applied in combination with other mitigating factors:⁹⁰

I recognise that you are a young man and I recognise you have got rehabilitative prospects and I also recognise that you are remorseful for your offending ... I give you [a] 15 percent discount for that.

(20 years) — GBH

In some cases, however, judicial engagement with the relationship that might exist between a person's age and other mitigating factors — such as their ability to demonstrate remorse or rehabilitative prospects — is lacking:⁹¹

You are resigned to a life in prison, believing yourself to be “too old to change”. You are 23. ...

You represent, in Ms Quince's words, “the worst kind of offender in many ways”: you have an established pattern of violent offending, and there is little evidence suggesting you have any insight into, or active remorse over, your actions. That is what has been modelled to you by much of your family and your community, and you have yet seen no reason to act otherwise. Ultimately, Ms Quince says a finite and proportionate sentence, served in a facility providing for rehabilitation, will enable you to make the changes you need. But you must want to make those changes.

(23 years old) — GBH

Here the sentencing Judge has overlooked the relationship that exists between a person's maturity and their ability to demonstrate remorse. That

89 *R v Karekare* [2018] NZHC 1364 at [30].

90 *R v Forster* [2017] NZDC 3787 at [39].

91 *R v Sanders* [2019] NZHC 164 at [11] and [17].

oversight has resulted in the provision of a harsher sentence than might have otherwise been given if this relationship had been fully appreciated.

In *Woodmass v Police*, the High Court acknowledged that the sentencing Judge had failed to correctly assess the nature of the appellant's offending.⁹²

I do not consider the Judge was correct to decline a discount for Mr Woodmass' youth. The Judge considered the primary driver of the offending was not impulsive offending or immature decision making but Mr Woodmass' underlying personality disorder, substance abuse and gang involvement.

(18 years) — Burglary

Here the appellate Court has determined that the offender's age was interconnected with his mental impairments (including substance use) and gang involvement. In many ways, these factors are indicative of youth because a person's age is inherently connected with their impulse control and decision-making ability. Refusing to grant the discount because these factors were involved in the offending misunderstands that causal relationship.

A better judicial approach to sentencing a young person would involve the careful consideration of how a person's young age might affect the presence of certain aggravating and mitigating factors. This type of approach would better align with the psychological evidence surrounding the relationship between youth and the other factors listed in s 9 of the Sentencing Act. This assessment would also go further than the mere recognition by the Court in *Dickey* that young people are likely to present with several mitigating factors.⁹³

In summary, the current judicial approach to the youth discount is both inconsistent and divorced from the psychological evidence base.

D *Why is there inconsistency in the judicial approach to the youth discount?*

The case excerpts included in this article demonstrate that judges chose to rationalise their use, or rejection, of a youth discount in a range of ways. There was a noticeable trend of sentencing judges justifying their treatment of the discount by reference to the *Churchward* decision. These judges appear to have interpreted *Churchward* as providing "criteria" from which the availability and extent of the discount can be assessed. That interpretation centres around the following paragraph:⁹⁴

92 *Woodmass v Police* [2019] NZHC 2503 at [39].

93 *Dickey*, above n 28, at [177].

94 *Churchward v R*, above n 13.

Youth has been held to be relevant to sentencing in the following ways:

- (a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.
- (b) The effect of imprisonment on young people, including the fact that long sentences may be crushing on young people.
- (c) Young people have greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult. (footnotes omitted)

Some judges were more likely to award the discount where they considered that one, or all, of these “criteria” were implicated in the offending. To illustrate this trend, I have included quotes below from a pair of unrelated cases decided by the same sentencing Judge on the same day. The Judge rationalised that only the offending of the 18-year-old could be described as impulsive and therefore requiring recognition for youth.

I am satisfied that, while the factors relied upon justified a two years nine months’ starting point on the basis of the offending, some discount ought to have been made on account of the appellant’s youth. The brazen nature of the offending, which carried not only a high risk of injury to the participants and bystanders but also a high risk of apprehension, is referable, to a degree which ought to have been recognised, to the impulsive behaviour and risk-taking of adolescents.⁹⁵

(18 years) — Burglary

This was not impulsive offending of the kind which I considered should be given some acknowledgement in another appeal I heard on the same day [*Rarere*], and on which the judgment is released contemporaneously with this.⁹⁶

(21 years) — Burglary

In both quotes, in determining the extent of the youth discount to apply, the sentencing Judge refers to whether the offending was impulsive. It is my thesis that *Churchward* has significantly shaped the way that some judges treat the youth discount. As these quotes demonstrate, certain judges appear to have interpreted *Churchward* as setting out the circumstances where a youth discount should be provided or maximised. This is often reflected

95 *Rarere v Police* [2012] NZHC 779 at [39].

96 *Skipper v Police* [2012] NZHC 783 at [47].

by a judicial focus on assessing the “impulsivity” of the offending (as in both of the cases quoted above) — representing the first point made in the *Churchward* paragraph.⁹⁷ This is clearly visible also in the sentencing notes of the following cases:

The next issue is your relative youth. You are not under 20 but you are 23 years of age and I have to have regard to what the Court said in *Churchwood* [*sic*]. ... young men often do not have the mental maturity to be able to think through the consequences of your actions and that is very much the situation that you are in. Therefore, I will give you limited credit for your youth.⁹⁸ (footnotes omitted)

(23 years) — GBH

In the present case, Ms Matangi’s offending was certainly serious and the sentencing principles of denunciation and deterrence are engaged. Nevertheless, I also consider it a case where the factors stated in *Churchward* are relevant.⁹⁹ (footnotes omitted)

(20 years) — Burglary

Mr Wiseman was 20 years old. Given the correlation between the recognised factors of risk-taking and impulsive decision-making and Mr Wiseman’s actions, I consider a youth discount of 20 per cent is appropriate.¹⁰⁰

(20 years) — GBH

Although a youth discount may be available for offenders even older than Mr Tinomana in some cases, there is little evidence that Mr Tinomana’s offending was as a result of a developing maturity or due to his relatively young age.¹⁰¹ (footnotes omitted)

(22 years) — Burglary

I accept Mr Taumihau’s submission that the discount is too low. The present convictions have all of the hallmarks of youthful, impulsive, stupid, substance-fuelled offending, committed by a young person without structure in his life.¹⁰²

(22 years) — Burglary

97 *Churchward v R*, above n 13, at [77].

98 *R v Roake* [2017] NZDC 18312 at [70].

99 *Matangi v Police* [2018] NZHC 1479 at [62].

100 *Wiseman v R* [2018] NZHC 1684 at [58].

101 *Tinomana v Police* [2017] NZHC 794 at [42].

102 *Nelson v Police* [2019] NZHC 2434 at [39].

Even if youth was not the primary driver, I consider that is not a sufficient reason to deny a discount. While concerning, Mr Woodmass' offending has the attributes of youthful offending: impulsive or spur of the moment offending (to evade Police) and opportunistic, relatively petty crime.¹⁰³

(18 years) — Burglary

Here we can see clear examples of sentencing judges refusing to grant — or limiting the provision of — the youth discount because they considered that the offending was not impulsive.¹⁰⁴ Judges who have interpreted *Churchward* in this way will often restrict the provision of the discount to offending that appears “youthful” — in other words, actions that can be considered impulsive. This misinterpretation is concerning for two reasons. First, it creates another risk of double counting certain aggravating factors. Secondly, it unjustifiably limits the availability of the discount to offending that appears “youthful”.

Where a judge refuses to grant the discount because they consider that the offending was not “impulsive”, it is possible that the sentence's starting point has already been elevated by a finding that the offence was premeditated or planned. These factors are relevant to a judge's assessment of the offence seriousness.¹⁰⁵ In these situations, the lack of “impulsivity” in the offending has been counted against an offender twice — to increase the starting point and to justify the refusal of the youth discount.

The case law that establishes the current sentencing methodology clearly provides that the starting point must be determined without reference to those factors personal to the defendant.¹⁰⁶ For example, the age of an offender is not relevant to setting the starting point because this is a factor personal to the defendant.¹⁰⁷ It is not a feature of the offending itself. This means that the objective seriousness of an offence (the focus of setting a starting point) is not tempered by an offender's age.¹⁰⁸

The judicial trend of restricting the youth discount to offending that appears impulsive begins to blur the distinction between factors personal to the defendant and those that are part of the offending. Considering whether the offending appears “youthful” starts to look like an evaluation of the nature of the offending. This approach does not align well with the legislation or

103 *Woodmass v Police* [2019] NZHC 2503 at [39].

104 See *Tinomana v Police*, above n 101, at [42]; and *Skipper v Police*, above n 96, at [47].

105 *R v Mako* [2000] 2 NZLR 170 (CA) at [36].

106 *R v Mako*, above n 105.

107 *Overton v R*, above n 17, at [22]; and *R v E*, above n 16, at [19].

108 *Pouwhare v R*, above n 17, at [91].

traditional sentencing methodology.¹⁰⁹ It is also out of step with the current base of psychological evidence. As this article has explained, a young adult is less culpable than an older person because their age is causally implicated in their offending due to the associated delays in neurological development and the absence of protective factors. Therefore, it is the *age* of the offender that should mitigate their offending, not the nature of their conduct and whether it appears “youthful”.

In summary, the misapplication of *Churchward* by some judges is problematic because it has shaped their treatment of the youth discount in a way that does not align with sentencing methodology, legislation or psychological evidence. Treating *Churchward* as having provided “criteria” for the discount limits its application to circumstances where the offending appears “youthful”. This treatment of *Churchward* has not been addressed by the Court of Appeal’s more recent decision in *Dickey*. Again, in that decision the Court has only provided a summary of the research findings that are relevant to this age group. It has not explicitly addressed the application of these findings to the sentencing of young adults for offences beyond murder. Given the extent of the inconsistency in how the youth discount is applied, I consider that explicit guidance is needed, in the form of a guideline judgment, to address the concerns raised by this case review.

The trends identified in this case review are also likely to disproportionately affect certain groups. We know that Māori are overrepresented at every stage of the criminal justice process. It follows that the inconsistencies present in the judicial approach to the youth discount are likely to significantly impact the sentencing of young adult Māori. That is particularly concerning when you consider that the youth discount can be the difference between a custodial and community-based sentence. Māori also have higher rates of unemployment, and lower educational attainment than non-Māori.¹¹⁰ That is important when you consider that these social factors play an important role in the natural desistance from offending that young adults experience as they age.¹¹¹ This is an area that would benefit from further research.¹¹²

109 Under the *R v Taueki* and *Moses v R*, above n 74, methodology, the age of an offender is considered during stage two of sentencing — after the starting point has been set. See Hall, above n 60, at [I.6.2(b)] for more guidance.

110 Juan Tauri “Indigenous perspectives and experiences: Maori and the criminal justice system” in Trevor Bradley and Reece Walters *Introduction to Criminological Thought* (2nd ed, Pearson, Auckland, 2011) 187.

111 As discussed in part II.

112 The purpose of this article is to shed light on the current judicial use of the youth discount. Further research might build on these findings to examine the broader impact of these sentencing trends in the context of overrepresentation within the criminal justice system.

IV Recommendations

The previous part established that there is inconsistency in the way the youth discount is applied. We can see that inconsistency in both the decision regarding the availability of the discount and its extent. In this part, I suggest how the youth discount might be reformed. I will present the case for introducing a guideline judgment to inform the use of judicial discretion relating to this discount. In doing so, I will consider the alternative reform options suggested in the literature, before evaluating the guideline judgments used in Scotland and England. My recommendation will include suggestions about the content to be included in a guideline judgment, as well as identifying the potential limitations of this approach.

A Potential reform options

Generally, the literature discusses three different options for reforming how young adults are sentenced.

The first option would extend the youth justice jurisdiction to include this age group. Under this reform, young adults would be sentenced according to the youth justice regime.¹¹³ The second option would be to create an entirely distinct young adult jurisdiction.¹¹⁴ This would involve introducing new legislation and court processes to reflect the needs of this age group.¹¹⁵ The third option is reforming the youth discount under the current sentencing regime.

Although others have claimed that the first two proposals would significantly improve the state of young adult justice in New Zealand, I argue that sentencing reform represents the most realistic solution for this age group. Introducing a distinct young adult jurisdiction, or extending the youth jurisdiction, would require major legislative change. Even if there is the political will, that type of reform is resource intensive and would take a long time to implement. The pursuit of those options risks allowing the current inconsistency in sentencing to continue disadvantaging young adults. By contrast, a guideline judgment is a comparatively straightforward option for reform. It would not require legislative change and would go a long way to reduce the inconsistency in this area.

113 Farrington, Loeber and Howell, above n 39, at 737.

114 Andrea Păroșanu and Ineke Pruin “Young adults and the criminal justice system” [2020] NZLJ 296.

115 Woodwark and Lynch, above n 9, at 134.

B *Scottish and English approaches*

Overseas jurisdictions, such as Scotland and England, illustrate how guideline judgments can be used in this area. The Scottish Sentencing Council has recently introduced a guideline for the sentencing of young people.¹¹⁶ The guideline applies to offenders who are under the age of 25 at the time they are found, or pleaded, guilty.¹¹⁷ It explains that the youth of the offender should be taken into account in assessing culpability.¹¹⁸ This assessment should also consider the maturity of the offender, including their intellectual and emotional maturity. In assessing maturity, a court should not have sole regard to the offender's age. In selecting the appropriate type of sentence to impose, a court must again have regard for the offender's maturity and the aim of rehabilitating young people.¹¹⁹ The guideline also makes it clear that a custodial sentence should only be imposed on a young person where no other sentence is appropriate.¹²⁰

In England, the age of an offender is discussed in the Sentencing Council's guideline on general principles in sentencing.¹²¹ A reduction in sentence is justified where an offender's age or maturity has affected their culpability or their ability to serve a particular sentence. The guideline notes that an offender's chronological age is no more significant than their emotional and developmental age. The guidance then goes on to summarise the research findings that relate to the culpability and rehabilitative prospects of offenders aged between 18 and 25 years.

Each of these guidelines seeks to explain the relevance of an offender's age in sentencing. However, neither guideline sets out a detailed process by which a judge should approach the sentencing of a young adult. Addressing the inconsistency identified in this article's case review requires a more structured guideline judgment for New Zealand.

116 Scottish Sentencing Council *Sentencing young people: Sentencing guideline* (26 January 2022).

117 At [2].

118 At [3].

119 At [10]–[14].

120 At [21].

121 Sentencing Council "General guideline: overarching principles" (1 October 2019) <www.sentencingcouncil.org.uk>.

C Recommended guideline judgment for New Zealand

(1) Content of the guideline judgment

A guideline judgment should establish a direction that a discount must be given for youth when the offender is aged between 18 and 25 years old. The extent of the discount available will then be determined by reference to the offender's chronological age and maturity. This will be a general guideline that applies to most types of offending. In relation to certain types of offending, however, the available evidence base might support a departure from the use of this guideline.¹²²

This direction will ensure that sentencing judges consider the offender's age in the sentencing process. This addresses the current inconsistency in determining the discount's availability. It would also be consistent with the wording of s 9(2)(a).¹²³ This provision requires a sentencing judge to consider an offender's age to the "extent that [it is] applicable in the case".¹²⁴ As this article has explained, research shows that this age group all have some form of psychological or social impairment because of their age. That delayed maturity goes directly to the culpability of the offender. Therefore, the age of the offender will always be applicable when considering the circumstances of a young adult's offending.

To guide the extent of the discount, the guideline judgment should establish two general ranges. These ranges should presumptively focus on the specific age of the offender and reflect the current range of discounts that judges are prepared to provide for youth — ranging from five per cent to 25 per cent.

Range one would be presumptively available for offenders aged 18 to 20 years old. Research shows that this age group is most likely to show clear signs of immaturity. This range also reflects the current judicial preference to provide larger discounts to younger offenders. For offenders within this range, a discount between 15 and 25 per cent should be provided. At its highest, this range reflects a significant discount for a single mitigating factor (here being age) — aligning with the size of a discount generally available for other mitigating factors, such as an early guilty plea and a history of deprivation.

Range two would be presumptively available for offenders aged between 21 to 25 years old. This age group are still likely to show some signs of continued immaturity, although their executive functioning may be more

122 This limitation is discussed towards the end of this part.

123 Sentencing Act, s 9(2)(a).

124 Section 9(1).

developed than their younger counterparts.¹²⁵ Offenders within this range should be provided with a discount between five and 15 per cent. This range provides a more modest discount to recognise the relationship between an offender's age and their offending.

In each case, the available evidence may support treating an older offender (older than 20 years) as falling under range one, displacing the presumptive discount available for that age in range two. For example, some offenders may show signs of delayed psychological development despite their older age. In these cases, a judge would be able to classify the offender as falling within range one.¹²⁶

Once a judge has identified the appropriate range, the exact size of a youth discount would be determined by the sentencing judge's discretion. The guideline judgment should provide, however, that the judge assesses the offender's maturity to determine the extent of the discount. This judicial assessment would be aided by the materials generally available at sentencing, such as pre-sentence reports. Section 27 of the Sentencing Act may also play a key role in this assessment. This provision allows an offender to request that the court hears evidence on matters relating to their background. Under s 27, defence counsel may request that the offender be seen by a relevant professional to obtain a clinical assessment of their developmental maturity. That type of evidence may assist the judge in determining the extent of any discount. It may also displace the presumptive range of the discount. For example, a clinical assessment of an older offender might support a larger discount than the presumptive five to 15 per cent available under range two.

The proposed guideline judgment should also direct sentencing judges to provide the youth discount as a discrete discount. It should not be provided in combination with any other mitigating factors. As this article has explained, the current judicial practice of providing the youth discount in combination with other factors obscures the exact credit for youth being provided. That undermines the ability of sentencing judges to provide comparative discounts in similar cases. Additionally, combining the discount reflects a misinterpretation of *Churchward*. If the discount existed to mitigate offending because the behaviour was "youthful", it understandably overlaps with other mitigating factors because the discount does not focus on a distinct personal feature of the offender. However, I have argued that offenders should receive the discount because they are young not because of the nature of the behaviour. A person's age is directly relevant to their culpability.

125 Higher executive functioning results in improved planning, verbal memory and impulse control. The research suggests that the brain development associated with these skills is typically completed by 25 years. Farrington, Loeber and Howell, above n 39, at 736.

126 I note that intellectual disability is also considered a mitigating factor in its own right, under the Sentencing Act, s 9(2)(e).

That rationale creates a youth discount that is distinguishable from other mitigating factors. Therefore, the youth discount recognises a discrete mitigating factor, which should be acknowledged in a discrete discount.

The directions contained within this proposed guideline judgment would reduce the unjustified inconsistency in the judicial approach to this discount. At the same time, this approach avoids imposing undue restrictions on the exercise of judicial discretion in the sentencing process. It is also consistent with the jurisprudence surrounding the role of guideline judgments in sentencing. New Zealand courts continue to emphasise that “[s]entencing is an evaluative exercise and guideline judgments must not be applied in a mechanistic way”.¹²⁷

To address the issues identified in the case review, further recommendations are needed beyond those that simply relate to the calculation of a discrete youth discount. These recommendations arise from the interaction between youth and other features of sentencing, namely the type of sentence to impose and the assessment of other aggravating and mitigating factors.

(2) Relationship between youth and the type of sentence imposed

(a) *Youth weighs in favour of a non-custodial sentence being applied*

To acknowledge the body of psychological research showing that prison has a particularly detrimental effect on young people and is un conducive to their rehabilitation,¹²⁸ the guideline judgment should also comment on the relevance of youth in determining the type of sentence to impose on an offender. This resembles the approach taken in the Scottish sentencing guideline. That guideline explicitly states that a court should have regard to the fact that some sentences could have a more adverse effect on a young person because of their age and maturity.¹²⁹ The Scottish guideline also notes that a custodial sentence should only be imposed on a young person when the court is satisfied that no other sentence is appropriate.¹³⁰ Applying that approach in New Zealand, I recommend that our own guideline judgment should explicitly state the relevance of the age and maturity of the offender in determining the appropriate type of sentence to impose. Where the end sentence reached is less than two years’ imprisonment, the age and maturity of the offender should weigh in favour of a non-custodial sentence being imposed.

127 *Shramka v R* [2022] NZCA 299, [2022] 3 NZLR 348 at [44].

128 Lambie and Randell, above n 41, at 449.

129 Scottish Sentencing Council, above n 116, at [17].

130 At [21].

(b) *Relationship between youth and s 25 of the Sentencing Act 2002*

Section 25 of the Sentencing Act allows a court to adjourn a criminal proceeding to enable a rehabilitative programme or course of action to be undertaken. This provision provides some scope for young adults to access support programmes before their sentencing. This might include rehabilitative programmes as well as educational support. The use of s 25 would enable a court to steer a young offender towards the types of support that might previously have been lacking from their life. That type of intervention is important because the psychological research shows that desistance from offending can be causally linked with the introduction of certain protective factors into a young person's life.¹³¹ Programmes that focus on developing employable skills and interpersonal relationships would assist an offender in returning to prosocial life — therefore, reducing their risk of recidivism.

The guideline judgment should note the availability and relevance of s 25 in the sentencing of young adults. This reflects the approach taken by the Court of Appeal in establishing a guideline judgment for methamphetamine-related offending. Here, the Court has explicitly noted that s 25 should be used where independent evidence shows the offending was partially caused by a factor that a proposed rehabilitative programme is designed to treat.¹³² Similarly, sentencing judges should be encouraged to use rehabilitative programmes before sentencing young people. Where the offender engages well with any programme offered, the sentencing judge might take that evidence into account in setting the discount for youth. It may also be a relevant factor in determining the type of sentence imposed. For example, a non-custodial sentence that allows the offender to continue engaging with certain programmes may be in the best interests of their rehabilitation.

(3) *Relationship between youth and other aggravating/mitigating factors*

To address the concerns identified in the case review — specifically that judges do not consistently recognise the relationship between an offender's age and other aggravating and mitigating factors — the guideline judgment should set out a general expectation that sentencing judges will consider the relationship between youth and other relevant factors.

(a) *Aggravating factors*

The case review revealed that the current judicial approach to sentencing young adults involves significant risk of double counting certain aggravating

131 Gullotta, Plant and Evans, above n 44, at 451.

132 *Zhang v R* [2019] NZCA 507, [2019] 3 NZLR 648 at [10].

factors. This risk was the most pronounced with prior convictions and premeditation.

The guideline judgment should operate to prevent this risk of double counting by displacing the approach — adopted by some judges — where the discount’s availability and extent is determined by reference to “impulsivity” or prior convictions.

The guideline judgment should also provide, however, further guidance on how an uplift for prior convictions in the sentencing of young adults does apply. The guideline should set out the concerns surrounding the application of this aggravating factor with this age group. In the case review, I argued that the weight of the psychological evidence challenges the rationale supporting an uplift for prior convictions. Therefore, in sentencing a young adult, a sentencing judge should explicitly consider whether the rationales for applying an uplift apply in the case before them. Where the rationales do not apply, the sentencing judge should not impose an uplift for prior convictions.

(b) *Mitigating factors*

Encouraging sentencing judges to consider the relationship between an offender’s age and maturity, and other mitigating factors, is also important. In certain circumstances, a nuanced judicial approach may be needed to determine how a mitigating factor — one that is influenced by a person’s age or maturity — applies.

Case law is already developing on this issue. In *Rolleston*, the Court of Appeal recognised a connection between lack of remorse and youth.¹³³ The Court noted that the appellants’ attitude and lack of understanding of the impact of their offending was indicative of a lack of remorse, but it was also “equally indicative of their immaturity”.¹³⁴ Here we see a Court prepared to acknowledge that youth can affect an offender’s ability to demonstrate the type of behaviour associated with remorse. This case law provides scope for a sentencing court to view lack of remorse as not necessarily weighing against an offender’s capacity for rehabilitation.

The proposed guideline judgment should encourage nuanced approaches to assessing the availability of other mitigating factors in cases involving young adults. Where a relationship can be shown between the offender’s age and maturity, and another mitigating factor, a court should have scope to consider whether that mitigating factor applies to the current case. This might require departing from established case law relating to that mitigating factor. This departure would be justified, however, because young adults

133 *Rolleston v R (No 2)* [2018] NZCA 611, [2019] NZAR 79.

134 At [36].

represent a distinct group of offenders who require specialised treatment in sentencing.

A direction to sentencing judges to consider the relationship between an offender's age and other mitigating factors is another example of how judicial discretion can be retained in the sentencing process while also giving meaningful effect to the youth discount. This direction would encourage a sentencing judge to holistically consider the nature of the offending and the characteristics of the offender. The consequence would be an end sentence that achieves consistency in sentencing without compromising justice in a particular case.

D Limitations of the guideline judgment

The guideline judgment should also acknowledge that it is a general guideline only. It may not be appropriate for judges to apply this guideline to all offences. Framing the judgment in this manner would allow jurisprudence to develop regarding the types of offending that should be excluded. Offending may be excluded from the guideline's application where it does not fit well with the guideline's underpinning research and premises.

The rationale that underpins the youth discount is that a young person is less culpable than an adult. That is because there is a causal relationship between a person's age and maturity, and criminal behaviour.¹³⁵ However, this research finding does not necessarily apply to all types of offending.

For example, recidivist sexual offending that is escalating in severity may not be well explained by reference to a person's age or immaturity. Instead, the research suggests that sexual recidivism is associated with at least two broad factors: deviant sexual interests, and antisocial orientation/lifestyle instability.¹³⁶ Highly specialised intervention is required to reduce the risk of recidivism for this type of offending.¹³⁷ To acknowledge that different causative factors are implicated in this type of offending, it may be appropriate for recidivist sexual offending to be excluded from the application of this general guideline.

135 Iselin, DeCoster and Salekin, above n 40, at 455.

136 Caton F Roberts, Dennis M Doren and David Thornton "Dimensions Associated with Assessments of Sex Offender Recidivism Risk" (2002) 29 *Crim Just & Behav* 569 at 570.

137 Stina Lindegren "A Pilot Study of the Swedish Sexual Offender Treatment Program" (2022) 32 *Research on Social Work Practice* 328 at 328.

V Conclusion

The case review in this article has shown that the current judicial use of the youth discount is inconsistent. Sentencing judges use conflicting approaches to determine whether the discount is available, and then the extent of the discount to apply. Sentencing notes reveal a significant trend in judges referring to *Churchward* as providing “criteria” by which the discount’s availability and extent can be decided. This approach does not align well with the rationale that underpins this discount or the growing body of relevant psychological evidence. A discount for youth exists to recognise the causal relationship between an offender’s age and their offending. According to that rationale, the offending is mitigated by a person’s *age*, not by the nature of their conduct. Therefore, the focus of the assessment should be on the *age* of the offender, not on whether their conduct appears “youthful”.

My main recommendation to reform this area — a guideline judgment — seeks to provide guidance for sentencing judges on how to exercise their discretion when sentencing young adults. I am mindful, however, of the need to retain a degree of flexibility in sentencing.¹³⁸ I have argued that the guideline judgment should contain a direction for sentencing judges to provide a discount for youth to offenders aged 18 to 25 years. The extent of the discount should be guided by two presumptive ranges. These ranges reflect the current sentencing practice of providing larger discounts to younger offenders. They also acknowledge the large body of psychological research that suggests younger offenders have more significant developmental delay than their older counterparts.¹³⁹ The exact extent of the discount would be determined by the sentencing judge’s evaluation of the available evidence regarding the offender’s maturity. This type of reform represents a workable, evidence-based solution to the current inadequacies of the sentencing practices used with young adults.

138 *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [70]–[77].

139 Iselin, DeCoster and Salekin, above n 40, at 455.