

**“Crossover Young Adults”: The Case for a Neurodevelopmentally-Aware,  
Trauma-Informed Approach to Sentencing Young Adults with Criminal  
Justice and Care and Protection Involvement**

**Sarah Watt**

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## Abstract

“Crossover young adults”, that is, 18 to 25 year olds with criminal justice and care and protection involvement, are overlooked in research and policy. There is general acceptance that “crossover youth” up to 17 years with care and youth justice involvement are a complex group facing multiple challenges often rooted in childhood trauma. They are the most likely group to offend as adults. However, beyond the youth justice stage, limited attention is paid to the care-crime connection. Young adults in the criminal justice system more broadly are increasingly acknowledged as a distinct group given their developmental stage. Neuroscience shows that the human brain develops into the mid-twenties. Notably neuroscience also shows that childhood trauma disrupts development. Accordingly, considering crossover young adults from a purely age-related perspective leaves a gap in understanding.

The aim of this thesis is to draw upon neurodevelopmental and trauma research to critique the current approach to sentencing crossover young adults in Aotearoa New Zealand and to pave the way towards more effective, fair and just outcomes for this vulnerable group. Neuroscience shows childhood trauma can cause significant maladaptation, including reactive behaviours which amount to offending. Importantly, childhood trauma can be resolved through positive experiences and relationships. Young adulthood offers an “age of opportunity” for healing and intercepting the care to custody pipeline given heightened neuroplasticity and susceptibility to change. Sentencing for crossover young adults currently fails to reflect these insights. An offence-focused approach responds to behavioural manifestations of trauma rather than underlying causes. Acknowledgement of distinctions of crossover young adults is limited to deficit-based sentencing discounts.

By drawing on trauma-informed practice, a values-based approach for service delivery, this thesis provides four guiding principles and four proposals for neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults. Sentencing must be grounded in an understanding of the prevalence of childhood trauma amongst crossover young adults and its neurodevelopmental impacts. Responses must be strengths-based and healing-focused, prioritising safety and connections. Education ought to support the necessary shift in perspective. At sentencing, rehabilitation must be prioritised, consideration of trauma must be mandated and imprisonment must be a measure of last resort.

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I would also like to thank Judge Fitzgerald for taking the time to share his unique insights and knowledge of crossover youth and crossover young adults built up through his determined efforts to disrupt the care to custody pipeline in Aotearoa New Zealand.

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## **List of Abbreviations**

ACE:	Adverse Childhood Experiences
ADHD:	Attention Deficit Hyperactivity Disorder
FASD:	Foetal Alcohol Spectrum Disorder
ODD:	Oppositional Defiant Disorder
PTSD:	Post-traumatic Stress Disorder
TBI:	Traumatic Brain Injury

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## ***I Introduction***

### *Zion*

*Zion is a 21 year old young man of Niuean and Māori descent. In 2021, Zion was sentenced in respect of his involvement in four sets of offending. In November 2018, aged 17 years, he arranged twice via social media to purchase an iPhone. On each occasion, he grabbed the phone and ran off. On the second occasion, he was apprehended by the police and was found to be in possession of a claw hammer. This resulted in two charges of theft and one of possession of an offensive weapon. In December 2018, still aged 17, Zion was part of a group of six who robbed a liquor store. One of Zion's co-offenders pointed a pistol at the manager and struck him several times with a tennis racquet causing minor bruising. The group took cash and alcohol. This resulted in an aggravated robbery charge. In May 2019, then 18 years of age, Zion and four others broke into a shopping mall and stole electrical items resulting in a burglary charge. In May 2020, Zion, then aged 19 years, again with four others, travelled in a stolen car to a jewellery store where they broke in and stole jewellery of high value. Some of the group carried hammers and one carried a large rock. This resulted in a further aggravated robbery charge as well as a charge of unlawfully taking a motor vehicle. Zion is currently serving a sentence of four years and five months' imprisonment in respect of his involvement in the four sets of offending.*

*In early childhood Zion was subjected to significant violence at the hands of his father who struggled with alcohol addiction. Zion also frequently witnessed his father beating his mother. His parents separated when he was a toddler resulting in his whānau being uprooted without a support system or cultural network. At 13 years of age, Zion was uplifted and placed in state care. Soon after, he also became involved with the youth justice system. Zion's early experience of state intervention was not only characterised by placement instability with several moves around various homes in Auckland, he was abused in state institutions, including a youth justice residence. Zion began to disengage from school at an early stage and became fully alienated from mainstream education at 13 years of age. When he was aged 14 years, he started using substances including cannabis, alcohol and cigarettes which later escalated to methamphetamine and hallucinogens. Zion reported pursuing criminal offending alongside fellow gang members in order to fund his substance use.*



All of the facts in Zion’s story are real and were extracted from a publicly available sentencing decision.<sup>1</sup> Prior to beginning this thesis, I had the privilege of working in the Manukau District Court for several years, initially as a Youth Court Registrar and later as a Judges’ Clerk. Sadly, Zion’s story is disconcertingly similar to several others I came across during that time. I have chosen to begin with his story to humanise an otherwise abstract argument that the criminal justice system is failing young adults like Zion who are vulnerable by reason of the intersection of their care and crime proceedings, as well as their transition from youth justice to adult criminal justice.

There has been a steady increase in attention given to the care-crime connection in Aotearoa New Zealand within research and policy for more than a decade.<sup>2</sup> However, with prevention and early intervention as key focal points, this gathering interest centres around “crossover youth”, that is, children and young people up to the age of 17 years who have involvement in the care and protection and youth justice systems.<sup>3</sup> Research shows that crossover youth, amongst whom Māori are consistently overrepresented,<sup>4</sup> are characterised by multiple disadvantages including educational disengagement, substance misuse, neurodisability and mental illness, which are frequently rooted in histories of trauma and adversity.<sup>5</sup> As a Youth Court Registrar, I became acutely aware of the countless challenges faced by crossover youth and the immense hardship they had commonly endured. It seemed clear to me that their distinct complexities would not expire when they aged out of the Youth Court jurisdiction. In line with my anecdotal observations and concerns, statistics show that individuals with a care and protection background are consistently overrepresented in adult criminal justice as well as

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<sup>1</sup> *Waikato-Tuhega v R* [2021] NZCA 503.

<sup>2</sup> Centre for Social Research and Evaluation *Crossover between child protection and youth justice, and transition to the adult system* (Ministry of Social Development, 2010); Elizabeth Stanley “From Care to Custody: Trajectories of Children in Post-War New Zealand” (2017) 17(1) *Youth Justice* 57; Tony FitzGerald “Children in both Youth and Family Courts: New Zealand” (2018) 1 *The Chronicle* 15; Jennifer George *Crossover Youth Scoping Study* (Henwood Trust, 2020).

<sup>3</sup> Under s 2 and 272 of the Oranga Tamariki Act 1989, there is a legislative distinction for youth justice purposes between children (aged 10–13 years) and young people (aged 14–17 years). Adult criminal liability applies to offending committed at 18 years or over. The exception is young persons aged 17 years charged with serious offences specified in Schedule 1A who are dealt with as adults in the criminal justice system. Throughout this thesis, the term “youth” will be used to refer to young persons, as well as children and young persons, interchangeably. The term “young adult” or “emerging adult” will be used to refer to those aged 18 to 25 years, as well as those aged 17 years charged with serious specified offending to whom adult criminal liability applies.

<sup>4</sup> *Youth Justice Indicators Summary Report - December 2020* (Ministry of Justice, December 2020) at 17 and 18.

<sup>5</sup> See Chapter II(A) for discussion of the profile and pathways of crossover youth.

youth justice.<sup>6</sup> However, once they age out of the Youth Court and enter the adult criminal court, questions of how to disrupt the care to custody pipeline remain largely unasked and unanswered.

Scholarly attention in Aotearoa New Zealand has turned to the distinct needs of young adults aged 18 to 25 years as a broader cohort in the criminal justice system.<sup>7</sup> Lynch has put forward a persuasive case for a unique response for young adults principally on the basis of age-related developmental factors.<sup>8</sup> However, despite broad acceptance of the care-crime connection at the youth justice stage, scholarly attention is yet to turn to young adults in the criminal justice system who also have current or prior care and protection involvement. This thesis, therefore, focusses on this particularly vulnerable subgroup of young adults who will hereafter be referred to as “crossover young adults”.

Unlike the arbitrary age cut off within the youth justice sphere, following recent legislative changes, young people with a care background are now able to remain with caregivers to 21 years of age, will be provided with a transition worker from 18 to 21 years and are entitled to advice and assistance to 25 years of age.<sup>9</sup> Accordingly, there is an increasing portion of crossover youth who will have ongoing care involvement and entitlement to support well beyond the age of penal majority.<sup>10</sup>

The extended transition support provided by the recently amended care and protection provisions reflects the unique vulnerabilities of care involved young adults as one of the most

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<sup>6</sup> Oranga Tamariki Evidence Centre *Youth Justice Pathways: An examination of wellbeing indicators and outcomes for young people involved with youth justice* (Oranga Tamariki, April 2021) at 24; Centre for Social Research and Evaluation, above n 2; Carolyn Henwood and others “Rangatahi Māori and Youth Justice: Oranga Rangatahi” (The Law Foundation, September 2018) at 82.

<sup>7</sup> N Lynch *Young Adults in the Criminal Justice System in Aotearoa New Zealand – A Principled Framework for Reform* (Michael and Suzanne Borrin Foundation, April 2022); S Woodwark and N Lynch “Decidedly but differently accountable?” – *Young Adults in the Criminal Justice System* (2021) 1 NZ L Rev (forthcoming); Andrea Păroşanu and Ineke Pruin “Young adults and the criminal justice system” [2020] 8 NZLJ 29.

<sup>8</sup> N Lynch, above n 7, at 22.

<sup>9</sup> Oranga Tamariki Act 1989, ss 386AAA-386C; See Nicola Atwool “Transition from care: Are we continuing to set care leavers up to fail in New Zealand?” (2020) 113 Child Youth Serv Rev 104995 for critical analysis of the new provisions.

<sup>10</sup> Although the youth justice age was raised to 17 years of age in July 2019, 17 year olds charged with certain specified serious offences are still dealt with through the adult criminal justice system: Oranga Tamariki Act 1989, s 272, sch 1A. There will accordingly be an increasing group of young people who will have ongoing simultaneous proceedings in the Youth Court, the Family Court and the District Court.

disadvantaged groups in society.<sup>11</sup> It also aligns with an expanding body of interdisciplinary research establishing that “young adulthood” or “emerging adulthood” is a unique developmental period which extends to the mid-twenties.<sup>12</sup> Particularly compelling research findings have emerged from advances in neuroimaging which show that young adults, into their mid-twenties, have considerably different “brain architecture” than adults which can be linked with risky behaviour.<sup>13</sup>

Along with increasing awareness of high rates of neurodisability and traumatic brain injury (TBI) among young adults who offend,<sup>14</sup> the multidisciplinary research highlighting the mismatch between the age of penal majority and the developmental reality of young adults formed the impetus behind a recently piloted judge-led initiative: the Porirua Young Adult List.<sup>15</sup> This specialist court separates out those aged 18 to 25 years from older adults appearing in court, has extra support to identify any particular health needs or disabilities and adapts an approach used in the Youth Court designed to enhance procedural fairness and participation.<sup>16</sup> Those appearing in the Young Adult List may access a range of wrap-around services including specialist probation officers, adolescent mental health services, alcohol and other drug screening, and links to community support.<sup>17</sup>

An initial evaluation of the Young Adult List shows promising results.<sup>18</sup> It is undoubtedly a step in the right direction for all young adults, including crossover young adults. However, as the initiative is largely focused on participation rights, the degree to which it will impact

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<sup>11</sup> Nicola Atwool “Journeys of Exclusion: Unpacking the Experience of Adolescent Care Leavers in New Zealand” in P Mendes and P Snow (eds) *Young People Transitioning from Out-of-Home Care* (Palgrave Macmillan, London, 2016).

<sup>12</sup> Laurence Steinberg *Age of Opportunity: Lessons from the New Science of Adolescence* (Houghton Mifflin Harcourt, New York, 2014); Jeffrey Jensen Arnett “Emerging Adulthood: A Theory of Development From the Late Teens Through the Twenties” (2000) 55 *Am Psychol* 469.

<sup>13</sup> E White and K Dalve *Changing the Frame: Practitioner Knowledge, Perceptions, and Practice in New York City's Young Adult Courts* (Centre for Court Innovation, New York, 2017) at 2; Ian Lambie *What were they thinking? A discussion paper on brain and behaviour in relation to the justice system in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 29 January 2020) at 5.

<sup>14</sup> See for example Lambie, above n 13; N Lynch *Neurodisability in the Youth Justice System in New Zealand: How Vulnerability Intersects with Justice* (Neurodisabilities Forum, 30 May 2016); N Hughes and others *Nobody Made the Connection: The Prevalence of Neurodisability in Young People Who Offend* (Office of the Children's Commissioner for England, 2012).

<sup>15</sup> Principal Youth Court Judge John Walker “Trial of Young Adult List court officially launched in Porirua” (press release 31 July 2020) < <https://www.districtcourts.govt.nz/media-information/media-releases/31-july-2020/>>.

<sup>16</sup> Judy Paulin and others *Formative and Short-Term Outcome Evaluation of the Porirua District Young Adult List Court Initiative: Iti rearea teitei kahikatea ka taea* (Artemis Research, July 2021) at iii.

<sup>17</sup> At 1.

<sup>18</sup> Paulin and others, above n 16.

substantive outcomes is questionable.<sup>19</sup> Unlike the rehabilitative, reintegrative approach of the Youth Court, sentencing in the adult court is offence-focused and retributive in nature.<sup>20</sup> Accordingly, crossover young adults like Zion end up sentenced to imprisonment for offences committed in their teenage years. Such sentences are not only likely to fail to address the underlying causes of offending, they are highly likely to compound them and to encourage a cycle of offending and institutionalisation.<sup>21</sup> This thesis accordingly focusses on the sentencing stage of criminal proceedings, that is, the approach to sentencing or otherwise dealing with crossover young adults following a guilty plea or a finding of guilt.

As noted, whilst scholarly attention is yet to turn to crossover young adults, Lynch has considered possible routes for reform for young adults in the criminal justice system as a broader cohort.<sup>22</sup> Correspondingly, academic attention in Aotearoa New Zealand focusses on the case for a distinct response for young adults on normative, age-related developmental factors.<sup>23</sup> However, a rapidly expanding body of research indicates that family, social and environmental factors have a major role to play in shaping the developing brain.<sup>24</sup> Childhood adversity and trauma, common amongst those with a care and protection background, have been cited as a “particularly potent and significant” factor which can disrupt brain development and maturation.<sup>25</sup> Developmentally appropriate criminal justice responses to crossover young adults, by definition, therefore, ought to include consideration of the impacts of childhood adversity and trauma.<sup>26</sup> If left unacknowledged, developmental disparities are likely to deepen inequality with lasting effects throughout the life course.

Accordingly, this thesis has three key aims. First, to consider neuroscientific findings relating to the developmental phase of young adulthood and the impacts of childhood trauma. Secondly, to draw upon those insights to critique the current approach to sentencing for crossover young

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<sup>19</sup> Woodwark and Lynch, above n 7, at 26.

<sup>20</sup> See Chapter IV for a critique of the current approach to sentencing for crossover young adults.

<sup>21</sup> Jane Mulcahy “Towards ACE-Aware, trauma responsive penal policy and practice” (2019) 245 *Prison Service Journal* 3 at 9.

<sup>22</sup> N Lynch, above n 7.

<sup>23</sup> At 22; Woodwark and Lynch, above n 7; Păroşanu and Pruin, above n 7.

<sup>24</sup> Bruce Perry and others “The Impact of Neglect, Trauma, and Maltreatment on Neurodevelopment: Implications for Juvenile Justice Practice, Programs, and Policy” in Anthony Beech and others (eds) *The Wiley Blackwell Handbook of Forensic Neuroscience* (1st ed, Wiley and Sons Ltd, Hoboken, 2018).

<sup>25</sup> S O’Rourke and others *The development of cognitive and emotional maturity in adolescents and its relevance in judicial contexts: Literature Review* (Scottish Sentencing Council, February 2020) at 57.

<sup>26</sup> S Marsh and J Byer “Toward a Conceptual Framework for Trauma-Responsive Practice in Courts” (2013) 1(1) *Criminal Law Practitioner* 1 at 2.

adults in Aotearoa New Zealand. Thirdly, to pave the way towards more neurodevelopmentally-aware, trauma-informed responses to crossover young adults at the sentencing or disposition stage.

It could be argued that focus ought to turn to early intervention, to prevention of entry to the criminal justice system, and that focus on the disposition stage is too late. However, early intervention and more effective, fair and just sentencing options are not mutually exclusive. In other words, it is “never too early and never too late”.<sup>27</sup> Sentencing is a critical cliff edge stage that provides an opportunity for intervention and diversion off the care to custody pipeline or for deepening system entrenchment. This opportunity is particularly important when account is taken of the fact that for many crossover young adults like Zion, involvement in the criminal justice system is often demonstrative of the “culmination of multiple systems prior that have ineffectively served them”.<sup>28</sup>

In order to pave the way towards more neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults, this thesis will take the following structure. Chapter II will build a profile of crossover young adults’ characteristics and trajectories from care to custody by drawing upon research relating to crossover youth and to young adults as two separate cohorts. A primary reason cited in the literature for the overrepresentation of crossover youth in the youth justice system is the ongoing impacts of childhood trauma and adversity, such as maltreatment, abuse and neglect. Research shows that childhood adversity can cause a range of negative outcomes across the life course. As for young adults, as noted, interdisciplinary research attributes their overrepresentation in the criminal justice system to age-related developmental factors. Drawing links between the research insights relating to crossover youth and young adults signals how their unique complexities might intersect and compound amongst crossover young adults. Chapter II will, thus, make it clear that effective sentencing for crossover young adults must incorporate current insights from developmental and trauma research.

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<sup>27</sup> Peter Gluckman and Ian Lambie *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, August 2018).

<sup>28</sup> Alisha Moreland-Capuia *Training for Change: Transforming Systems to be Trauma-Informed, Culturally Responsive, and Neuroscientifically Focused* (Springer, Cham, 2019) at 1.

Chapter III will integrate key themes arising from neurodevelopmental research relating to typical patterns of young adult brain development with those relating to the impact of childhood trauma or adversity on brain development. By integrating these findings, Chapter III facilitates the formulation of a neurodevelopmentally-aware, trauma-informed lens through which to critique the current approach to sentencing. From the insights discussed in Chapter III, three key points will be put forward to constitute a neurodevelopmentally-aware, trauma-informed lens. Firstly, crossover young adults, amongst whom childhood trauma is prevalent, may well exist in a constant state of fear. Their emotional, behavioural and cognitive functioning will reflect this state and exaggerate their age-related inclination towards risky behaviours. Seemingly reactive, oppositional or remorseless behaviours can be understood as (mal)adaptive responses to early adversity and trauma. Secondly, healing from unresolved trauma and the interception of its negative impacts is possible. The most effective interventions will prioritise safety, self-regulation and connection to whānau, family, community, and culture. Thirdly, young adulthood offers a prime opportunity for healing and to ultimately address trauma as an underlying cause of offending given the particular malleability of the developing brain.

Chapter IV will assess the current approach to sentencing for crossover young adults. Rather than a substantive quantitative review, Chapter IV will provide a critique of key principles through a neurodevelopmentally-aware, trauma-informed lens. The application of the current sentencing framework and principles to a crossover young adult will be demonstrated through analysis of the sentencing decision of Zion, the young man introduced at the beginning of this thesis. The current approach to sentencing is offence-focused and retributive. Acknowledgement of young adulthood and childhood trauma is limited to transactional, deficit-based discounts. Coupled with a lack of alternatives to imprisonment, this sets the stage for punitive, triggering sentences that simply will not work and are likely to reinforce pre-existing issues and contribute to a cycle of offending. By failing to incorporate current neurodevelopmental research insights, the criminal justice system is failing to embrace an opportunity to support healing and rerouting off the care to custody pipeline.

By drawing on trauma-informed practice, a values-based approach for service delivery, Chapter V will provide four guiding principles for a shift towards neurodevelopmentally-aware, trauma-informed responses to crossover young adults at the sentencing stage. First,

sentencing for crossover young adults must be grounded in an understanding of the prevalence of trauma amongst crossover young adults and its neurodevelopmental impacts. Secondly, responses must be strengths-based and healing-focused. Thirdly, responses must prioritise safety and self-regulation. Fourthly, responses to crossover young adults at sentencing must also prioritise connections to whānau, family, community, and culture. Chapter V will also provide four tangible proposals for neurodevelopmentally-aware, trauma informed sentencing. First, education and awareness building must be facilitated in order to support the necessary shift in perspective. Second, rehabilitation must be given priority as a purpose of sentencing. Thirdly, trauma must be a mandatory consideration at sentencing for crossover young adults. Fourthly, imprisonment must be a measure of absolute last resort for crossover young adults.

The arguments raised and recommendations made in this thesis are not a substitute for broader change, such as developing a statutory “third system” for all young adults in the criminal justice system or raising the youth justice age.<sup>29</sup> Similarly, the arguments advanced in this thesis are also not a substitute for a response to the escalating calls for a transformative overhaul of the criminal justice system at large.<sup>30</sup> It is acknowledged that, whilst more scientifically sound interventions or initiatives are likely to better serve crossover young adults, “the ‘interventionist emphasis... cannot overcome persistent, severe, and multiple adversities’ that are manifest in inter-generational poverty, colonial marginalisation and discrimination, and experiences of family or state institutional violence”.<sup>31</sup> Notwithstanding, in the interim period pending more wholesale reform or transformative change, more can and ought to be done for crossover young adults as a particularly vulnerable group.

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<sup>29</sup> See N Lynch, above n 7; Woodwark and Lynch, above n 7.

<sup>30</sup> Safe and Effective Justice Advisory Group *He Waka Roimata – Transforming Our Criminal Justice System* (June 2019) [*He Waka Roimata*]; Safe and Effective Justice Advisory Group *Turuki! Turuki! Move together! Transforming our Criminal Justice System* (12 December 2019) [*Turuki! Turuki!*]; *Ināia Tonu Nei: The Time is Now: We Lead, You Follow* (Hui Māori, July 2019) [*Ināia Tonu Nei*].

<sup>31</sup> D Haydon “Children deprived of their liberty on ‘welfare’ grounds: A critical perspective” in: E Stanley (ed) *Human Rights and Incarceration: Critical Explorations* (Palgrave, Cham, 2018) at 43 as cited in E Stanley and S Monod de Froideville “From vulnerability to risk: Consolidating state interventions towards Māori children and young people in New Zealand” (2020) 40(4) *Crit Soc Policy* 526 at 541.

## *II The Profile and Pathways of Crossover Young Adults*

Whilst there is growing awareness and expanding research to support the case that crossover youth and young adults in the justice system in Aotearoa New Zealand are two distinctly vulnerable groups requiring specific responses,<sup>32</sup> consideration has yet to turn to when these two groups intersect and their complexities are inevitably compounded. It is clear that crossover youth not only make up a significant proportion of the young people who offend, but also those who go on to reoffend as adults. Recent research exploring the pathways of a 1993 to 1997 birth cohort in Aotearoa New Zealand found that by age 22, 85 percent of the crossover group committed an offence and 24 percent of the crossover group received a prison sentence.<sup>33</sup> A report prepared for the Iwi Chairs Forum noted that, at 31 January 2017, over 80 percent of prisoners in Aotearoa New Zealand under the age of 20 had a care and protection background.<sup>34</sup> This ongoing crossover beyond the age of 18 years is not a new discovery. In 2010 the Ministry of Social Development undertook a retrospective study of a 1989 birth cohort and identified for the first time in New Zealand that crossover youth were not only significant numbers within the youth justice population, but also in the adult criminal justice system.<sup>35</sup> This research suggested that compared to those without prior statutory involvement with the care and protection or youth justice systems, crossover youth were 15 times more likely to get a Corrections' record by the age of 19 or 20, and 107 times more likely to be imprisoned under 20.<sup>36</sup>

In order to gain a fuller understanding of crossover young adults as a distinct subgroup within the criminal justice system, this chapter considers the research base relating to crossover youth and young adults in the criminal justice system as two separate vulnerable cohorts. Turning firstly to crossover youth, this chapter will consider the well-established overlap between care and protection and youth justice. By drawing on national and international research, it will discuss characteristics of crossover youth, before exploring some of the key reasons cited in relevant literature for the care-crime connection. This chapter will then proceed to consider the rapidly expanding body of multidisciplinary research around the distinctions of “young adults” or “emerging adults” aged 18 to 25 years and the implications of those distinctions in the

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<sup>32</sup> See George, above n 2, at 23; Fitzgerald, above n 2 at 16; Lynch, above n 7; Woodwark and Lynch, above n 7; Păroşanu and Pruin, above n 7.

<sup>33</sup> Oranga Tamariki Evidence, above n 6, at 24.

<sup>34</sup> Carolyn Henwood and others, above n 6, at 82.

<sup>35</sup> Centre for Social Research and Evaluation, above n 2.

<sup>36</sup> At 12.



criminal justice system. Finally, consideration will turn to how the key drivers of offending for crossover youth and young adults, namely ongoing impacts of childhood trauma and ongoing development, might intersect and compound amongst crossover young adults.

## *A Crossover Youth*

### *1 The crossover between care and protection and youth justice*

The overrepresentation of children and young people with a statutory care and protection background in the youth justice system in New Zealand is an alarmingly well-established trend. A recent Youth Justice Indicators Summary Report showed that throughout the period from 2014/15 to 2019/20, 97 percent of children aged between 10 and 13 years who were referred for a youth justice family group conference had previously been the subject of a report of concern to Oranga Tamariki about their care and protection.<sup>37</sup> The rate for young people aged between 14 and 18 years within the same group was 88 percent.<sup>38</sup> Another recent Oranga Tamariki report examining the wellbeing indicators and outcomes for children involved in youth justice from a 1997 to 2002 birth cohort showed that 81 percent of all of the children and young people referred for a youth justice family group conference had previously been the subject of a care and protection report of concern.<sup>39</sup> This trend is not a recent phenomenon. In 2010, research commissioned by the Ministry of Social Development found, through analysis of Child, Youth and Family (now Oranga Tamariki) records for a 1989 birth cohort, that 73% of 14 to 16 year olds in the youth justice system were also known for care and protection concerns.<sup>40</sup>

It is important to note that being involved in the care and protection system is not causative of justice system involvement; in fact, most children and young people with a care background never have any involvement with youth justice.<sup>41</sup> Notwithstanding, there is a stubborn and alarming overrepresentation of crossover youth in the youth justice system.

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<sup>37</sup> Ministry of Justice, above n 4, at 17.

<sup>38</sup> At 18.

<sup>39</sup> Oranga Tamariki Evidence Centre, above n 6, at 8.

<sup>40</sup> Centre for Social Research and Evaluation, above n 2, at 8-9.

<sup>41</sup> Oranga Tamariki Evidence Centre *Youth Justice Insights: Separating Misconceptions from Facts* (Oranga Tamariki, 2020) at 9–12.

The persistent overrepresentation of crossover youth in the youth justice system has also been noted in several overseas jurisdictions including Australia,<sup>42</sup> Canada,<sup>43</sup> America,<sup>44</sup> the United Kingdom<sup>45</sup> and Ireland.<sup>46</sup> There are accordingly mounting calls internationally for more effective responses to this particularly complex group.<sup>47</sup> As this awareness and attention has heightened, the relevant research base has correspondingly grown nationally and internationally. By drawing upon this research, the following section will map out some of the key characteristics of crossover youth and the factors that drive their offending.

## *2 Key characteristics of crossover youth*

### *(a) Male, though females are overrepresented*

Males are consistently overrepresented in the youth justice system, including amongst crossover youth. 71 percent of the children and young people born in New Zealand from 1997 to 2002 with statutory involvement in both the youth justice and care and protection jurisdictions were male.<sup>48</sup> Notwithstanding, crossover youth are more likely to be female compared to the general youth justice population. In 2019/20, for example, every female child aged between 10 and 13 years and 91 percent of female youth aged between 14 and 18 years who were referred for a youth justice family group conference had previously been the subject of a report of concern to Oranga Tamariki relating to their care and protection.<sup>49</sup>

Australian studies also show that males make up the majority of crossover youth but, comparative to the broader youth justice population, females are over-represented.<sup>50</sup>

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<sup>42</sup> Susan Baidawi and Rosemary Sheehan “‘Crossover kids’: Offending by Child Protection-involved Youth” (2019) 582 *Trends and Issues in Crime and Criminal Justice* 1; C Malvaso, P Delfabbro, and A Day “The Child Protection and Juvenile Justice Nexus in Australia: A Longitudinal Examination of the Relationship Between Maltreatment and Offending” (2017) 64 *Child Abuse and Neglect* 32.

<sup>43</sup> N Bala and others “Child Welfare Adolescents and the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19(1) *Canadian Criminal Law Review* 129.

<sup>44</sup> M Jonson-Reid, A Dunnigan and J Ryan “Foster Care and Juvenile Justice Systems” in E Trejos-Castillo and N Trevino-Schafer (eds) *Handbook of Foster Youth* (Routledge, New York, 2019).

<sup>45</sup> J Shaw “Policy, Practice and Perceptions: Exploring the Criminalisation of Children’s Home Residents in England” (2016) 16(2) *Youth Justice* 147.

<sup>46</sup> N Carr and P Maycock *Care and Justice: children and young people in care and contact with the criminal justice system* (Irish Penal Reform Trust, 2019).

<sup>47</sup> Susan Baidawi and Rosemary Sheehan “‘Crossover’ Children in the Youth Justice and Child Protection Systems (Routledge, Oxon, 2020) at 17.

<sup>48</sup> Oranga Tamariki Evidence Centre, above n 6, at 7.

<sup>49</sup> Ministry of Justice, above n 4, at 17-18.

<sup>50</sup> *Young People in Child Protection and Under Youth Justice Supervision: 1 July 2013 to 30 June 2017* (Australian Institute of Health and Welfare, 2018) as cited in Baidawi and Sheehan, above n 47, at 26.

(b) Māori

Māori are overrepresented in both the youth justice and care and protection populations. Māori made up 64 percent of crossover youth from a 1997 to 2002 New Zealand birth cohort, despite the fact that Māori make up only approximately 25 percent of the overall youth population in New Zealand.<sup>51</sup> In 2019/20, 97 percent of all Māori children aged between 10 and 13 years who were referred for a youth justice family group conference had previously been the subject of a report of concern to Oranga Tamariki relating to their care and protection.<sup>52</sup> The rate for Māori young people aged between 14 and 18 years was 92%.<sup>53</sup>

The overrepresentation of Māori amongst crossover children and youth is indicative of the ongoing systemic racism and colonial legacy in Aotearoa New Zealand. Reviews into both the justice system and care and protection systems have heavily indicated that systemic and structural failings disproportionately affect Māori.<sup>54</sup> Racial biases in policing and incarceration of Māori have been acknowledged.<sup>55</sup> In May 2019, an attempt by Oranga Tamariki to uplift a newborn Māori child into care attracted significant public scrutiny and media attention which prompted a series of inquiries.<sup>56</sup> The common thread amongst the inquiries was that state care and protection has overwhelmingly failed generations of Māori. Further, the Royal Commission of Inquiry into Abuse in Care has been presented with an independent research report showing that structural and systemic racism across several government organisations

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<sup>51</sup> Oranga Tamariki Evidence Centre, above n 6, at 7; J Reil and others “Children who offend: Why are prevention and intervention efforts to reduce persistent criminality so seldom applied?” (2021) 27(1) *Psychology, Public Policy, and Law* 65 at 67-68.

<sup>52</sup> Ministry of Justice, above n 4, at 17.

<sup>53</sup> At 18.

<sup>54</sup> *He Waka Roimata*, above n 30; *Turuki! Turuki!*, above n 30; Independent Panel Examining the 2014 Family Justice Reforms *Te Korowai Ture ā-Whānau: The final report of the Independent Panel examining the 2014 family justice reforms* (Ministry of Justice 2019); M Jackson *Māori and the Criminal Justice System: A New Perspective, He Whaipāanga Hou* (Policy and Research Division, Department of Justice, 1988); *Puao-Te-Ata-Tu: The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Māori Perspective Advisory Committee, 1988) [*Puao-Te-Ata-Tu*]; *A fair go for all? Rite tahi tatou katoa? Addressing Structural Discrimination in Public Services* (Human Rights Commission, 2012).

<sup>55</sup> D Fergusson, L Horwood and M Lynskey “Ethnicity and bias in police contact statistics” (1993) 26 *Australian and New Zealand Journal of Criminology* 193; K Workman *Whānau ora and imprisonment Te Arotahi series paper* (Ngā Pae o te Māramatanga – New Zealand’s Centre of Māori Research Excellence, 2019) as cited in L Hashemi and others “Exploring the health burden of cumulative and specific adverse childhood experiences in New Zealand: Results from a population-based study” 2021 (117) *Child Abuse and Neglect* 1.

<sup>56</sup> H Kaiwai and others *Ko te Wā Whakawhiti: It’s time for change. A Māori Inquiry into Oranga Tamariki* (Whānau Ora Commissioning Agency, 2020); *Hawke’s Bay Practice Review* (Oranga Tamariki, November 2019); Office of the Children’s Commissioner *Te Kuku O Te Manawa – Ka puta te riri, ka momori te ngākau, ka heke ngā roimata mo tōku pēpi* (Office of the Children’s Commissioner, 2020); *He Take Kōhukihuki | A Matter of Urgency – Ombudsman inquiry* (Ombudsman, August 2020); Waitangi Tribunal *He Pāharakeke, he Rito Whakakīkinga Whāruarua* (WAI 2915, 2021).

was responsible for the over-representation of generations of Māori in state care and that Māori were subjected to racist and inequitable treatment, including being prevented from seeing their whānau.<sup>57</sup> In excess of 100,000 young people, particularly between the 1950s and 1990s, many of whom were Māori, were institutionalised by the state.<sup>58</sup> For many, a devastating legacy of physical and sexual abuse “continues to blossom” with the next generation of these children and young people found in the system today.<sup>59</sup>

Overrepresentation of racial minorities is a trend observed within several jurisdictions.<sup>60</sup> In countries with ongoing colonial legacies, indigenous youth are consistently overrepresented amongst crossover youth.<sup>61</sup> In Australia, Aboriginal and Torres Strait Islander children and young people have been reported to be 17 times more likely to have been involved in both the child protection and youth justice systems compared to non-Indigenous children.<sup>62</sup> In Canada, Aboriginal children are similarly persistently overrepresented amongst crossover youth.<sup>63</sup>

*(c) Educational disengagement*

Disengagement from school is highly common amongst crossover youth with many reportedly having left school early due to learning difficulties and challenging behaviours.<sup>64</sup> Recent wellbeing indicators for 17 year olds in New Zealand born between 1997 and 2002 showed that, of crossover youth with statutory involvement in both jurisdictions, only 30 percent had been in school over the previous year and 34 percent had been truant.<sup>65</sup> Chronic truancy, somewhat inevitably, is correlated with negative outcomes in later life including violence, offending, substance abuse issues and unemployment.<sup>66</sup>

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<sup>57</sup> C Savage and others *Hāhā-uri, hāhā-tea – Māori Involvement in State Care 1950-1999 Report prepared for the Crown Secretariat* (Ihi Research, 2021).

<sup>58</sup> Tracey McIntosh “Brief of Evidence for Contextual Hearing” (Royal Commission of Inquiry into Abuse in Care and Faith Based Institutions, November 2019) at 12.

<sup>59</sup> at 6.

<sup>60</sup> Baidawi and Sheehan, above n 47, at 26.

<sup>61</sup> At 26.

<sup>62</sup> At 27 citing *Young People in Child Protection and Under Youth Justice Supervision: 1 July 2013 to 30 July 2017* (Australian Institute of Health and Welfare, 2018).

<sup>63</sup> At 27 citing British Columbia Representative for Children and Youth and Office of the Provincial Health Officer *Kids, Crime and Care: Health and Well-Being of Children in Care – Youth Justice Experiences and Outcomes* (Ministry of Children and Family Development, Victoria, British Columbia 2009).

<sup>64</sup> George, above n 2, at 23; Fitzgerald, above n 2 at 16.

<sup>65</sup> Oranga Tamariki Evidence Centre, above n 6, at 18.

<sup>66</sup> George, above n 2, at 23.

Recent Australian research by Baidawi and Sheehan involving an in-depth study of a sample of 300 crossover youth found that, at the time of their court proceedings, only approximately 17 percent were engaged in education, training, or employment.<sup>67</sup> Amongst the small number who were engaged, attendance was rarely regular or full time and stable educational experiences were somewhat anomalous.<sup>68</sup> Challenges including emotional and behavioural dysregulation were noted to commonly commence at an early stage and were seemingly linked to unmet care and protection, mental health, and disability needs as well as systemic factors such as placement instability.<sup>69</sup> At least 36 percent of children experienced school exclusion, at least half of whom reportedly had trauma or attachment related disorders.<sup>70</sup>

*(d) Neurodisability*

Neurodisability is an umbrella term encompassing atypical neurodevelopmental disorders and neurological profiles including intellectual disability, Traumatic Brain Injury (TBI), Attention Deficit Hyperactivity Disorder (ADHD), Foetal Alcohol Spectrum Disorder (FASD), and communication disorders.<sup>71</sup> Characteristics of neurodisabilities include impaired personal, social, and occupational functioning due to cognitive and executive delay and challenges in emotional and behavioural regulation.<sup>72</sup> Local and international literature increasingly links neurodisability with entry into the justice system.<sup>73</sup> FASD, for example, can be misconstrued as “bad” or difficult behaviour.<sup>74</sup>

Findings from the comprehensive study of 300 crossover youth in Australia referred to above showed that almost half of the group had a neurodisability.<sup>75</sup> Nearly one third had received a diagnosis of ADHD, around a quarter had specific learning difficulties or communication disorders, and 17 percent had been diagnosed with an intellectual disability.<sup>76</sup> These findings

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<sup>67</sup> Baidawi and Sheehan, above n 47, at 103.

<sup>68</sup> At 103.

<sup>69</sup> At 104.

<sup>70</sup> At 104.

<sup>71</sup> Lynch, above n 14, at 3-4.

<sup>72</sup> P Chitsabesan and N Hughes “Mental health needs and neurodevelopmental disorders amongst young offenders: implications for policy and practice” in J Winstone (ed) *Mental health, crime and criminal justice: responses and reforms* (Palgrave Macmillan, London, 2016).

<sup>73</sup> Lynch, above n 7, at 21.

<sup>74</sup> Lambie, above n 13, at 26.

<sup>75</sup> Susan Baidawi and Richard Piquero “Neurodisability among Children at the Nexus of the Child Welfare and Youth Justice System” (2021) 50 *J Youth and Adolesc* 803.

<sup>76</sup> Baidawi and Sheehan, above n 47, at 105.

correspond with studies of populations of crossover youth seen in other jurisdictions including the United Kingdom,<sup>77</sup> Ireland<sup>78</sup> and America.<sup>79</sup>

There have been calls for New Zealand based research to examine the prevalence of neurodisability amongst young people in the justice system.<sup>80</sup> It has been anecdotally suggested that neurodisabilities are prevalent amongst crossover youth. For example, Judge Tony Fitzgerald, in a paper presented at the 2018 World Congress on Justice for Children, noted that many crossover youth have neurodisabilities and are heavily overrepresented in cases where fitness to stand trial is at issue and communication assistance is needed.<sup>81</sup> Further, research suggests that, in addition to biological factors such as genetics, neurodisability is often the result of a complex mix of influences including environmental factors such as trauma and socio-emotional deprivation which are prevalent amongst crossover youth.<sup>82</sup>

*(e) Mental Health and addiction*

Mental health and substance abuse issues are also prevalent amongst crossover youth. Wellbeing indicators for 17 year olds within the 1997 to 2002 birth cohort in New Zealand showed that, of crossover youth with statutory involvement in both jurisdictions, 57 percent received mental health treatment and 28 percent had substance usage treatment or provider contact in the previous year, both higher proportions than for any other group.<sup>83</sup>

Similar trends are evident in Australian research. The Australian study of 300 crossover youth found that 61 percent had formal diagnoses, including 28 percent for mood disorders and 20 percent for trauma or attachment related disorders and behavioural disorders.<sup>84</sup> 35 percent had

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<sup>77</sup> Hughes and others, above n 14; H Williams *Repairing shattered lives: brain injury and its implications for criminal justice* (Barrow Cadbury Trust, 2012); N Hughes and others “The prevalence of traumatic brain injury among young offenders in custody: a systematic review” (2015) 30(2) *J Head Trauma Rehabil* 94.

<sup>78</sup> P Taflan *Children in custody 2016-17: An analysis of 12-18 year olds’ perceptions of their experiences in secure training centres and young offender institutions* (HM Inspectorate of Prisons, 2017) as cited in Baidawi and Piquero, above n 75.

<sup>79</sup> G Halemba and others *Arizona dual jurisdiction study: Final report* (National Center for Juvenile Justice Pittsburgh, 2004) as cited in Baidawi and Piquero, above n 75; M Cho and others “A prospective, longitudinal study of risk factors for early onset of delinquency among maltreated youth” (2019) 102 *Child Youth Serv Rev* 222; Haight and others “An evaluation of the Crossover Youth Practice Model (CYPM): Recidivism outcomes for maltreated youth involved in the juvenile justice system” (2016) 65 *Children Youth Serv Rev* 78.

<sup>80</sup> Lynch above, n 14, at 7.

<sup>81</sup> Fitzgerald, above n 2.

<sup>82</sup> Chitsabesan and Hughes, above n 72, at 114.

<sup>83</sup> Oranga Tamariki Evidence Centre, above 6, at 20-21.

<sup>84</sup> Baidawi and Sheehan, above n 47, at 107.

a history of self-harm, suicidal ideation, or suicide attempts which were more common amongst females than males.<sup>85</sup> 73 percent of the sample abused substances, with at least 40 percent reportedly having used “hard drugs” such as heroin and methamphetamines.<sup>86</sup>

A notable observation from the Australian study was that mental health classification systems seemed to inadequately capture the crossover youths’ frequently “complex mental health symptomology ...”<sup>87</sup> Distress often was labelled as “emotional regulation challenges or “challenging behaviour”.<sup>88</sup> The “psychological and emotional distress reportedly apparent from children's case files was frequently attributed to “underlying trauma”, “attachment issues”, rather than specific mental health diagnoses.<sup>89</sup> This aligns with broader trauma research which suggests that as much as half of all mental illness and mental health consequences, including those which although serious do not amount to a formal diagnosis, has trauma at its roots.<sup>90</sup> Similar links were apparent in relation to substance abuse with many within the sample of 300 reportedly having understood their substance use as a coping mechanism.<sup>91</sup>

*(f) Maltreatment and adversity*

Given the involvement of crossover youth with state care and protection, the reality of abuse, maltreatment or other adversity in their childhoods can arguably be presumed. The Australian study of 300 crossover youth found that 67 percent were victims of neglect, 60 percent of physical abuse, 53 percent of emotional abuse, and 21 percent of sexual abuse.<sup>92</sup> Around two-thirds of the sample had experienced two or more of these maltreatment types.<sup>93</sup>

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<sup>85</sup> At 107; Baidawi and Sheehan, above n 42, at 10.

<sup>86</sup> Baidawi and Sheehan, above n 47, at 108.

<sup>87</sup> At 107-108.

<sup>88</sup> At 108.

<sup>89</sup> At 107.

<sup>90</sup> *Crossover Kids: Vulnerable Children in the Youth Justice System – Report 3: Sentencing Children Who Have Experienced Trauma* (Sentencing Advisory Council Victoria, April 2020) at 18 citing M de Bellis and A Zisk “The Biological Effects of Childhood Trauma” (2014) 23(2) *Child and Adolescent Clinics* 185 at 207; Sara R Jaffee “Child Maltreatment and Risk for Psychopathology in Childhood and Adulthood” (2017) 13 *Annual Review of Clinical Psychology* 525 at 528; Martin Teicher and Jacqueline Samson “Annual Research Review: Enduring Neurobiological Effects of Childhood Abuse and Neglect” (2016) 57(3) *J Child Psychol Psychiatry* 241 at 241.

<sup>91</sup> Baidawi and Sheehan, above n 47, at 108.

<sup>92</sup> At 98-99.

<sup>93</sup> At 98-99.

A range of other adversities were also recorded amongst the group of 300 crossover youth studied in Australia. At least 74 percent were exposed to family violence.<sup>94</sup> At least half had members of their family suffering mental health issues including suicide attempts for 5 to 10 percent.<sup>95</sup> Approximately 70 percent had parents with substance abuse issues.<sup>96</sup> Over 40 percent had parents with criminal justice involvement and 25 percent had a parent or step parent who had experienced incarceration as adults.<sup>97</sup> At least 20 percent had a deceased parent, often lost by way of a traumatic death such as homicide or suicide.<sup>98</sup> Socioeconomic conditions and contexts of poverty, transience and homelessness were prevalent.<sup>99</sup>

It is also important not to overlook the trauma inherent in forced removal from the home and consequent disconnection.<sup>100</sup> Further, abuse and maltreatment not only occur in the home but also in the context of social institutions which purport to care for and protect children and young people.<sup>101</sup>

In the Australian study, intergenerational trauma was starkly clear amongst the sample of 300 crossover youth with parents generally noted as having had an inability to feel safe or secure in their own childhood.<sup>102</sup> The cyclical nature of this intergenerational trauma was further highlighted by the fact that six percent of the sample were already parents, 79 percent of whom had already had child protection involvement in their child's life.<sup>103</sup>

Available research in New Zealand corresponds with these findings. Recent wellbeing indicators for 17 year olds within the 1997 to 2002 birth cohort showed that more than half of the crossover group had a family violence incident within their immediate family in the last year.<sup>104</sup> Further, 45 percent of the crossover group had a parent who had been to prison.<sup>105</sup> This sat in stark contrast to merely 5 percent amongst the group of young people without any

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<sup>94</sup> At 95-96.

<sup>95</sup> At 96-97.

<sup>96</sup> At 97.

<sup>97</sup> At 97.

<sup>98</sup> At 97-98.

<sup>99</sup> At 98.

<sup>100</sup> Samantha Buckingham "Trauma Informed Juvenile Justice" 53(3) Am Crim Law Rev 641 at 689.

<sup>101</sup> See Abuse in Care – Royal Commission of Inquiry <<https://www.abuseincare.org.nz/>>; Cathy Kezelman and Pam Stavropoulos, *The Last Frontier: Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (Adults Surviving Child Abuse / Blue Knot Foundation, 2012) at xxx.

<sup>102</sup> Baidawi and Sheehan, above n 47, at 97.

<sup>103</sup> At 103-104.

<sup>104</sup> Oranga Tamariki Evidence Centre, above n 6, at 21.

<sup>105</sup> At 16.



statutory involvement.<sup>106</sup> The crossover group was also noted as the most likely to have a parent who was subject to reports of concern as a child or to have been in an out of home placement.<sup>107</sup> In terms of socioeconomic wellbeing indicators, over half of the crossover group lived in areas of high socioeconomic deprivation and were most likely to have been in receipt of a benefit or to have parents supported by benefits.<sup>108</sup>

*(g) Offending profile*

Crossover youth have a distinct and concerning offending profile. In addition to their stubborn overrepresentation in the youth justice system, research shows that crossover youth tend to be younger when they first become involved with the justice system.<sup>109</sup> As noted above, a recent Youth Justice Indicators Summary Report showed that throughout the period from 2014/15 to 2019/20, 97 percent of children aged 10 to 13 years who were referred for a youth justice family group conference had previously been the subject of a report of concern to Oranga Tamariki about their care and protection.<sup>110</sup> In other words, virtually all of the youngest justice cohort in New Zealand during that timeframe were crossover youth. Baidawi and Sheehan's study of 300 crossover youth in Australia found that crossover youth were three times as likely to be charged before the age of 14 than their non-crossover peers.<sup>111</sup>

Baidawi and Sheehan also noted, in line with a number of prior small-scale studies, that crossover youth were comparatively more likely to offend in groups.<sup>112</sup> McIntosh has noted that being placed in care and removed from family, whānau, community and culture can encourage alternative forms of connection including gang formation.<sup>113</sup> Gangs can provide otherwise lacking "safety and protection" as well as "acceptance and connection".<sup>114</sup>

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<sup>106</sup> At 16.

<sup>107</sup> At 16-17.

<sup>108</sup> At 18.

<sup>109</sup> K McFarlane "Care-Criminalisation: The Involvement of Children in Out-of-Home Care in the New South Wales Criminal Justice System" (2018) 51(3) Australian and New Zealand Journal of Criminology 412; J P Ryan and others "Adolescent Neglect, Juvenile Delinquency and the Risk of Recidivism" 42(3) (2013) J Youth and Adolesc 454.

<sup>110</sup> Ministry of Justice, above n 4, at 17-18.

<sup>111</sup> Baidawi and Sheehan, above n 42.

<sup>112</sup> Baidawi and Sheehan, above n 47, at 34.

<sup>113</sup> McIntosh, above n 58, at 3.

<sup>114</sup> Buckingham, above n 100, at 648.

Offending by crossover youth also tends to escalate at a greater rate than other groups.<sup>115</sup> Further analysis by Baidawi and Sheehan indicated a higher volume of offending and a greater prevalence of violence comparative to the broader youth justice population.<sup>116</sup> Correspondingly, Fitton and others undertook a comprehensive review of international studies of the link between maltreatment and violence and found that childhood maltreatment is an important determinant of violence later in life, almost doubling the risk of violent outcomes.<sup>117</sup> In a longitudinal study in America, Widom and others found that the volume of offending amongst maltreated children also appears higher than both matched controls of non-maltreated children.<sup>118</sup>

Of particular relevance in the context of this thesis and as noted in the introduction to this chapter, crossover youth have been found to be more likely to continue offending into adulthood.<sup>119</sup> Former Principal Youth Court Judge and former Children’s Commissioner, Andrew Becroft, noted that “life course persistent” offenders tend to be characterised by significant personal, social and family dysfunction.<sup>120</sup>

Crossover youth are clearly a complex group. They are acknowledged as one of the most vulnerable groups in society and are said to present the Youth Court and associated agencies with their greatest challenges.<sup>121</sup> In Aotearoa New Zealand, their complexities led to the rollout of “Crossover Lists”, a judge-led initiative whereby all matters, both youth justice and care and protection, are dealt with in the same hearing before a dual warranted judge.<sup>122</sup> The initiative facilitates a collaborative, multidisciplinary team approach, sharing of information and more

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<sup>115</sup> C G Malvaso and others “The maltreatment-violence link: exploring the role of maltreatment experiences and other individual and social risk factors among young people who offend” (2018) 55 J Crim Justice 35 at 35–45; M T Baglivio and others “Maltreatment, child welfare, and recidivism in a sample of deep-end crossover youth” (2016) 45(4) J Youth and Adolesc 625; C S Widom and others “A prospective examination of criminal career trajectories in abused and neglected males and females followed up into middle adulthood” (2018) 34 J Quant Criminol 831.

<sup>116</sup> Baidawi and Sheehan, above n 47, at 161.

<sup>117</sup> Lucy Fitton, Rongqin Yu and Seena Fazel “Childhood Maltreatment and Violent Outcomes: A Systematic Review and Meta-Analysis of Prospective Studies” (2020) 21(4) Trauma, Violence and Abuse 754.

<sup>118</sup> Widom and others, above n 115.

<sup>119</sup> Oranga Tamariki Evidence, above n 6, at 24. Carolyn Henwood and others, above n 6, at 82. Centre for Social Research and Evaluation, above n 2; Widom and others, above n 115.

<sup>120</sup> Andrew Becroft “How to Turn a Child Offender Into An Adult Criminal—In 10 Easy Steps” (Paper presented at the Children and the Law International Conference, Tuscany, Italy, 2009) at 16.

<sup>121</sup> Fitzgerald, above n 2 at 16; Katherine Werry “Crossover Kids in New Zealand” [2021] NZLJ 312.

<sup>122</sup> Fitzgerald, above n 2.

coordinated, synchronised interventions.<sup>123</sup> It shows clear acknowledgment of the care-crime connection.

### *3 Reasons for the crossover*

In addition to the individual, environmental and systemic characteristics of crossover youth, numerous researchers have considered the reasons behind the concerning and persistent trajectory from care and protection into the youth justice system.<sup>124</sup> Predominant amongst the explanations cited is the link between pre-existing “risk factors”, most commonly experience of trauma, adversity and maltreatment.<sup>125</sup> Other commentators, additionally point to factors involved with the care experience itself which compound pre-existing vulnerabilities and to factors related to treatment in the youth justice space which contribute to the care-crime crossover and to system entrenchment.<sup>126</sup>

#### *(a) Impacts of childhood trauma and adversity*

As noted, crossover youth have commonly suffered significant maltreatment and adversity prior to their involvement in the justice system. Indeed, the care to custody pipeline has been otherwise dubbed the “trauma to prison pipeline”.<sup>127</sup> A substantial body of research shows associations between childhood adversity and a broad range of health, behavioural, emotional and social problems across the life course. The pioneering Adverse Childhood Experiences (ACE) Study by Felitti and others in America in 1998 was among the first to demonstrate this nexus and was foundational to countless other studies.<sup>128</sup> In the original study, which involved

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<sup>123</sup> At 19.

<sup>124</sup> Stanley, above n 2; N Carr and S McAllister “The Double Bind: Looked After Children, Care Leavers and Criminal Justice” in P Mendes and P Snow (eds) *Young People Transitioning from Out-of-Home Care* (Palgrave, London, 2016); J Staines *Risk, Adverse Influence and Criminalisation: Understanding the over-representation of Looked After Children in the Youth Justice System* (Prison Reform Trust, London, 2016); Andrew McGrath, Alison Gerard and Emma Colvin “Care Experienced Children and the Criminal Justice System” (2020) 600 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>125</sup> McGrath, Gerard and Colvin, above n 124, at 3; A Stewart, S Dennison and E Waterson “Pathways from Child Maltreatment to Juvenile Offending” (2002) 241 *Trends and Issues in Crime and Criminal Justice* 1; A Stewart, M Livingston and S Dennison “Transitions and turning points: Examining the links between child maltreatment and juvenile offending” (2008) 32(1) *Child Abuse and Neglect* 51.

<sup>126</sup> McGrath, Gerard and Colvin, above n 124, at 3; Staines, above n 124; Alison Gerard and others “I’m not getting out of bed! The criminalisation of young people in residential care” (2019) 52(1) *Australian and New Zealand Journal of Criminology* 76.

<sup>127</sup> K Lowenstein *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth* (Citizens for Juvenile Justice, Boston, 2018).

<sup>128</sup> A Felitti and others “Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults: the Adverse Childhood Experiences (ACE) study” (1998) 14(4) *Am J Prev Med* 245.

over 17,000 participants, ten specific types of ACE were assessed including physical, sexual and emotional abuse and a range of indicators of household dysfunction, such as exposure to domestic violence, and incarceration of a household member.<sup>129</sup> The study established a clear link between the number and breadth of ACE exposure and a range of negative outcomes for physical and mental health across the life course. The authors of the study suggested that the potential influences of ACEs across the life course include social, emotional and cognitive impairment, adoption of health risk behaviours, disability, disease and social problems, ultimately culminating in early death.<sup>130</sup>

A limitation of the original ACE study by Felitti and colleagues was its failure to take account of broader social and structural factors given the narrow parameters around what constituted an ACE.<sup>131</sup> Adversity can be presumed not only at home, but also in communities “riddled by violence, and bankrupted of resources”.<sup>132</sup> Further, for those removed from whānau and placed in care, contact with the system itself can be traumatic. Consistent findings have been observed by subsequent researchers who have expanded the original ten ACEs beyond household factors to include racism, community violence, bullying, parental death, low socioeconomic status and state care.<sup>133</sup>

As an epidemiological study, a further acknowledged limitation of the original ACE study was that it did not offer any explanations for the correlations and links it demonstrated.<sup>134</sup> Over time other researchers have increasingly pointed to neurobiology to explain the study’s findings.<sup>135</sup> In short, links have been found between the number and breadth of ACE exposure and a range

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<sup>129</sup> At 248.

<sup>130</sup> At 256.

<sup>131</sup> Craig McEwen and Scout Gregorson “A Critical Assessment of the Adverse Childhood Experiences Study at 20 Years: (2019) 56(6) Am J Prev Med 790.

<sup>132</sup> M Gohara “In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing” (2018) 45(1) Am J Crim Law 1 at 16.

<sup>133</sup> M Smith “Capability and Adversity: Reframing the ‘Causes of the Causes’ for Mental Health.” (2018) 4(1) Palgrave Commun 13; D Bruska “Children in foster care: A vulnerable population at risk” (2008) 21(2) J Child Adolesc Psychiatr Nurs 70; R Anda and others “Building a framework for global surveillance of the public health implications of Adverse Childhood Experiences” (2010) 39(1) Am J Prev Med 93; Jane Stevens “How Cities, Counties and States use the ACEs Connection Network to Help Build Healthy Communities” (2017) 10 Journal of Child and Adolesc Trauma 243.

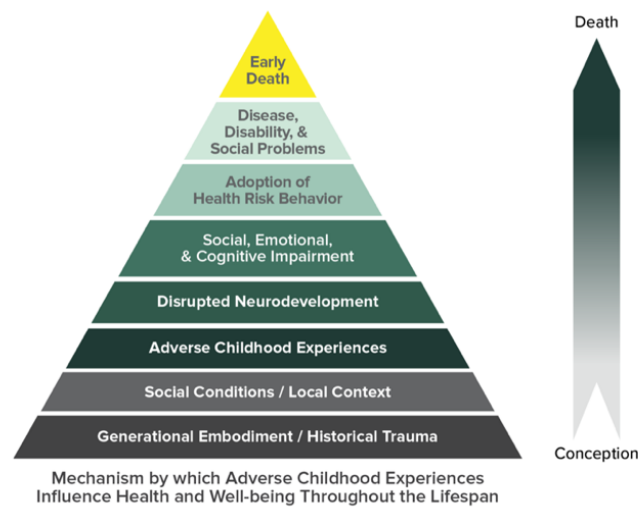
<sup>134</sup> Felitti and others, above n 128, at 256.

<sup>135</sup> R Anda and others “The Enduring Effects of Abuse and Related Adverse Experiences in Childhood” (2006) 256(3) Eur Arch Psychiatry Clin Neurosci 174.

of negative neuroscientific effects including functional changes to the developing brain that in turn lead to a range of social, emotional, cognitive and behavioural impacts.<sup>136</sup>

The original ACE study findings were illustrated in a conceptual framework in the form of a tiered pyramid reflecting the cascade of interconnected impacts of ACEs.<sup>137</sup> As the research findings have developed and expanded, the conceptual framework showing the wide-ranging impacts across the life course has correspondingly developed as shown in Figure 1.<sup>138</sup>

**Figure 1: The Ace Pyramid**



The base two layers of the pyramid show the broader structural and systemic issues including historical and intergenerational trauma and the social conditions that form the context within which ACEs are experienced. The third layer represents ACEs. The next layer represents disrupted neurodevelopment. The subsequent layers to the apex show the flow of negative impacts for which disrupted neurodevelopment is the substrate: social, emotional and cognitive impairment; adoption of health-risk behaviours; disease, disability and social problems and, finally, early death.

<sup>136</sup> R Anda and others, above n 133; D Cicchetti “Annual research review: Resilient functioning in maltreated children—Past, present, and future perspectives” (2013) 54 *J Child Psychol Psychiatry* 402; M Teicher and others “The neurobiological consequences of early stress and childhood maltreatment” (2003) 27 *Neurosci Biobehav Rev* 33; S Twardosz and J Lutzker “Child maltreatment and the developing brain: A review of neuroscience perspectives” (2010) 15 *Aggress Violent Behav* 59.

<sup>137</sup> Felitti and others, above n 128, at 256.

<sup>138</sup> Centre for Disease Control and Prevention “About the CDC-Kaiser ACE Study” Centre for Disease Control and Prevention <<https://www.cdc.gov/violenceprevention/aces/about.html>>; see also Jane Stevens “Adding layers to the ACEs pyramid -- What do you think?” (7 April 2015) PACE Connection <<https://www.pacesconnection.com/blog/adding-layers-to-the-aces-pyramid-what-do-you-think>>.

Even taking account of deviation amongst terminology or the parameters set around what constitutes an ACE, crossover youth inevitably have high rates of exposure.<sup>139</sup> A recent comprehensive review by Oranga Tamariki of the backgrounds of children and young people in the care system and youth justice systems suggested that the difficulties faced by children and young people in both the care and youth justice populations often stem from a history of trauma, neglect or abuse.<sup>140</sup> A large American study exploring ACE exposure amongst serious, chronic and violent young people in the justice system and young people referred to the justice system for single non-violent offences found that, for every additional ACE, the risk of serious, chronic and violent offending increased by more than 35 percent.<sup>141</sup> It follows that the original ACE study by Felitti and colleagues and the research which expands upon its findings offer a cogent explanation for many of the challenges faced by crossover youth in Aotearoa New Zealand and for their sustained overrepresentation in the justice system.

*(b) Factors related to care experience*

Some researchers have pointed to factors involved with the care experience itself which are said to compound pre-existing vulnerabilities and draw care involved young people deeper into the justice system.<sup>142</sup> One such explanation is placement instability and its knock-on effects of disrupted education, relationships and health.<sup>143</sup> Placement instability impinges on crucial attachments to family, care givers, community and culture.<sup>144</sup>

Other researchers argue that the care environment itself is criminogenic given the way it brings together a group of young people who each have multiple complexities, some of whom are already well entrenched in the justice system.<sup>145</sup> It is important to acknowledge that, in the context of impaired connections with family, whānau, care givers, community and culture, peer

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<sup>139</sup> D Simkiss “The Needs of Looked after Children from an Adverse Childhood Experience Perspective” (2018) 29(1) *Paediatr Child Health* 25; Baidawi and Sheehan, above n 47, at 95.

<sup>140</sup> Oranga Tamariki Evidence Centre *Evidence Brief: Complex Needs* (Oranga Tamariki, September 2018).

<sup>141</sup> B Hahn Fox “Trauma changes everything: examining the relationship between adverse childhood experiences and serious, violent and chronic juvenile offenders” (2015) 46 *Child Abuse and Neglect* 163.

<sup>142</sup> Stanley, above n 2; Carr and McAllister, above n 124; Baidawi and Sheehan, above n 47, at 196.

<sup>143</sup> Stanley, above n 2, at 59.

<sup>144</sup> J Cashmore “The Link Between Child Maltreatment and Adolescent Offending” (2011) 89 *Family Matters* 31; J Cashmore and M Paxman “Predicting aftercare outcomes: The importance of ‘felt’ security” (2006) 11(3) *Child Fam Soc Work* 232.

<sup>145</sup> Stanley, above n 2, at 65.

influence is acutely significant.<sup>146</sup> Stanley accordingly argues that the care environment fosters “cultures of ‘trouble’”.<sup>147</sup>

In addition to the creation of conditions which enhance criminal behaviour, several studies, primarily from the United Kingdom and Australia, raise concerns about a related issue: criminalisation and oversurveillance of behaviour that might not come to police attention in the family home.<sup>148</sup> In England, the Howard League for Penal Reform, for example, noted that “looked after children living in children’s homes are being criminalised at excessively high rates compared to other groups of children”.<sup>149</sup>

Relatedly, the concerning trend of “criminalisation of care and protection” issues has recently been noted judicially and academically in Aotearoa New Zealand.<sup>150</sup> In *Police/Oranga Tamariki v LV* Judge Fitzgerald drew attention to the fact that most crossover youth enter the youth justice system with a history of running away from unhappy placements.<sup>151</sup> As a young child, not yet within the jurisdiction of the youth justice system, such behaviours are seen as “a concerning feature of their care and protection concerns”.<sup>152</sup> Once old enough to enter the Youth Court, however, care and protection “steps back” and youth justice powers are then used to control those behaviours.<sup>153</sup> The running away becomes relabelled as “absconding” which is met with arrest, detention in custody and opposed bail applications.<sup>154</sup> In short, Judge Fitzgerald states that, by replacing their status as vulnerable and in need of care and protection with one of risk, “we take these highly traumatised children and further traumatise them by dealing with the issue in that way, thereby greatly increasing the likelihood of further offending”.<sup>155</sup>

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<sup>146</sup> C Taylor *Young People in Care and Criminal Behaviour* (Jessica Kingsley, London, 2006) at 88; J Shaw “Why do young people offend in children’s homes? Research, theory and practice” (2014) 44(7) Br J Soc Work 1823.

<sup>147</sup> Stanley, above n 2, at 59.

<sup>148</sup> Shaw, above n 45; Gerard and others above n 126; McFarlane, above n 109.

<sup>149</sup> Claire Sands *Criminal Care: Children’s Homes and Criminalising Children* (The Howard League for Penal Reform, 2016) at 1; Claire Fitzpatrick and Patrick Williams “The neglected needs of care leavers in the criminal justice system: Practitioners’ perspectives and the persistence of problem (corporate) parenting” (2016) 17(2) Criminol Crim Justice 175.

<sup>150</sup> *New Zealand Police/Oranga Tamariki v LV* [2020] NZYC 117 at [107]; Katherine Werry “Crossover Kids in New Zealand” [2021] NZLJ 312.

<sup>151</sup> *New Zealand Police/Oranga Tamariki v LV*, above n 150, at [112].

<sup>152</sup> At [112].

<sup>153</sup> At [113].

<sup>154</sup> At [113].

<sup>155</sup> At [113].

Along similar lines of a risk-vulnerability dichotomy, Stanley argues that, without the “safety net” of a stable family, young people from care backgrounds are viewed as risky to society and risky to themselves so are more likely to end up in custody.<sup>156</sup> Judge Fitzgerald has alerted that once remanded in a youth justice facility, often little is done to find a suitable placement for crossover youth resulting in long remands in custody.<sup>157</sup>

It is clear that crossover youth are a highly complex group facing countless co-occurring challenges. The vast and far reaching impacts of ACEs and childhood trauma go some way to providing an explanation for the complexities of crossover youth and their overrepresentation in the justice system. Importantly, the ACE research shows that these challenges cascade across the life course. This shows there is a clear need to consider and address these complexities as live issues beyond the youth justice stage. Further, the compounding nature of system involvement for young people with care involvement shows the need for a trauma lens at all stages. That is to say, even at the youth justice stage, where there is direct recognition of the care-crime connection through the crossover list initiative, there is an inclination for young people, once given the label of “offender”, to become the “problem” as opposed to the underlying issues which trauma research shows drives their behaviour.

### *B Young Adults in the Criminal Justice System*

As noted in the introduction to this chapter, it is clear that crossover youth not only make up a significant proportion of the children and young people who offend, but also those who go on to reoffend as adults.<sup>158</sup> Clearly the complexities of crossover youth do not elapse at 18 years of age. One recent research report exploring the pathways of a 1993 to 1997 birth cohort in Aotearoa New Zealand found that by age 22 the crossover group continue to face a range of disadvantages which may continue to contribute to their involvement in the criminal justice system.<sup>159</sup> In terms of socioeconomic factors, they were significantly more likely to have been on a benefit for more than half of their early adult life than any other group their age.<sup>160</sup> They also had the highest rates of unemployment.<sup>161</sup> The crossover group also fared worse across a

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<sup>156</sup> Stanley, above n 2, at 60.

<sup>157</sup> *New Zealand Police/Oranga Tamariki v LV*, above n 150, at 114.

<sup>158</sup> Oranga Tamariki Evidence, above n 6, at 24. Carolyn Henwood and others, above n 6, at 82. Centre for Social Research and Evaluation, above n 2.

<sup>159</sup> Oranga Tamariki Evidence Centre, above n 6, at 22.

<sup>160</sup> At 26.

<sup>161</sup> At 27.



range of wellbeing indicators. In the previous year, 67 percent had mental health treatment and 52 percent for substance abuse issues.<sup>162</sup> This report aside, despite the substantial ongoing crossover, once aged out of the youth justice jurisdiction, young adults with a care and protection background have received minimal attention in either research or policy.

Whilst crossover young adults in Aotearoa New Zealand are a neglected group in research and policy, the distinct needs of young adults aged 18 to 25 years in the justice system as a broader cohort are the subject of an expanding body of research.<sup>163</sup> Interest increasingly surrounds the mismatch between the arbitrary youth justice system age limit of 17 years,<sup>164</sup> and interdisciplinary research showing that development continues into the mid-twenties.<sup>165</sup> Young adulthood, thus, is a distinct phase of life bringing crossover young adults a further set of challenges. It, therefore, would be remiss to assume that crossover young adults are the same as crossover youth calling for the same responses.

This chapter will, accordingly, turn to the research base relating to young adults in the justice system. It will briefly consider a nationally and internationally established criminological phenomenon: the age-crime curve. It will then turn to consider research relating to the transition to adulthood from sociological and neuroscientific perspectives, taking account of the additional hurdles facing crossover young adults. Notably neuroscientific and neurodevelopmental research is considered amongst the most compelling research in this area.<sup>166</sup> Steinberg notes that “people are persuaded much more by concrete than by abstract evidence, and by neuroscience in particular.”<sup>167</sup>

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<sup>162</sup> At 28.

<sup>163</sup> See Lynch, above n 7; Woodwark and Lynch, above n 7; Păroşanu and Pruin, above n 7.

<sup>164</sup> Adult criminal liability applies to offending committed at 18 years or over. The exception is young persons aged 17 years charged with serious, specified offences who are dealt with as adults in the criminal justice system: Oranga Tamariki Act 1989, s 272 and sch 1A.

<sup>165</sup> See Lynch, above n 7; Woodwark and Lynch, above n 7; Păroşanu and Pruin, above n 7; D Prior and others *Maturity, Young Adults and Criminal Justice: A Literature Review* (Commissioned by the Barrow Cadbury Trust for the Transition to Adulthood Alliance Barrow Cadbury Trust, March 2011).

<sup>166</sup> Claire Hammond *Youth offending and sentencing in Scotland and other jurisdictions Literature review* (Scottish Sentencing Council, April 2019) at 21 and 26.

<sup>167</sup> Steinberg, above n 12, at 190.

## *1 The age-crime curve*

An “age-crime curve” demonstrating a peak of offending around age 18 with gradual desistance in the early twenties has been consistently found across the world for some time.<sup>168</sup> Statistics show that the “peak of offending” in Aotearoa New Zealand occurs across the divide of age bands for “youth” and “adult” courts and services.<sup>169</sup> Young adults up to the age of 20 in prison in Aotearoa New Zealand are estimated to be 43 percent more likely than the general population to be re-imprisoned and 63 percent more likely to be reconvicted within 12 months of release.<sup>170</sup>

Despite common connotations of adulthood arriving upon an individual’s 18<sup>th</sup> birthday, developmental researchers consider “emerging adulthood” a phase of life distinct from adulthood and childhood in need of separate attention.<sup>171</sup> Researchers from a range of disciplines point to a multitude of sociological, psychological, and biological changes that occur during adolescence and adulthood to distinguish young adults and, within the criminal justice context, to explain the “age-crime” curve.<sup>172</sup>

## *2 Transition to adulthood from a sociological perspective*

Sociological researchers urge attention to be paid to the transition to adulthood as a key developmental phase that has a “profound impact” on individuals’ future life course trajectories.<sup>173</sup> Researchers point to changes in societal norms that have prolonged the age of key milestones or markers of adulthood such as onset of employment, financial independence, long term stable relationships with many more young adults still living with parents than 50

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<sup>168</sup> Alex Piquero “Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course” in Akiva M Liberman (ed) *The Long View of Crime: A Synthesis of Longitudinal Research* (Springer, New York, 2008).

<sup>169</sup> Gluckman and Lambie, above n 27, at 9.

<sup>170</sup> At 7.

<sup>171</sup> Steinberg, above n 12; Jensen Arnett, above n 12, at 476.

<sup>172</sup> G Sweeten, A Piquero and L Steinberg “Age and the explanation of crime, Revisited” (2013) 42 *J Youth Adolesc* 921; Jeffrey Arnett “Reckless Behaviour in Adolescence: A Developmental Perspective” (1992) 12 *Dev Rev* 339; Terrie Moffitt “Adolescence-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy” (1993) 100 *Psychol Rev* 674.

<sup>173</sup> E Scott, R Bonnie and L Steinberg “Young adulthood as a transitional legal category: Science, social change, and justice policy (2016) 85(2) *Fordham Law Review* 641 at 653; Jensen Arnett, above n 12.

years ago.<sup>174</sup> Adoption of these adult roles such as marriage and stable employment are associated with desistance and successful transition to adulthood.<sup>175</sup>

Whilst the protracted sociological concept of adulthood and later age of attaining key markers of adulthood apply to all young adults in a normative sense, of course marginalised young adults such as crossover young adults are likely to have a more difficult transition at this cliff edge stage. The majority will be involved in a range of statutory and government agencies such as Regional Youth Forensics Services, health and education. At this higher risk stage, they transition from youth to adolescent services and face a “double jeopardy” – high risk of offending and, as they are at the divide of services, they run the risk of slipping through the cracks.<sup>176</sup>

It is noteworthy that when the extended transition provisions for young people with care backgrounds were enacted in 2019, the legislature gave express acknowledgement of the fact that “transitions to independence are not linear”, that many young adults are in “unsettled circumstances” and, crucially, that young people leaving care are “among the most vulnerable people in Aotearoa New Zealand”.<sup>177</sup> Research correspondingly shows the difficulties faced by young people leaving care. Stanley has noted their developmental and attachment issues.<sup>178</sup> Numerous empirical studies in a range of countries attest to the challenges faced by young people transitioning from care, particularly when these transitions are condensed, fast-tracked, and poorly supported.<sup>179</sup>

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<sup>174</sup> Frieder Dunkel and Ineke Pruin *Better in Europe? European Responses to Young Adult Offending* (Barrow Cadbury Trust, 2015) at 23-24; J Arnett “Emerging Adulthood: What is it, and what is it good for?” (2007) *Child Dev Perspect* 68 at 68-69; V Helyar-Cardwell *Young Adult Manifesto* (London Transition to Adulthood Alliance, 2009)

<sup>175</sup> V Schiraldi, B Western and K Bradner *Community-Based Responses to Justice Involved Young Adults* (US National Institute of Justice, 2015) at 3.

<sup>176</sup> House of Commons Justice Committee *The treatment of young adults in the criminal justice system* (House of Commons, HC169, 26 October 2016) at 8.

<sup>177</sup> Children, Young Persons and Their Families (Oranga Tamariki) Legislation Bill 2016 (224-1) (explanatory note).

<sup>178</sup> Stanley, above n 2, at 59-60.

<sup>179</sup> M Courtney, J Hook and J Lee *Distinct subgroups of former foster youth during young adulthood: Implications for policy and practice* (2012) 18(4) *Child Care in Practice* 409; P Mendes and B Moslehuddin “From dependence to interdependence: Towards better outcomes for young people leaving state care” (2006) 15(2) *Child Abuse Review* 110; M Stein “Research review: Young people leaving care” (2006) 11(3) *Child Fam Soc Work* 273; Carr and McAllister, above n 124.

### *3 Young adult brain development and associated psychosocial characteristics*

Neuroscience explains immaturity in physical terms and provides “compelling evidence” that young adults are fundamentally different and require different responses and interventions.<sup>180</sup> It is well settled that the brain is not fully developed at age 17 or 18 years; rather, development continues until at least 25 years.<sup>181</sup> Following substantial scientific advancements since 2000, there is a considerable body of research into the changes in structure and activity in young adult brains and the implications for social, emotional, behavioural and cognitive development.<sup>182</sup> These structural and functional changes translate into a number of stereotypical behaviours or characteristics for which adolescents are known.

#### *(a) Impulsive*

Firstly, young adults are more impulsive, present-oriented and less inclined to consider the consequences of their actions,<sup>183</sup> particularly in emotionally heightened scenarios.<sup>184</sup> Research suggests this is developmentally adaptive as it encourages exploration and development of a sense of self, though it can contribute to harmful risk taking behaviour, including that which results in criminal charges.<sup>185</sup> It is notable that criminal offending is but one instance of a broader inclination amongst young adults to engage in “risky activity”.<sup>186</sup>

#### *(b) Sensitivity to reward and peer pressure*

Secondly, the lesser ability to plan and rationally make decisions is coupled with a heightened sensitivity to reward.<sup>187</sup> In short, young people tend to minimise or underestimate the potential

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<sup>180</sup> Hammond, above n 166, at 21.

<sup>181</sup> Mark Fondacaro and others “The Rebirth of Rehabilitation in Juvenile and Criminal Justice: New Wine in New Bottles” (2015) 41 Ohio North University Law Rev 697 at 716; A Galvin and others “Earlier development of the accumbens relative to orbitofrontal cortex might underlie risk taking behaviors in adolescents” (2006) J Neurosci 6885; S Johnson, R Blum and J Giedd “Adolescent maturity and the brain: The promise and pitfalls of neuroscience research in adolescent health policy” (2009) 45(3) J Adoles Health 216; D Prior and others, above n 165.

<sup>182</sup> See D Prior and others, above n 165.

<sup>183</sup> Elizabeth Scott, Natasha Duell and Laurence Steinberg “Brain Development, Social Context and Justice Policy” 2018 57 Washington University Journal of Law and Policy at I(A)(3).

<sup>184</sup> Alexandra Cohen and others “The Impact of Emotional States on Cognitive Control Circuitry and Function” (2016) 28 J Cogni Neurosc 446 at 446-459.

<sup>185</sup> Bruce Ellis and others “The Evolutionary Basis of Adolescent Behaviour: Implication for Science, Policy and Practice” (2012) 48 Dev Psychol 598.

<sup>186</sup> Scott, Bonnie and Steinberg, above n 173, at 646.

<sup>187</sup> Steinberg, above n 12, at 69; L Steinberg and others “Age Differences in sensation seeking and impulsivity as indexed by behaviour and self report: Evidence for a dual systems model” (2008) 44(6) Dev Psycho 1764.

of dangerous, risky, and negative consequences while simultaneously overestimating potential rewards.<sup>188</sup> Relatedly, in addition to being more influenced by heightened or emotional situations, young adults are more susceptible to peer pressure, especially when engaged in risk taking behaviours as part of a group.<sup>189</sup>

*(c) Susceptibility to change*

Thirdly, on a more positive note, a further common thread cited from neurodevelopmental research is that, as young adults are still developing, they are more susceptible to change, responsive to rehabilitative interventions and inclined to “grow out” of crime.<sup>190</sup> Steinberg has correspondingly dubbed young adulthood the “age of opportunity”.<sup>191</sup>

This period from 18 to 25 years has been characterised as a period of continuing development and continuing risk.<sup>192</sup> The above psychosocial abilities demonstrate that poor decision making and risk taking during young adulthood as a particular developmental phase may not be “intrinsically motivated”, but instead may be attributable to underdevelopment of particular parts of the brain.<sup>193</sup> This research is increasingly relied upon to argue for a distinct approach to young adults in the justice system.<sup>194</sup>

Notably, the above traits are general and normative characteristics of immaturity arising in the context of typical brain development. Research findings have demonstrated that factors including neurodisabilities, which are prevalent amongst crossover youth as noted above, contribute to abnormal maturation and development and exacerbate the characteristics outlined in respect of all young adults in the criminal justice system.<sup>195</sup> Such conditions can, for example, impact young adults’ impulsivity and increase the likelihood of risk taking and

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<sup>188</sup> Elizabeth Scott and Laurence Steinberg *Rethinking Juvenile Justice* (Harvard University Press, Cambridge, 2008) at 40-41.

<sup>189</sup> Elizabeth Cauffman and Laurence Steinberg “Emerging Findings From Research on Adolescent Development and Juvenile Justice” (2012) 7 *Victims and Offenders* 428 at 434; Margo Gardner and Laurence Steinberg “Peer influence on risk taking, risk preference, and risky decision making in adolescence and adulthood: an experimental study” 2005 41(4) *Dev Psychol* 625.

<sup>190</sup> JA Weller and others “Plasticity of risky decision making among maltreated adolescents: Evidence from a randomised controlled trial” (2015) 27(2) *Dev and Psychopathol* 535.

<sup>191</sup> Steinberg, above n 12.

<sup>192</sup> Jensen Arnett, above n 12, at 476.

<sup>193</sup> O’Rourke and others, above n 25, at 3.

<sup>194</sup> e.g. see Lynch, above n 7, at 22.

<sup>195</sup> Lambie, above n 13, at 5; Lynch, above n 14; Hughes and others, above n 20.

criminal justice system involvement.<sup>196</sup> In fact, the prevalence of neurodisabilities in the young adult subgroup of the justice population was a key driving force behind the implementation of the Young Adult List Court Initiative in Aotearoa New Zealand.<sup>197</sup>

It is important to take account of the fact that brain development can be disrupted in a range of ways that may not amount to a specific neurodisability, label or diagnosis. Advances in neuroimaging have provided a means to investigate the “web of interactions” between brain development and environmental or contextual factors, including maltreatment and adversity.<sup>198</sup> Research demonstrates that family, social and environmental factors have a fundamental role to play in shaping the young human brain.<sup>199</sup> Importantly, as noted above in the discussion of crossover youth, neurodevelopmental research findings have been drawn upon to explain the links between ACEs and the cascade of consequent negative outcomes across the life course. ACEs have been cited as a “particularly potent and significant” factor which can inhibit maturation and development.<sup>200</sup> Accordingly, disparities in criminal justice statistics relating to those on the “care to custody pipeline” are paralleled by research findings that show differences in brain development because of early adversity.<sup>201</sup> It follows that there is a clear need to take account of childhood trauma and adversity when considering the developmental stage of young adulthood for criminal justice purposes.

### *C Conclusion*

Crossover youth in the youth justice system present with a host of challenges, often rooted in a history of childhood trauma and adversity. The original ACE study and research which built upon its findings show that childhood adversity can disrupt development resulting in a range of negative outcomes which, if unresolved, continue to have impacts across the life course.<sup>202</sup> This makes a strong case for considering care involvement and related childhood trauma beyond the youth justice stage.

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<sup>196</sup> C Moynan and T McMillan “Prevalance of head injury and associated disability in prison populations: A Systematic Review” (2018) 33(4) *Journal of Head Trauma Rehab* 275.

<sup>197</sup> Woodwark and Lynch, above n 7, at 28.

<sup>198</sup> O’Rourke and others, above n 25, at 31.

<sup>199</sup> M Gunnar and K Quevedo “The neurobiology of stress and development” (2007) 58 *Annu Rev Psychol* 145; Perry and others, above n 24.

<sup>200</sup> O’Rourke and others, above n 25, at 57.

<sup>201</sup> Barbara Wallace “The Conference Morning Keynote Address of Dr. Laurence Steinberg on the Age of Opportunity and Lessons from the New Science of Adolescence: With Introductory and Closing Commentary” (2016) 15(3) *J Infant Child Adolesc Psychother* 155.

<sup>202</sup> Felitti and others, above n 128.

The compounding impact of system responses to crossover youth on their pre-existing challenges provides a strong cautionary note in respect of crossover young adults. Even at the youth justice stage where there is general acknowledgment of the care-crime connection, it is clear that the issues with which crossover youth present can lead to them being considered “problematic” or “risky”.<sup>203</sup> Given the lack of acknowledgement of the care-crime connection in the adult criminal justice system, the status of crossover young adults as in need of care and protection is arguably even more likely to become overshadowed by a perception of a “risk-posing offender requiring management or containment”.<sup>204</sup>

Young adults aged 18 to 25 are at a pivotal stage of life. Crossover young adults naturally face additional challenges transitioning not only to adulthood but also out of the care and protection and criminal justice systems. Young adults, as a result of ongoing brain development, present with a range of psychosocial limitations which increase their inclination for risky behaviour and often lead to justice involvement. Research therefore increasingly draws attention to the need to distinguish young adults in the criminal justice system on purely age-related developmental factors.<sup>205</sup>

Arguably, considering crossover young adults from a purely age-related perspective leaves a significant gap in understanding and limits the consequent effectiveness of criminal justice responses. The neurodevelopmental research which built upon the original ACE study’s findings clearly shows that family, social and environmental factors have a major role to play in shaping the developing brain.<sup>206</sup> Given the prevalence of childhood trauma amongst crossover youth and the inextricable links between trauma and development, arguably developmentally appropriate criminal justice responses for crossover young adults ought to include consideration of the impacts of trauma.<sup>207</sup> If left unacknowledged, developmental disparities are likely to increase inequality with potential to sustain across the life course.

Accordingly, the next chapter will integrate key neuroscientific findings relating to young adult brain development with those relating to the impacts of ACEs and childhood trauma. Drawing

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<sup>203</sup> C Fitzpatrick, P Williams and D Coyne “Supporting Looked After Children and Care Leavers in the Criminal Justice System: Emergent Themes and Strategies for Change” (2016) 226 *Prison Service Journal* 8 at 8.

<sup>204</sup> At 8.

<sup>205</sup> Lynch, above n 7, at 22.

<sup>206</sup> E McCrory, M Gerin and E Viding “Annual Research Review: Childhood Maltreatment, Latent Vulnerability and the Shift to Preventative Psychiatry” 58(4) *J Child Psychol Psychiatry* 338.

<sup>207</sup> Marsh and Byer, above n 26, at 2.

such connections will facilitate the formulation of a neurodevelopmentally-aware, trauma-informed lens through which to assess the current approach to sentencing for crossover young adults in Chapter IV.



### ***III Building a Neurodevelopmentally-Aware, Trauma-Informed Lens***

As noted in chapter II, following substantial scientific advancements over the last twenty years, there is a considerable body of research into the developmental changes in structure and activity in the young adult brain and the implications for their functioning.<sup>208</sup> Increased risky behaviour, including that which amounts to criminal offending, is frequently attributed to “unfortunate yet transient immaturity”.<sup>209</sup> There is increasing acknowledgement nationally and internationally of the need for criminal justice responses to young adults to incorporate findings from research on the developing brain.<sup>210</sup>

Of course, brain development is not a homogenous process; research demonstrates that family, social and environmental factors have a major role to play in shaping the developing brain.<sup>211</sup> As noted in chapter II, childhood adversity and trauma have been cited as a “particularly potent and significant” factor which can disrupt brain development and maturation.<sup>212</sup> Any criminal justice response to the unique developmental phase of crossover young adults, therefore, ought to account for the impacts of childhood trauma given its prevalence amongst those with a care and protection background.<sup>213</sup>

This chapter will integrate key themes from neurodevelopmental research relating to normative patterns of young adult brain development with key findings relating to the impacts of childhood trauma on the developing brain. By integrating these findings, this chapter will facilitate the formulation of a neurodevelopmentally-aware, trauma-informed lens through which to assess the current approach to sentencing for crossover young adults in Chapter IV.

Brain development, of course, is a “complex and dynamic process”.<sup>214</sup> Neurodevelopmental research is correspondingly ever-growing and highly technical.<sup>215</sup> Notwithstanding, there are several key discernible concepts that can and ought to inform current understanding of

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<sup>208</sup> Prior and others, above n 165; O’Rourke and others, above n 25.

<sup>209</sup> Elizabeth Scott and others “Juvenile Sentencing Reform in a Constitutional Framework” (2016) 88 Temple Law Rev 675 at 679.

<sup>210</sup> See Lynch, above n 7; Woodwark and Lynch, above n 7; Păroşanu and Pruin, above n 7; Scott, Bonnie and Steinberg, above n 173.

<sup>211</sup> McCrory, Gerin and Viding, above n 206.

<sup>212</sup> O’Rourke and others above n 25, at 57.

<sup>213</sup> Marsh and Byer, above n 26.

<sup>214</sup> Bruce Perry, “Examining Child Maltreatment Through a Neurodevelopmental Lens: Clinical Applications of the Neurosequential Model of Therapeutics” (2009) 14 J Loss and Trauma 240 at 241.

<sup>215</sup> Prior and others, above n 165, at 8.

offending behaviour by crossover young adults and, most importantly, how best to (or not to) respond to it.

Following a preliminary contextual note on the sequential manner in which the brain develops, this chapter will begin with discussion of the “imbalance model”.<sup>216</sup> The “imbalance model” is a neurodevelopmental explanation for increased offending during young adulthood which attributes risk taking behaviours amongst young adults to the differing developmental trajectories of distinct parts of the brain. In theory, when this developmental imbalance flattens out, so should immaturity related impulsiveness and risky behaviours, including criminal offending. However, while some stages in brain development are “genetically mapped”,<sup>217</sup> as noted above, experience is the “major modifier” of brain development.<sup>218</sup> This chapter, therefore, will proceed to consider the impacts of early adversity on the developing brain.

In short, when exposed to childhood adversity or trauma, development can be disrupted in a wide range of ways causing extensive maladaptation. Crossover young adults with unresolved childhood trauma are likely to be easily triggered and reactive. The age-related factors relevant to all young adults are likely to be significantly exacerbated. In other words, trauma is clearly a key driver of offending, non-compliance and reoffending. Importantly, by locating the impacts of trauma within the developmental framework of young adulthood, this chapter will then bring reversibility and healing into focus. In the same way that adversity and negative experiences can cause maladaptation, positive experiences characterised by safety and connections to others can facilitate healing. During young adulthood, the brain goes through a period of heightened neuroplasticity, that is, a period during which it is particularly malleable in accordance with experience. This “science of hope” reframes the sentencing stage for crossover young adults as an opportunity to either assist or impede recovery from trauma and entrench or interrupt a cycle of offending and institutionalisation.<sup>219</sup>

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<sup>216</sup> B Casey, R Jones and L Somerville “Braking and Accelerating of the Adolescent” (2011) 21(1) *J Res Adolesc* 21; Laurence Steinberg “A social neuroscience perspective on adolescent risk taking” (2008) 28 *Dev Rev* 78 at 99; Galvin and others, above 181.

<sup>217</sup> Perry and others, above n 24, at 819; Bruce Perry “Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells us about Nature and Nurture” (2002) 3 *Brain and Mind* 79.

<sup>218</sup> Bruce Perry, “Incubated in Terror: Neurodevelopmental Factors in the ‘Cycle of Violence’” in J Osofsky (ed) *Children, Youth and Violence: The Search for Solutions* (Guilford Press, New York, 1997) at 2.

<sup>219</sup> Ruth Müller and M Kenney “A Science of Hope? Tracing Emergent Entanglements between the Biology of Early Life Adversity, Trauma-informed Care, and Restorative Justice” (2021) 46(6) *Sci Technol Human Values* 1230.

## *A Sequential Development*

The human brain develops in a sequential, hierarchical manner from the bottom to the top, from less complex to more complex as shown in Figure 2 below.<sup>220</sup> Figure 2 shows the four main regions of the brain.<sup>221</sup> The brainstem and diencephalon are involved in self-regulation and basic survival related functions, such as heart rate and body temperature. The limbic system is involved in emotional development, relational development and attachment. The cortex controls executive function, an overarching term for cognitive abilities such as problem solving, planning, abstract thought and insight.

### **Figure 2: Sequential brain development and functioning**

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Source:  
B D Perry © 2010-2015

Accessed at:  
Bruce Perry and others “The Impact of Neglect, Trauma, and Maltreatment on Neurodevelopment: Implications for Juvenile Justice Practice, Programs, and Policy” in Anthony Beech and others (eds) *The Wiley Blackwell Handbook of Forensic Neuroscience* (1st ed, Wiley and Sons Ltd, Hoboken, 2018) at 820.

Also available at B Perry “Seven Slide Series: The Human Brain” (7 September 2013) The Child Trauma Academy Channel at 4:03  
<<https://www.youtube.com/watch?v=uOsgDkeH52o>>

Whilst each of the four areas of the brain has a distinct function and its own developmental “timetable”,<sup>222</sup> they are all intricately interconnected and coordinated by a multitude of neural networks. Like stacked Jenga blocks<sup>223</sup> or a house under construction,<sup>224</sup> development and functioning of higher parts of the brain critically depend on a strong foundation in the lower parts.<sup>225</sup>

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<sup>220</sup> Perry and others, above n 24, at 820.

<sup>221</sup> Perry and others, above n 24, at 820.

<sup>222</sup> Perry, above n 214, at 242.

<sup>223</sup> Ivana Lucero “Written in the Body? Healing the Epigenetic Molecular Wounds of Complex Trauma Through Empathy and Kindness” (2018) 11(4) *Journal of Child and Adolescent Trauma* 443;

<sup>224</sup> Center on the Developing Child *From best practices to break-through impacts: a science-based approach to building a more promising future for young children and families* (Harvard University, 2016) at 7.

<sup>225</sup> Perry, above n 214; Perry, above n 218, at 4-5.

## *B The Imbalance Model*

Whilst the most rapid period of neurodevelopment occurs in the five years following conception, the interconnecting parts of the brain continue to go through significant maturational changes through young adult life.<sup>226</sup> A common thread amongst much of the developmental research, particularly surrounding heightened criminal offending during the young adulthood phase, is the contrasting developmental courses of the limbic system and the prefrontal cortex.<sup>227</sup>

As noted, the cortex is involved in executive function and the limbic system is involved in emotion and motivation. Changes in the limbic system make young adults more emotional, more responsive to stress, more sensitive to rewards, and more likely to engage in sensation seeking than either children or adults.<sup>228</sup> Development in the prefrontal cortex, on the other hand, increases capacity for sophisticated thinking abilities, such as planning, weighing risks and rewards, rationalising and controlling impulses.

Importantly, during young adulthood, development occurs at a significantly slower rate in the cortex than limbic region.<sup>229</sup> Steinberg likens this imbalance to “driving a car with a sensitive gas pedal and bad brakes”.<sup>230</sup> This developmental imbalance provides an evidential basis for the “maturity gap” underlying the limited psychosocial functioning of young adults as discussed in the previous chapter.<sup>231</sup> As noted, interdisciplinary research shows that adolescents are more present-oriented,<sup>232</sup> and have less capacity than adults to control impulses.<sup>233</sup> Researchers have also found a heightened susceptibility to engaging in risky

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<sup>226</sup> Perry and others, above n 24, at 819.

<sup>227</sup> Casey, Jones and Somerville, above n 216; Steinberg, above n 216, at 99; Galvin and others, above n 181; Fondacaro and others, above n 181; Scott, Bonnie and Steinberg, above n 173, at 646.

<sup>228</sup> E Schulman and others “The Dual Systems Model: Review, Reappraisal and Reaffirmation” (2016) 17 *Dev Cogni Neurosci* 103; Casey, Jones and Somerville, above n 216; B Braams and others “Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development, and Risk-Taking Behavior” (2015) 35(18) *J Neurosci* 7226; M Luciana and PF Collins “Incentive motivation, cognitive control, and the adolescent brain: is it time for a paradigm shift?” (2012) 6(4) *Child Dev Perspect* 392.

<sup>229</sup> B Casey and others “Imaging the developing brain: what have we learned about cognitive development?” (2005) 9(3) *Trends Cogn Sci* 104; S Ordaz and others “Longitudinal growth curves of brain function underlying inhibitory control through adolescence” (2013) 33(46) *J Neurosci* 18109.

<sup>230</sup> Steinberg, above n 12, at 15.

<sup>231</sup> G Icenogle and others “Adolescents’ Cognitive Capacity Reaches Adult Levels Prior to Their Psychosocial Maturity: Evidence for a “Maturity Gap” in a Multinational, Cross-Sectional Sample” (2019) 43(1) *Law Human Behav* 69.

<sup>232</sup> A Galvan and others “Risk-taking and the adolescent brain: who is at risk?” (2007) 10(2) *Dev Sci* F8.

<sup>233</sup> L Steinberg and others “Age Differences in Future Orientation and Delay Discounting” (2009) 80(1) *Child Dev* 28; T Willoughby and others “Examining the link between adolescent brain development and risk taking

behaviour under peer pressure due to the “imbalance” between these two key brain systems.<sup>234</sup> This developmental imbalance, therefore, also provides an explanation for the “age-crime curve” discussed in chapter II.

### *C Use-dependence*

Whilst normative developmental insights can and ought to inform criminal justice responses, Steinberg has pointed out that reference to brain development research is not intended to reduce people to little more than a “network of neurons” that is “dictated by biology alone” or unaffected by “external forces”.<sup>235</sup> He states, rather, that a backdrop of neuroscientific understanding does quite the opposite – it shows how important the environment and experiences are.<sup>236</sup>

The brain and neural networks alter in accordance with patterns of activation – they develop and change in a “use-dependent” manner.<sup>237</sup> While some stages in brain development are “genetically mapped”,<sup>238</sup> brain construction and consequent functional capacities will directly reflect an individual’s nature, timing and pattern of early experiences.<sup>239</sup> Comparing the developing brain to a house under construction once more, “just as the unavailability of needed materials at key points in the [building] process can force changes to blueprints, the lack of appropriate experiences can lead to alterations in neural architecture...”<sup>240</sup>

Accordingly, the principle of use-dependence assists understanding of much of the emotional, behavioural, cognitive and social functioning that brings so many care-involved young people into the justice system. If a child is raised in an environment that caters for their physical needs and provides stimulating experiences and nurturing, healthy relational interactions with family and community, they are more likely to develop optimal cognitive, emotional, behavioural and

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from a social-developmental perspective” (2013) 83(3) *Brain Cogn* 315; B Casey and K Caudle “The Teenage Brain: Self Control” (2013) 22(2) *Curr Dir Psychol Sci* 82.

<sup>234</sup> J Chein and others “Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry” (2011) 14 *Dev Sci* F1.

<sup>235</sup> Steinberg, above n 12, at 4.

<sup>236</sup> At 4.

<sup>237</sup> Perry, above n 217, at 87.

<sup>238</sup> Perry and others, above n 24, at 819; Perry, above n 217.

<sup>239</sup> Perry and others, above n 24, at 819.

<sup>240</sup> Center on the Developing Child, above n 224, at 7.

physiological functioning.<sup>241</sup> The unfortunate corollary is that where a child suffers adversity such as trauma, abuse, neglect or impaired attachment in early life, development can be compromised, organisation interrupted and functional capacities deeply impacted.<sup>242</sup> Full appreciation of the powerful implications of experience as the “major modifier” of brain development and behaviour for individuals with a history of childhood adversity or trauma requires consideration of the impacts of trauma on the stress response.<sup>243</sup>

#### *D Sensitisation of the Stress Response*

Bearing in mind the principle of “use-dependence”, key neural systems impacted by activation through early adversity or traumatic experience are those that facilitate the stress response.<sup>244</sup> The effects of trauma on these systems have been the subject of extensive research.<sup>245</sup> Studies show that, on the one hand, if the brain is exposed to moderate, controllable and predictable stressors and novelty, the stress response system will gradually become less sensitive and a degree of “tolerance” will be built up.<sup>246</sup> This will result in proportionality between stimulus and response and an ability to cope with new challenges and novel experiences. Ungar and Perry found this to also relate to the degree of resilience demonstrated when faced with significant or even extreme stress.<sup>247</sup>

On the other hand, where exposure to stress is variable, unpredictable, extreme, chronic or prolonged – as is prevalent amongst justice and care and protection involved youth and adults - the stress response system will become sensitised and the relationship between stimulus and response will no longer be in sync. Any stressor, no matter how minor, is likely to prompt a

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<sup>241</sup> Bruce Perry “Maltreatment and the developing child: How early childhood experience shapes child and culture” (The Inaugural Margaret McCain lecture, London, September 2004).

<sup>242</sup> J Shonkoff and P Philips (eds) *From Neurons to Neighbourhoods: The Science of Early Childhood Development* (National Academic Press, Washington, 2000) at 183; Perry, above n 214, at 241; Perry, above n 217, at 87.

<sup>243</sup> Perry, above n 218, at 2.

<sup>244</sup> Shonkoff and Philips, above n 242, at 213; Perry and others, above n 24, at 815 and 822; Bruce Perry and Ronnie Pollard “Homeostasis, stress, trauma, and adaptation: A neurodevelopmental view of childhood trauma” (1998) 7 *Child and Adolescent Psychiatric Clinics of North America* 33; W Baker and others “Childhood trauma, the neurobiology of adaptation and ‘use-dependent’ development of the brain: How “states” become “traits”” (1995) 16 (4) *Infant Mental Health Journal* 271 at 277.

<sup>245</sup> Perry and Pollard, above n 244; Gunnar and Quevedo, above n 199; Shonkoff and Philips, above n 242; M DeBellis and others “Developmental Traumatology Part II: Brain Development” (1999) 45 *Society of Biological Psychiatry* 1271.

<sup>246</sup> Perry and others, above n 24, at 822; Shonkoff and Philips, above n 242, at 213.

<sup>247</sup> Michael Ungar and Bruce Perry “Trauma and Resilience” in Ramona Alaggia and Cathy Vines (eds) *Cruel but not unusual: Violence in Canadian Families* (2<sup>nd</sup> ed, Wilfrid Laurier University Press, Waterloo, 2012).

more extreme or disproportionate response.<sup>248</sup> There are two main adaptive stress responses: hyperarousal and dissociation.<sup>249</sup> A range of factors influence which of these two adaptive responses are engaged, though frequently individuals engage elements of both.<sup>250</sup>

Hyperarousal is what is commonly understood as “fight or flight” mode.<sup>251</sup> When this mode is activated, a range of neurophysiological changes occur in order to prepare the body to either fight the perceived threat or to flee from it. Dissociation is much less commonly understood and is even often overlooked.<sup>252</sup> In contrast to “fight or flight”, it could be described as “defeat”, “giving up” or “surrender”.<sup>253</sup> In traumatic scenarios where a fight or flight attempt is deemed futile, dissociation confers an ability to mentally check out so that the intensity of trauma can be buffered by emotional distance.

One problem for individuals with unresolved trauma is that even when they transition into a safe environment, often the survival responses and state of fear do not turn off; they become “wired for survival”.<sup>254</sup> In some cases, they will be more inclined towards substance use in order to self soothe.<sup>255</sup> As noted in chapter II, research shows that addiction is common amongst crossover youth. Further, future challenges, even minor, will activate the most common adaptive pattern used in similar situations in the past. Their “exaggerated reactivity”<sup>256</sup> can be considered inattentive, non-compliant or lead to misdiagnosis with ADHD, conduct disorder or oppositional defiant disorder (ODD) diagnoses.<sup>257</sup> As noted in chapter II, such diagnoses are prevalent amongst crossover youth.

When trauma responses manifest as offending behaviours, they can also end up unrecognised.<sup>258</sup> Crossover young adults who respond through fight or flight mode will be inclined toward outbursts which could easily result in behaviour that amounts to criminal offending and may also be misinterpreted as aggressive and oppositional. For example, a young

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<sup>248</sup> Perry and others, above n 24, at 822; Shonkoff and Philips, above n 242, at 26-27.

<sup>249</sup> Baker and others, above n 244, at 277.

<sup>250</sup> Perry and others, above n 24, at 826.

<sup>251</sup> At 824.

<sup>252</sup> Baker and others, above n 244, at 277.

<sup>253</sup> At 280; Perry and Pollard, above n 244, at 43.

<sup>254</sup> Gohara, above n 132, at 20.

<sup>255</sup> G Maté “Addiction: Childhood Trauma, Stress and the Biology of Addiction” (2012) 1(1) J Restor Med 56.

<sup>256</sup> Baker and others, above n 244, at 278.

<sup>257</sup> At 283; Buckingham, above n 100 at 653 citing A Cook and others *Complex Trauma in Children and Adolescents* (National Child Traumatic Stress Network Complex Trauma Task Force, 2003).

<sup>258</sup> Buckingham, above n 100, at 656.

male who grew up suffering domestic violence and who used a fight or flight response during those traumatic situations may respond to authoritarian males, even in neutral and unthreatening scenarios, with fight or flight.<sup>259</sup>

Similarly, those with a dissociative response could be wrongly considered to be defiant or remorseless. Regardless of which type of sensitised response an individual presents with, there is a strong prospect that it will not be recognised and acknowledged as a “symptomatic reaction to horrible events”.<sup>260</sup> Rather, it is likely to be viewed as in-compliant or oppositional and to attract a punitive response which will do little other than further ignite the stress response and contribute to a vicious cycle.<sup>261</sup>

### *E State-dependent Functioning*

The full implications of the disruptive “developmental ‘echo’” of living in a persistent state of fear are made clearer through consideration of a further neuroscientific principle: state-dependent functioning.<sup>262</sup> As the lower brain areas that mediate the stress response are intricately connected with and play a foundational role for the higher areas of the brain, a sensitised stress response can result in wide ranging emotional, cognitive, behavioural and physiological maladaptation.<sup>263</sup>

An individual’s “state” plays a significant role in determining which neural networks in the brain are activated and which are de-activated.<sup>264</sup> All functioning – emotional, social, cognitive and behavioural – therefore are impacted by “state”. In a state of calm, we use the higher, more complex parts of our brain to process and act on information. In a state of fear, we use the lower, more primitive, regulatory parts of our brain. As the perceived threat level goes up, the less thoughtful and the more reactive and emotionally driven our responses become.<sup>265</sup> State-dependent functioning can be set out in the following continuum:<sup>266</sup>

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<sup>259</sup> Perry and others, above n 24, at 824.

<sup>260</sup> Gohara, above n 132, at 2.

<sup>261</sup> Baker and others, above n 244, at 280; Perry and Pollard, above n 244, at 45.

<sup>262</sup> E Hambrick, T Brawner and B Perry “Examining Developmental Adversity and Connectedness in Child Welfare-Involved Children” (2018) 43(2) *Children Australia* 105 at 105.

<sup>263</sup> Baker and others, above n 244, at 278.

<sup>264</sup> Perry and others, above n 24, at 817.

<sup>265</sup> Perry, above n 241.

<sup>266</sup> Adapted from B Perry “Seven Slide Series: State-dependent Functioning” (27 February 2014). The Child Trauma Academy Channel <https://www.youtube.com/watch?v=1uCn7VX6BPQ> at 8:42.



### Figure 3: State-dependent functioning

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Source: B D Perry © 1996-2014

Adapted from B Perry “Seven Slide Series: State-dependent Functioning” (27 February 2014). The Child Trauma Academy Channel  
<https://www.youtube.com/watch?v=1uCn7VX6BPQ> at 8:42.

Bearing in mind the sequential manner in which the brain develops and organises, as discussed at the beginning of this chapter, to be able to access or influence higher level functioning, such as learning social skills or new knowledge, lower levels of the brain must be regulated or balanced.<sup>267</sup> An individual who has suffered trauma may be “developmentally stuck” in the lower level of the brain, allowing minimal information to get passed up to the higher parts of their brain where rationalising and learning happens.<sup>268</sup>

It follows that, to the extent that all adolescents engage in risky activity because of limited executive functioning due to the mismatch between the competing upper and lower brain systems and a still growing “braking system” as set out above, this mismatch is exacerbated for those who have experienced childhood adversity. Steinberg states that everything known about the young adult brain and involvement in the justice system “applies threefold” to those who experienced disadvantage or adversity.<sup>269</sup>

Fundamentally, people with unresolved trauma will exist in a constant state of fear, responding by hyperarousal or dissociation and their emotional, behavioural and cognitive functioning will reflect this state. The implications of this are profound in terms of how crossover young adults will cope and respond to justice system processes and interventions. In order to follow or comply with directions, or to build skills, an individual needs to be able to be capable of executive function which requires cortical regulation. The older individuals become, the more is expected of them. For those with neurotypical development, self-regulation and executive

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<sup>267</sup> Perry, above n 214, at 243.

<sup>268</sup> S Lyons *The Repair Of Early Trauma A “Bottom Up” Approach* (Beacon House Therapeutic Services and Trauma Team) at 4.

<sup>269</sup> Wallace, above n 201.

functioning may not be reached until well into the twenties. Trauma will significantly delay this, which means that functioning is likely to fall well below chronological age. Expectations on traumatised young adults based on chronological age are sure to fail.<sup>270</sup> Incompliance with rules will contribute to a continuation of a lifelong “toxic negative feedback cycle” - from teachers, social workers, probation officers, judges – which will simply reinforce and compound trauma and consequent maladaptive functioning.<sup>271</sup>

### *F Relational Neurobiology*

Another key theme requiring discussion is relational or interpersonal neurobiology.<sup>272</sup> Perry emphasises the fundamental importance of connections to others by reference to the fact that humans are inherently social beings. He states “[h]uman beings evolved not as individuals, but as communities. Despite Western conceptualisations, the smallest functional biological unit of humankind is not the individual.”<sup>273</sup> Successful existence and interdependence always has, and always will, rely on healthy, empathic relationships.<sup>274</sup> Perry notes that the understanding amongst indigenous peoples of the “primacy of human connectedness reflects a wisdom lost in our current world”.<sup>275</sup>

Crucially, activation of neural networks responsible for social interaction, empathy and bonding requires healthy, early caregiving.<sup>276</sup> Bearing the principle of “use-dependence in mind”, the more often an individual experiences a type of interaction, positive or negative, the more the brain will therefore become accustomed and shaped by it.<sup>277</sup> If a child experiences attentive, nurturing early interactions with a caregiver on a consistent and repetitive basis, this creates a “catalogue”<sup>278</sup> of non-verbal cues such as tone of voice and body language and “templates” in the brain about what humans are – a source of security, safety and acceptance.<sup>279</sup>

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<sup>270</sup> Perry and others, above n 24, at 828.

<sup>271</sup> At 827.

<sup>272</sup> D Siegel *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are* (2<sup>nd</sup> ed, Guilford Press, New York, 2012) at 65.

<sup>273</sup> Perry, above n 218, at 12.

<sup>274</sup> At 12.

<sup>275</sup> Perry and Winfrey, above n 283, at 253.

<sup>276</sup> Perry and others, above n 24, at 825; Perry, above n 217, at 95; Shonkoff and Philips, above n 242, at 6, 225-266.

<sup>277</sup> Perry, above n 214; G Kraemer “A psychobiological theory of attachment” (1992) 15(3) *Behav Brain Sci* 493.

<sup>278</sup> Perry and others, above n 24, at 825.

<sup>279</sup> Perry, above n 214, at 247.

Consequently, there is a significant connection between the neural systems involved in social functioning and those involved in the stress response.<sup>280</sup> Essentially, neurodevelopmental research findings show that “relational health” or “connectedness” offer a unique and unparalleled buffering effect to current and prior stress or adversity.<sup>281</sup> For those of us fortunate to have nurturing, consistent caregivers, human relational interactions throughout life will provide the template for healthy relationship building and calm when stressed.<sup>282</sup> This connectedness depends on the social, relational and bonding capabilities developed and the relational “opportunities” you have.<sup>283</sup>

For those with a relational history characterised by impermanence, inconsistency, abuse or neglect – clearly prevalent amongst those with a care and protection background - human interaction will not only fail to provide stress mediating effects, the interactions themselves are likely to be a trigger or source of dysregulation.<sup>284</sup> Notably unresolved trauma may be transmitted to later generations as trauma limits the ability to build and engage fully and safely in relationships.<sup>285</sup> Amongst the implications of negative relational interactions or relational deprivation noted by researchers is heightened sensitivity to relational cues.<sup>286</sup> Objectively neutral or even kindly interactions may trigger an oversensitised stress response.

Further reported implications of relational poverty are alteration of “personal space” and the “intimacy barrier”.<sup>287</sup> We all have a sense of our own physical “personal space” which, if invaded by an uninvited person, activates our stress response. Similarly, we all have an emotional personal space or “intimacy barrier” within which personal topics and personal issues are held close. Those with negative relational history will have a much larger sense of physical and emotional personal space, invasion of which is likely to activate their

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<sup>280</sup> Hambrick, Brawner and Perry, above n 262.

<sup>281</sup> E Hambrick and others “Beyond the ACE score: Examining relationships between timing of developmental adversity, relational health and developmental outcomes in children” (2019) 33(3) Archives of Psych Nursing 238; Perry and others, above n 24, at 825.

<sup>282</sup> Perry, above n 214, at 247; Hambrick, Brawner and Perry, above n 262; M Bellis and others “Does continuous trusted adult support in childhood impart life-course resilience against adverse childhood experiences - A retrospective study on adult health-harming behaviours and mental well-being” (2017) 17(1) BMC Psychiatry 110–121.

<sup>283</sup> B Perry and O Winfrey, “What Happened to You? Conversations on Trauma, Resilience, and Healing” (2021, New York) at 242.

<sup>284</sup> Perry, above n 214, at 247; G Kraemer “A psychobiological theory of attachment” (1992) 15(3) Behav Brain Sci 493 at 497.

<sup>285</sup> Lori Haskell and Melanie Randall “Disrupted Attachments: A Social Context Complex Trauma Framework and the Lives of Aboriginal Peoples in Canada” 5(3) Journal of Aboriginal Health 48.

<sup>286</sup> Perry and others, above n 24, at 826.

<sup>287</sup> At 826.

oversensitised stress response system and prompt one of the adaptive responses discussed above.<sup>288</sup>

The bottom line is that crossover young adults are highly likely to have negative relational history, characterised by abuse, neglect or inconsistency, alongside a sensitised stress response. Interaction with justice professionals is likely to prompt or exacerbate hyperarousal or dissociation which, as discussed above, could be misinterpreted as aggression or disengagement.<sup>289</sup> Transitions between youth and adult services are likely to bring staff changeovers and replications of abandonment and impermanence.<sup>290</sup> Imprisonment has clear implications in terms of issues with personal space likely to compound the issues caused by trauma, rendering it wholly counterproductive.<sup>291</sup>

### *G Neuroplasticity: the “Science of Hope”*<sup>292</sup>

An important further common thread in developmental neuroscientific research is that some areas of the brain are particularly malleable in adolescence and young adulthood.<sup>293</sup> It has long been established that there is heightened neuroplasticity from birth to three years when the brain is organising, but this second period of heightened neuroplasticity is a relatively recent discovery.<sup>294</sup> In simple terms, the brain is more easily shaped during adolescence or emerging adulthood than at any time other than infancy.<sup>295</sup>

Steinberg has termed this period of heightened neuroplasticity and susceptibility to change an “age of opportunity”.<sup>296</sup> Rather than viewing maladaptive behaviours resulting from trauma induced developmental disruption in a deterministic, deficit-based manner, therefore,

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<sup>288</sup> At 826.

<sup>289</sup> At 826.

<sup>290</sup> C Ludy-Dobson and B Perry “The role of healthy relational interactions in buffering the impact of childhood trauma” in E Gil (ed) *Working with children to heal interpersonal trauma: The power of play* (Guilford Press, New York, 2010) at 39.

<sup>291</sup> Perry and others, above n 24, at 826; Buckingham, above n 100, at 662.

<sup>292</sup> Müller and Kenney, above n 219.

<sup>293</sup> Jon Bardin, ‘Neurodevelopment: Unlocking the Brain’ (2005) 487(7405) *Nature* 24; KH Takao “Critical Period Plasticity in Local Cortical Circuits” (2005) 6(11) *Nat Rev Neurosci* 877 at 880.

<sup>294</sup> Steinberg, above n 12, at 9.

<sup>295</sup> A S Lillard and A Erisir, “Old Dogs Learning New Tricks: Neuroplasticity Beyond the Juvenile Period,” (2011) 31(4) *Developmental Review* 207; LD Selemon, “A Role for Synaptic Plasticity in the Adolescent Development of Executive Function,” (2013) 3(3) *Translational Psychiatry* 3.

<sup>296</sup> Steinberg, above n 12.

neuroplasticity provides a “science of hope”.<sup>297</sup> This brings the prospect of healing, recovery, positive development and the interruption of intergenerational harm into focus.

Of course, it is important to bear in mind the use-dependent manner in which the brain develops and alters. Neuroplasticity is the capacity to be influenced by experience and to adapt to the environment; it is not simply a “resilience” or an ability to “recover” or return to some original untainted position regardless of external influence.<sup>298</sup> Rather, appropriately targeted “positive experiences can activate positive neurological change and pathways to recovery”.<sup>299</sup> In other words, young adulthood is both a “window of opportunity for untapped potential for growth and maturation” as well as a “vulnerable period for external influence”.<sup>300</sup>

As discussed earlier, the brain develops, alters and functions in a sequential manner from bottom to top. When in a fear state, common amongst those with a sensitised stress response as a result of childhood adversity, the only part of the brain functioning is the brainstem (the survival brain); the cortex and limbic systems effectively switch off. In order to capitalise on the “age of opportunity” and the “science of hope”, interventions ought to take an approach that engages the brain from the bottom up.<sup>301</sup> For an individual to learn, which requires engagement of the cortex at the top of the brain, the lower parts of the brain must first be engaged and regulated.<sup>302</sup> To regulate the survival brain (the brainstem), there must be a felt sense of safety, an opportunity to get out of fight or flight mode and to access a state of calm.<sup>303</sup> In addition to safety and self-regulation, “healing and recovery are impossible... without lasting caring connections to others”.<sup>304</sup> When the biology of attachment is disrupted by traumatic experiences, it can be very difficult to form healthy relationships.<sup>305</sup> Bloom, therefore, asserts

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<sup>297</sup> Müller and Kenney, above n 219.

<sup>298</sup> Perry, above n 218.

<sup>299</sup> Kezelman and Stavropoulos, above n 101, at 36.

<sup>300</sup> PJ Eslinger and M Long “Biopsychosocial influences that promote and impede social brain maturation” (2016) 15(3) *J Infant Child Adolesc Psychother* 179 as cited in Wallace, above n 201; Shonkoff and Philips, above n 242, at 94.

<sup>301</sup> Perry and others, above n 24, at 830; Perry, above n 214, at 243.

<sup>302</sup> Perry, above n 214, at 243; Perry and Pollard, above n 244, at 46.

<sup>303</sup> Perry, above n 214, at 243.

<sup>304</sup> B Perry, M Szalavitz *The boy who was raised as a dog: And other stories from a child psychiatrist's notebook-what traumatized children can teach us about loss, love and healing* (Basic Books, New York, 2017) cited in Lucero, above n 223.

<sup>305</sup> Perry, above n 214, at 247.

that, as developmental trauma occurs in a relational context, it must also be healed in a relational context.<sup>306</sup>

### *H Conclusion*

It is clear that, in addition to age-related neurodevelopmental distinctions, neurodevelopmental impacts of childhood trauma are of central relevance to sentencing for crossover young adults. Whilst neurodevelopment and trauma do not necessarily excuse offending behaviour, they may help to explain why it occurred and guide the best course for reducing prospects of its reoccurrence. In other words, it is clear that “more effective, fair, intelligent and just” responses must come from a stance that is neurodevelopmentally-aware and trauma-informed.<sup>307</sup>

By integrating key themes from neurodevelopmental research relating to the young adult brain and the impacts of early trauma, this chapter has facilitated the formulation of a neurodevelopmentally-aware, trauma-informed lens through which to critique the current approach to sentencing for crossover young adults in Chapter IV. From the insights discussed in this chapter, this thesis proposes that a neurodevelopmentally-aware, trauma-informed lens ought to entail an understanding of three primary points.

Firstly, as the brain develops and adapts in accordance with experience, exposure to early adversity frequently disrupts brain development, significantly impacting emotional, behavioural and cognitive functioning.<sup>308</sup> Crossover young adults with unresolved childhood trauma will accordingly frequently exist in a persistent fear state and operate primarily in their brainstem (survival brain).<sup>309</sup> Age-related limitations in executive functioning and consequent risk taking and lesser ability to learn or engage with new skills will apply “threefold” amongst those with unresolved trauma.<sup>310</sup> Reactive, or seemingly volatile behaviours, including that

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<sup>306</sup> S Bloom “Trauma Theory” in B Richard, J Haliburton and S King (eds) *Humanising Mental Health Care in Australia: A Guide to Trauma Informed Approaches* (Routledge, New York, 2019).

<sup>307</sup> M Randall and L Haskell “Trauma-informed approaches to law: Why restorative justice must understand trauma and psychological coping” (2013) 36(2) *Dalhousie Law Journal* 501 at 501.

<sup>308</sup> J Shonkoff and P Philips (eds) *From Neurons to Neighbourhoods: The Science of Early Childhood Development* (National Academic Press, Washington, 2000) at 183; Perry, above n 214, at 241; Perry, above n 217, at 87.

<sup>309</sup> Perry, above n 214, at 243.

<sup>310</sup> Wallace, above n 201.

which amounts to criminal offending, may be understood as maladaptive “symptomatic reaction[s] to horrible events”.<sup>311</sup>

Secondly, the good news is that, just as trauma and adversity can lead to negative changes in the brain, positive experiences can also facilitate change and, importantly, healing from unresolved trauma.<sup>312</sup> Rather than viewing maladaptive behaviours resulting from trauma induced developmental disruption in a deterministic, deficit-based manner, neuroplasticity provides a “science of hope”.<sup>313</sup> This brings the prospect of healing, recovery and positive development into focus. In order to facilitate healing and prosocial change, the most effective and sustainable form of intervention ought to prioritise self-regulation and relational health, facilitating connection to whānau, family, community, and culture.<sup>314</sup>

Thirdly, young adulthood offers an “age of opportunity” for healing and to ultimately address trauma as an underlying cause of offending as a result of the heightened susceptibility of the developing brain to change.<sup>315</sup>

Chapter IV will adopt a neurodevelopmental trauma lens to critique the current approach to sentencing for crossover young adults.

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<sup>311</sup> Gohara, above n 132, at 21.

<sup>312</sup> Kezelman and Stavropoulos, above n 101, at 36.

<sup>313</sup> Müller and Kenney, above n 295.

<sup>314</sup> Perry and others, above n 24, at 818.

<sup>315</sup> Steinberg, above n 12.

#### ***IV Sentencing Crossover Young Adults: A Neurodevelopmentally-Aware, Trauma-Informed Critique***

This chapter will adopt a neurodevelopmentally-aware, trauma-informed lens to assess the current approach to sentencing for crossover young adults. As established in Chapter III, a neurodevelopmentally-aware, trauma-informed lens includes an appreciation of three key points. Firstly, crossover young adults, amongst whom childhood trauma is prevalent, may well exist in a constant state of fear.<sup>316</sup> Their emotional, behavioural and cognitive functioning will reflect this state and exaggerate their age-related inclination towards risky behaviour. Seemingly reactive, oppositional or remorseless behaviour can consequently be understood as adaptive responses to early adversity and trauma. Secondly, healing from unresolved trauma is possible.<sup>317</sup> The most effective interventions will prioritise safety, self-regulation and connection to whānau, family, community, and culture. Thirdly, young adulthood offers an “age of opportunity” for healing and addressing trauma as an underlying cause of offending, given the particular malleability of the developing brain.<sup>318</sup>

This chapter will begin with brief consideration of the Young Adult List, a pilot initiative applicable to all young adults, including crossover young adults. In short, as the initiative is largely focused on participation rights, the degree to which it will impact disposition and substantive outcomes is questionable.<sup>319</sup> The remainder of this chapter will consider the legal framework regulating decisions about how to sentence or otherwise deal with adult offenders and the application of principles relevant to crossover young adults at the sentencing stage.

Toward the end of this chapter, practical application of relevant principles to a crossover young adult at the sentencing stage will be demonstrated through a return to the sentencing decision for Zion, the young man introduced at the beginning of this thesis. Notably, the consideration of sentencing in this chapter does not constitute a substantive quantitative review. Rather, it is a critique of key principles from a neurodevelopmentally-aware, trauma-informed perspective.

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<sup>316</sup> See Chapter III(C)-(E) for discussion of how the stress response adapts and becomes sensitised as a protective mechanism in response to childhood trauma and the maladaptation this can lead to throughout the life course if unresolved.

<sup>317</sup> See Chapter III(G) for a discussion of neuroplasticity.

<sup>318</sup> Steinberg, above n 12.

<sup>319</sup> Woodwark and Lynch, above n 7, at 26 and 29.



In short, a retributive framework and offence-focused approach means the courts inevitably consider and respond to surface level behavioural manifestations of trauma in the initial instance, rather than their underlying cause. Acknowledgement of personal factors, including developmental distinctions attributable to age and histories of trauma, is generally limited to transactional discounts. Sentencing discounts simply change the length rather than type of sentence or intervention. Coupled with a lack of alternatives to imprisonment, this sets the stage for punitive, cortex-dependent sentences that simply will not work and are likely to reinforce and compound pre-existing issues, and contribute to a cycle of offending. This indicates a deterministic, deficit-based approach which fails to capitalise on heightened neuroplasticity or to embrace a valuable opportunity to support healing and desistance.

### *A Young Adult List*

As discussed in chapters II and III, an increasing body of research indicates that human development continues into the mid-twenties and that there are high levels of neurodisability and atypical brain development amongst justice involved young people. The implications of this research for criminal justice purposes, particularly in relation to the ability of young adults to understand and participate meaningfully in proceedings, formed the impetus behind a recently piloted judge-led initiative: the Porirua Young Adult List.<sup>320</sup>

The Young Adult List aims to ensure young adults are encouraged to fully engage and participate in the court process; are assisted to understand impacts of all stages and are given the opportunity to be referred to interventions.<sup>321</sup> It separates out those aged 18 to 25 years from older adults appearing in court, has extra support to identify any particular health needs or disabilities and adapts an approach used in the Youth Court to better respond to the concerns around young adults, in particular those with characteristics that limit executive functioning.<sup>322</sup> Examples of these adaptations include judges addressing the young adult more directly; all professionals making greater use of plain language; and changes to the courtroom layout to support a more informal, participatory approach.<sup>323</sup> A multidisciplinary team is present at each court sitting to provide the young adults with wraparound support.<sup>324</sup> Unlike the professionals

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<sup>320</sup> Principal Youth Court Judge John Walker, above n 15.

<sup>321</sup> Paulin and others, above n 16, at 1.

<sup>322</sup> At iii.

<sup>323</sup> At iii; iv; 5.

<sup>324</sup> At 1.

dealing with young adults in the mainstream adult criminal courts, the Young Adult List team is specially trained to work with young adults.<sup>325</sup> Support services include Māori, Pacific and Ethnic Services, Bail Support Officers, Adolescent Specialist Probation Officers, Police Prosecutors and Adolescent Mental Health Nurses.<sup>326</sup>

Whilst the initiative is still in relatively early stages, there are promising signs of it becoming a permanent fixture. In May 2022, a second Young Adult List launched in the Gisborne District Court.<sup>327</sup> Further, in the annual Norris Ward McKinnon Lecture at the end of 2020, Chief District Court Judge Taumaunu announced that an approach similar to the Young Adult List will be “mainstreamed” across the District Courts through a new operating model, Te Ao Mārama.<sup>328</sup> Each Court will be designed in partnership with local iwi and community so as to fully reflect the needs and characteristics of each locality.<sup>329</sup> That said, there are a range of common features which have been deemed “best practice” which are intended to be common to all.<sup>330</sup> Those features include infusion of te reo and tikanga Māori; improving information available to judges through whānau and community engagement; a multidisciplinary team approach through interagency co-ordination, less formalities and consistency of judge and personnel.<sup>331</sup>

An initial evaluation of the Young Adult List shows promising results indicating that the approach enables all participants, including defendants, whānau and victims to be more likely to understand what is happening and to be engaged in the proceedings.<sup>332</sup> Through a neurodevelopmentally-aware, trauma-informed lens, the initiative actively addresses limitations in executive function by taking a more informal, participatory approach. Such an approach is also likely to be less stressful and dysregulating for those with an over-sensitised stress response as a result of childhood adversity. Further, by enhancing community involvement, the Young Adult List takes some steps toward assisting young adults to build the

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<sup>325</sup> At 1.

<sup>326</sup> At 1.

<sup>327</sup> Akula Sharma “Life-changing and brave”: Young Adult List Court for Tairāwhiti hailed as way forward (10 May 2022) Gisborne Herald < <https://www.gisborneherald.co.nz/local-news/20220506/life-changing-and-brave/>>.

<sup>328</sup> Chief District Court Judge Heemi Taumaunu “Norris Ward McKinnon Annual Lecture 2020” (University of Waikato, November 2020)

<sup>329</sup> Chief District Court Judge Heemi Taumaunu, above n 328.

<sup>330</sup> Chief District Court Judge Heemi Taumaunu, above n 328.

<sup>331</sup> Chief District Court Judge Heemi Taumaunu, above n 328.

<sup>332</sup> At 1.

meaningful, empathic connections that relational neurobiology confirms are of central importance, including as an unparalleled buffer for current stressors and prior adversity.<sup>333</sup>

It is also noteworthy that the Young Adult List is not based solely on normative young adult development and is arguably more heavily based on the prevalence of atypical development and neurodisability within the young adult group.<sup>334</sup> Particularly relevant to crossover young adults, Principal Youth Court Judge John Walker, who led the development of this specialist initiative, specifically noted the high rates of exposure to trauma, abuse and violence amongst the young adult group.<sup>335</sup> His Honour highlighted that:<sup>336</sup>

We now know that those matters are not just a pre-cursor to some learned behaviour or acceptance that violence is okay in a relationship, but it also has an effect on brain development.

As Youth Court and Family Court files or information do not automatically accompany a person into the District Court when they surpass the youth justice age threshold, ordinarily there are significant barriers to a judge in the adult court having a full history of a young adult, including vital information relating to adversity they have endured and indications of its relevant implications.<sup>337</sup> On a case by case basis, the District Court Judge must usually request any relevant files and information from the judges in the Youth and Family Courts. Principal Youth Court Judge Walker has noted that such requests only happen “by chance”.<sup>338</sup> This might occur where the judge in the adult jurisdiction was sufficiently familiar with the young person when they were in the youth or family jurisdiction and, for example, knew there were issues with fitness to stand trial or executive function that would limit their understanding and proper participation in proceedings.<sup>339</sup> When viewed in the context of the volume of cases within the District Court and consequent time constraints under which judges must operate, it is clear that vital information, including that related to care involvement and exposure to

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<sup>333</sup> See Chapter III(F).

<sup>334</sup> Woodwark and Lynch, above n 7, at 28.

<sup>335</sup> M Johnson “Administering Justice in a different way at the Young Adult List Court in Porirua” (2021) 947 Lawtalk 50.

<sup>336</sup> M Johnson, above n 335.

<sup>337</sup> M Johnson, above n 335.

<sup>338</sup> M Johnson, above n 335.

<sup>339</sup> M Johnson, above n 335.

childhood adversity, could slip through the cracks and remain unknown within the adult system.

In light of the barriers to information sharing between jurisdictions, in December 2021, Principal Youth Court Judge Walker, Principal Family Court Judge Moran and Chief District Court Judge Taumaunu released a joint protocol to ensure a workable mechanism for more routine information sharing between the Young Adult List, the Youth Court and the Family Court.<sup>340</sup> From a neurodevelopmentally-aware, trauma-informed perspective, information on the earlier files relating to childhood adversity is of central relevance. Brain development disrupted by trauma and consequent cognitive, emotional, social and behavioural impacts not only go some way to explaining offending but also provide valuable insight into the suitability of potential interventions. Accordingly, more proactive sharing of information is definitely a step in the right direction for crossover young adults.

A further point emerging from the initial evaluation of the Young Adult List is that participants reported positively on the practice of being remanded to undertake tasks prior to being sentenced with the chance of the outcome being a discharge without conviction.<sup>341</sup> Section 25 of the Sentencing Act 2002 provides a mechanism by which the Court can adjourn sentencing for the offender to complete an appropriate rehabilitative or restorative intervention prior to sentencing or disposition. Use of this mechanism signals that the Young Adult list has a rehabilitative focus. This aligns with neuroscience which shows that, given heightened neuroplasticity, young adulthood is an “age of opportunity” during which young adults are particularly susceptible to change and to healing from prior adversity.<sup>342</sup>

Whilst the reported practice of young adult list judges adjourning sentencing for programmes or interventions to be completed, a significant limitation ought to be noted. The cited example in the Young Adult List evaluation of this practice was adjournment for a driver’s licence to be obtained in cases of repeat driving offences.<sup>343</sup> This leaves cases of more serious offending, in which the crossover young adults are likely to be involved as discussed in chapter II, subject

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<sup>340</sup> Chief District Court Judge Taumaunu, Principal Family Court Judge Moran and Principal Youth Court Judge Walker *Young Adult List Information Sharing Protocol* (2 December 2021) <https://www.districtcourts.govt.nz/youth-court/about-the-youth-court/young-adult-list-information-sharing-protocol/>.

<sup>341</sup> Paulin and others, above n 16.

<sup>342</sup> Steinberg, above n 12.

<sup>343</sup> Paulin and others, above n 16.

to the punitive standard sentencing process under the Sentencing Act 2002. Indeed, Woodwark and Lynch acknowledge that procedural changes may facilitate better engagement, but raise concern around residual questions as to the extent to which substantive outcomes will be changed.<sup>344</sup> They accordingly flag the need for attention to turn to more appropriate and effective substantive outcomes which have not been included as part of the pilot.<sup>345</sup>

From a neurodevelopmentally-aware, trauma-informed perspective, the Young Adult List and the Te Ao Mārama model are definitely steps in the right direction for crossover young adults. Through procedural adaptations, they directly respond to limited executive function which is prevalent amongst crossover young adults as a result of their developmental stage and potential developmental disruption owing to childhood adversity. The recent addition of an information sharing protocol to the Young Adult List initiative signals direct acknowledgment of the relevance of information on Youth and Family Court files, including experience and ongoing impacts of trauma and adversity, to criminal offending beyond the youth justice age cut off.

Notwithstanding, by limiting focus primarily to procedure and participation and thereby leaving substantive outcomes untouched, the substantive outcomes are likely to remain counter to neurodevelopmental and trauma research which make a strong case for a distinct approach for crossover young adults. The remainder of this chapter, therefore, will turn to consider the sentencing framework as it relates to crossover young adults.

### *B Sentencing Act 2002*

As a result of the arbitrary chronological age cut off for the youth justice system, crossover young adults from the age of 18 are legal adults for the purposes of the Sentencing Act 2002 and, therefore, are subject to a standard sentencing regime that applies to all adult offenders.<sup>346</sup> The purposes of sentencing, or otherwise dealing with adult offenders are set out in s 7 of the Sentencing Act. As is the case in respect of all adults, when dealing with crossover young adults, s 7 does not prioritise rehabilitation, but instead places it amidst other sentencing purposes including denunciation and deterrence. Failure to statutorily prioritise rehabilitation

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<sup>344</sup> Woodwark and Lynch, above n 7, at 26 and 29.

<sup>345</sup> At 26.

<sup>346</sup> Adult criminal liability applies to offending committed at 18 years or over. The exception is young persons aged 17 years charged with serious, specified offences who are dealt with as adults in the criminal justice system: Oranga Tamariki Act 1989, s 272 and sch 1A.

sits at odds with key neuroscientific findings that make up the second and third limbs of the neurodevelopmentally-aware, trauma-informed lens established in Chapter III. That is, young adulthood is a “window of opportunity for untapped potential for growth and maturation” given heightened neuroplasticity.<sup>347</sup> In other words, young adulthood is a period in which the brain is ripe for rehabilitative interventions that encourage positive development and healing from past adversity. Relatedly, as included under the first limb of the lens, neuroscience also shows that punitive, deterrent, cortex-dependent sentences simply will not work for those with unresolved trauma as they are likely to compound pre-existing issues, escalate dysregulation and maladaptive behaviours and inhibit learning and positive development.<sup>348</sup> It is notable that, in line with developmental research, in Scotland, effective as of January 2022, a Sentencing Young People Guideline applicable to those who are under the age of 25 years, mandates that particular regard be had to rehabilitation.<sup>349</sup>

Section 8 of the Sentencing Act 2002 provides a list of ten principles that the court must take into account when imposing a sentence or otherwise dealing with an offender. Several of these principles direct the sentencing judge’s attention to the offence and the offending as opposed to the person who committed it. The sentencing judge, for example, must take account of the gravity of the offending and the desirability of consistency in sentencing for similar offences.<sup>350</sup> Section 8(h) also requires the court to take account of matters relating to the offender including any particular circumstances that would render an otherwise appropriate sentence or other means of dealing with the offender disproportionately severely.<sup>351</sup> Section 8(i) requires the court to take account of the offender’s personal, family, whānau, community and cultural background when imposing a sentence or otherwise dealing with an offender in a, at least partially, rehabilitative way.<sup>352</sup> Clearly s 8(h) and s 8(i) are two broadly drafted provisions which provide scope for the court to take the distinctions of crossover young adults into account. Notwithstanding, Cleland argues that as the principles requiring consideration of personal factors are drafted after the duties to consider the seriousness of the offence and the offending, their impact is likely to be curtailed.<sup>353</sup>

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<sup>347</sup> Eslinger and Long, above n 300.

<sup>348</sup> Perry and others, above n 24, at 831.

<sup>349</sup> *Sentencing young people: Sentencing guideline* (Scottish Sentencing Council, 26 January 2022) at [9].

<sup>350</sup> Sections 8(a), (b) and (e).

<sup>351</sup> Section 8(h).

<sup>352</sup> Section 8(i).

<sup>353</sup> Alison Cleland “Portrait of the Accused as a Young Man: New Zealand’s Harsh Treatment of Young People who Commit Serious Crimes” (2016) 105(4) *Youth and the Commonwealth* 377 at 382.

Correspondingly, there is a well-entrenched sentencing methodology in Aotearoa New Zealand which follows a two-step process requiring the circumstances of the offence to be considered separately, before any consideration of the personal circumstances of the offender.<sup>354</sup> The first step in determining the sentence to be imposed in any given case is to select a starting point by assessing the seriousness of the offence and the culpability of the offender, taking account of any aggravating and mitigating features of the offending. The sentence starting point is determined by reference to the sentence that would be appropriate for the particular offending by an adult offender following a defended hearing.<sup>355</sup> In the interests of consistency, the court compares the offending at hand to cases of similar offending.

Notably, it is only at the second step in arriving at an appropriate sentence that the court ought to consider whether “overall the crime is aggravated or mitigated by the offender’s particular personal circumstances such that the sentence to be imposed should be higher or lower than the starting point.”<sup>356</sup> The list of aggravating and mitigating factors in s 9 relevantly includes the age of the offender. As the list is non-exhaustive, whilst trauma and early adversity have not specifically been stipulated as mitigating factors, they have frequently been considered as such as discussed more fully below.

From the outset, by taking an “offence first” approach, it is clear that sentencing methodology is based around “simplistic assumptions about humans as rational maximisers of their own self-interest, undertaking cost benefit assessments of their actions and the possible reactions to them”.<sup>357</sup> With a neurodevelopmentally-aware, trauma-informed lens, however, such a stance is ill-founded. For those with typical development, executive functioning may not be reached until well into the twenties. Young adults are accordingly likely to act on impulse rather than on a rational, reasoned basis. Trauma delays development and causes extensive maladaptation including emotional dysregulation which leads to overreactions or outbursts. These findings offer sound explanations for behaviour that brings people into the justice system.<sup>358</sup> Of course, experience of early abuse or trauma does not cause criminal offending in “a simplistic or linear

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<sup>354</sup> *R v Taueki* [2005] 3 NZLR 372 (CA); *R v Clifford* [2011] NZCA 360; *Hessell v R* [2010] NZSC 135; *Moses v R* [2020] NZCA 296.

<sup>355</sup> *Moses v R*, above n 354, at [5] citing *R v Taueki* [2005] 3 NZLR 372 (CA) and *R v Mako* [2000] 2 NZLR 170 (CA).

<sup>356</sup> *R v Mako* [2000] 2 NZLR 170 (CA) at 179.

<sup>357</sup> Randall and Haskell, above n 307, at 516.

<sup>358</sup> S Wright, M Liddle and P Goodfellow *Young offenders and trauma: experience and impact: a practitioner's guide* (Beyond Youth Custody, 2016).

way”. An offender is not a “mere puppet of circumstances” devoid of agency.<sup>359</sup> Notwithstanding, agency can of course be “unfettered” or “highly fettered” so offending behaviour must be understood in the context of specific circumstances.<sup>360</sup>

### *1 Sentencing reports*

Before considering how the courts acknowledge and respond to the unique vulnerabilities of crossover young adults, it is necessary to briefly consider how the court actually becomes aware of these factors. Information from Family or Youth Court files does not automatically follow the young adult to the adult court as noted above in the discussion of the recently implemented information sharing protocol which is confined to the Young Adult List in Porirua.

The Sentencing Act 2002 provides two key mechanisms by which the court can be furnished with reports covering personal information for the purposes of sentencing. Where a defendant charged with an offence punishable by imprisonment is found guilty or pleads guilty, pursuant to s 26 of the Sentencing Act 2002, the court may direct that a probation officer prepare a pre-sentence report. Pursuant to s 26A, where the court is considering a sentence of community detention or home detention, it must do so. Pre-sentence reports provide the court with background information relating to the offender, their rehabilitative needs as well as recommendations and information about available sentences.<sup>361</sup>

Section 27 of the Sentencing Act 2002 enables the defendant to request that the court hear any person or persons speak on matters including their personal, family, whānau, community, and cultural background, how it may have related to the commission of the offence, and how it may be relevant to any possible sentence. While the wording of the provision suggests that cultural and background information is to be provided to the court by way of informal oral submissions, it is common practice for a formal written report to be submitted to the court by a specialist cultural report writer.<sup>362</sup>

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<sup>359</sup> Joseph Williams “Build a Bridge and Get Over It: The Role of Colonial Dispossession in Contemporary Indigenous Offending and What We Should Do About It” (2020) 18(1) NZJPIL 3 at 20.

<sup>360</sup> at 20.

<sup>361</sup> Sentencing Act 2002, ss 26 and s 26A.

<sup>362</sup> *Solicitor-General v Heta* [2018] NZHC 2453; *Zhang v R* [2019] NZCA 507 at 162.



Section 27 reports have been described as “vastly different” to a report prepared pursuant to sections 26 or 26A.<sup>363</sup> Reasons for the difference include the fact that many people involved in the criminal justice system reportedly do not engage with probation officers responsible for writing the reports due to a lack of mistrust based on a view of the officer as “part of the system”.<sup>364</sup> By contrast, s 27 reports are not impacted by distrust of the Crown or the system.<sup>365</sup> Notwithstanding, s 27 reports come at a cost both financially and in terms of protracting proceedings whilst waiting for a report to be completed.<sup>366</sup> When declining to order a report pursuant to s 27, the High Court recently noted that “[f]inality in the criminal process is important to all parties, not only the defendant but also victims”.<sup>367</sup> Further, the neurodevelopmental research discussed in Chapter III highlighted that young people who have been repetitively hurt within the context of interpersonal relationships often have relational difficulties and an overly sensitive “intimacy barrier” within which personal topics and personal issues are held close.<sup>368</sup> An individual with a background of relational trauma, therefore, may have difficulty connecting and opening up to a report writer about sensitive issues including their experiences of trauma and adversity. There are clear implications, therefore, in terms of the extent (or lack) of information the court will therefore have before it at sentencing. Without a neuro-developmental trauma lens, lack of engagement with a report writer could also be taken as in-compliant. Accordingly, while there are key mechanisms for relevant information to be shared with the court, they are not without their limitations.

## *2 Youth as a mitigating factor*

While there is no specific legislative distinction in the process for sentencing crossover young adults, or young adults more broadly, age is expressly listed as a mitigating factor that the court ought to take into account at sentencing.<sup>369</sup> From the outset, difficulty seemingly arises with the fact that s 9 of the Sentencing Act 2002 refers to chronological age as opposed to developmental stage.<sup>370</sup> In other words, the law makes no express allowance for the research

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<sup>363</sup> *Ināia Tonu Nei*, above n 30, at 22.

<sup>364</sup> At 22; also see *R v Kahia* [2019] NZHC 1021 at [22].

<sup>365</sup> *Ināia Tonu Nei*, above n 30, at 22.

<sup>366</sup> Oliver Fredrickson “Pūnaha whakawā – criminal justice – re-thinking systemic deprivation sentencing discounts” (2020) *Māori Law Review* 3.

<sup>367</sup> *Kisiogo v R* [2021] NZHC 1648.

<sup>368</sup> Perry and others, above n 24, at 826; See Chapter III(F).

<sup>369</sup> Sentencing Act 2002, s9(2)(a).

<sup>370</sup> Cleland, above n 353, at 382.

base indicating that the human brain continues to change and develop into a person's twenties and is significantly experience dependent, as discussed in Chapter III. There is accordingly scope for "common sense" approaches to the concept of youth and adulthood to influence sentencing. In *Tukaki v R*, for example, the Court of Appeal considered 19 years of age to be at the upper end of the range which might justify a sentencing discount for youth.<sup>371</sup> In *B v R* the Court of Appeal similarly considered a 20 year old to be at the upper end of the range which might justify a separate discount for youth.<sup>372</sup> By contrast, the High Court has recognised that youth discount may be available to offenders aged 21 or 22<sup>373</sup> and in *R v Wan* the High Court recognised the offending by the 24 year old young adult before the Court had "hallmarks of youthful naivety".<sup>374</sup>

Despite varying sentencing remarks which seemingly draw on notions of "common sense" or "logic", it has been common practice for almost two decades in Aotearoa New Zealand for the courts to acknowledge the relevance of youth in sentencing, specifically as a result of age-related neurodevelopmental distinctions.<sup>375</sup> This practice can be traced to the case of *Churchward v R* in which the Court of Appeal granted leave for a clinical psychologist to give evidence on the development of the adolescent brain.<sup>376</sup> In light of the expert evidence adduced, the Court conceded that there are substantial neurological differences in young people compared to adults: inadequacies in decision making abilities, inherent inclination toward risky behaviours, increased susceptibility to external influences, and the substantially less ingrained nature of the adolescent identity or character.<sup>377</sup> The Court of Appeal also stressed the detrimental impact of imprisonment on young people.<sup>378</sup> Subject to a brief note that seeming indifference to offending may be the result of "coping strategies" that have stemmed from childhood trauma, notably the Court largely focused on normative age-related factors.<sup>379</sup>

The Court in *Churchward* held that whilst neurodevelopmental distinctions do not necessarily excuse youth offending, they may partially explain it and therefore lead to a reduction in

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<sup>371</sup> *Tukaki v R* [2013] NZCA 411 at [18].

<sup>372</sup> *B v R* [2018] NZCA 137 at [50].

<sup>373</sup> *R v Wellington* [2014] NZHC 2993 at [37]; *R v Salt* [2017] NZHC 1467 at [15].

<sup>374</sup> *R v Wan* [2017] NZHC 2376 at [28].

<sup>375</sup> *Churchward v R* [2011] NZCA 531; *Rolleston v R* [2018] NZCA 61.

<sup>376</sup> See *Churchward*, above n 375, at [50]-[55] for an overview of Dr Chaplow's evidence on adolescent brain development. This analysis has been "repeatedly endorsed" by the Court of Appeal: *Waikato Tuhega*, above n 1, at [64].

<sup>377</sup> See *Churchward*, above n 375, at [76]-[92] for the Court's discussion on the significance of neurological development and the effect of youth more broadly at sentencing.

<sup>378</sup> At [88] and at [85] citing *R v Slade* [2005] 2 NZLR 526 at [45].

<sup>379</sup> At [99].

culpability.<sup>380</sup> The Court confirmed that youth discount is unconstrained by any set percentage, even where the offending is serious.<sup>381</sup> It is, therefore, well settled in Aotearoa New Zealand that the immaturity related factors which arise from young adults' neurodevelopmental stage, are relevant to the question of culpability.<sup>382</sup> In *Churchward* the Court also highlighted that discount for youth at sentencing is not based solely on the interests of the young person. Rather, the Court noted that there is benefit to the wider public in encouraging rehabilitation and lessening the likelihood of more established criminals emerging from prisons.<sup>383</sup>

Notwithstanding, applying a youth discount is neither automatic nor guaranteed as it ought to be weighed in amongst other factors including the seriousness of the offending and any other relevant aggravating or mitigating factors. Where the offending is serious, the "scope to take account of youth may be greatly circumscribed."<sup>384</sup> More specifically, the Court of Appeal in *Churchward* stated that this was because "the very factors that may lead young people to offend may cause concerns about future public safety."<sup>385</sup> In other words, the Court seemingly viewed youthful distinctions as a "double edged sword" which on the one hand reduced culpability, but on the other indicated heightened prospects of reoffending and a risk to public safety.

In *Rolleston*, the Court of Appeal noted a significant degree of variability in the quantity of youth discount across case law.<sup>386</sup> The Court considered that one possible explanation for this inconsistency was the established principle that youth alone cannot always substantially reduce what is otherwise deemed an appropriate sentence.<sup>387</sup> The Court also suggested that the variability may be attributable to the difficulty in extracting the discrete youth discounts given, as they are often combined with other factors such as mental health and intellectual functioning.<sup>388</sup>

The maturity related neurodevelopmental factors taken into account as mitigating factors in *Churchward* and "repeatedly endorsed" are attributable to normative adolescent

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<sup>380</sup> At [81].

<sup>381</sup> *Pouwhare v R* [2010] NZCA 269 at [96] as cited in *Churchward*, above n 375, at [84] and in *Wang v R* [2021] NZCA 79 at [26].

<sup>382</sup> *Rolleston*, above n 375.

<sup>383</sup> *Churchward*, above n 375, at [90], relying on *R v Mahoni* (1998) CRNZ 428 (CA) at 436-437. See also *R v Slade* [2005] NZLR 526 (CA) at [48]-[49].

<sup>384</sup> *Churchward*, above n 375, at [84] citing *R v Rapira* [2003] 3 NZLR 794 at [122].

<sup>385</sup> *Churchward*, above n 375, at [84].

<sup>386</sup> *Rolleston*, above n 375, at [34].

<sup>387</sup> At [34].

<sup>388</sup> At [34].

development.<sup>389</sup> As noted in chapter II, neurodisabilities are common amongst young adults in the criminal justice system as expressly acknowledged in the rollout of the Young Adult List. As discussed in Chapter III, developmental disruptions caused by childhood trauma, which is common amongst crossover young adults, can result in a range of diagnoses (or misdiagnoses). For example, exaggerated reactivity as a result of a sensitised stress response in an individual with unresolved childhood trauma can result in a diagnosis of ADHD.<sup>390</sup>

As noted earlier, s 9(2)(e) of the Sentencing Act 2002 stipulates that the court take diminished mental capacity or understanding into account as a mitigating factor. Section 8(h) also requires the court to take account of any particular circumstances of the offender that would render an otherwise appropriate sentence or other means of dealing with the offender disproportionately severe. Diminished mental capacity or understanding as a result of a neurodisability may be capable of mitigating a sentence in two ways: where the lessened capacity or understanding reduces culpability or renders a sentence of imprisonment overly severe.<sup>391</sup> The courts have accordingly considered TBI,<sup>392</sup> FASD<sup>393</sup>, autism and ADHD<sup>394</sup> to be mitigating factors. An example where the Court of Appeal considered both youth and intellectual functioning is *Bryant v R*, wherein the 17 year old defendant was granted 25 percent discount for age and mild cognitive disorders that would make prison particularly challenging for him.<sup>395</sup> The court generally requires a causal nexus to be established between the neurodisability and the offending as well as medical evidence.<sup>396</sup>

Notwithstanding, even where diminished mental capacity or understanding was causative of the offending or where prison would be overly severe, it still does not guarantee discount. Similar to the approach with normative brain development and youth considerations, it ought to be balanced with other factors. In cases where the consequence of the mental state is a heightened risk of further offending, the courts tend to polarise rehabilitation and other s 7 purposes including public safety.<sup>397</sup> In *Dodds v R*, for example, the High Court held that the

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<sup>389</sup> *Waikato Tuhega*, above n 1, at [64].

<sup>390</sup> Buckingham, above n 100, at 653 citing A Cook and others *Complex Trauma in Children and Adolescents* (National Child Traumatic Stress Network Complex Trauma Task Force, 2003).

<sup>391</sup> *E (CA689/10) v R* [2011] NZCA 13 at [68]–[70]; *Shailer v R* [2017] NZCA 38 at [43]–[50].

<sup>392</sup> *Blackwood v R* [2011] NZCA 143; *C v R* [2019] NZCA 653.

<sup>393</sup> *Edri v R* [2013] NZCA 264.

<sup>394</sup> *R v Marson-Wood* [2018] NZHC 610; *C v R*, above n 392.

<sup>395</sup> *Bryant v R* [2014] NZCA 591.

<sup>396</sup> At [68]; *R v M* [2008] NZCA 148 at [33]; *Martin v R* [2020] NZCA 318.

<sup>397</sup> *Nixon v R* [2016] NZCA 589; *R v Lucas-Edmonds* [2009] NZCA 193.

appellant's neurodisability was "the very type that troubles the Court" given that "on the one hand, it diminishes his culpability because it affects self-regulation and hinders judgment, yet on the other it heightens the risk of re-offending, in turn giving rise to an issue of public protection".<sup>398</sup>

Whilst the courts take account of the youthful distinctions of young adults and, where applicable, neurodisability, at sentencing, there are significant limitations to the current approach when viewed through a neurodevelopmentally-aware, trauma-informed lens. First, as the Sentencing Act 2002 refers to age as opposed to maturity or developmental stage, there is scope for "common sense" approaches and inconsistencies.

Secondly, where the court's attention turns to neurodevelopmental immaturity, in the absence of a specific diagnosed neurodisability, consideration is largely confined to normative, age-related factors. Research findings discussed in Chapter III confirmed that childhood trauma can cause wide-ranging maladaptation which may not amount to a specific diagnosis or, alternatively, may amount to a range of misdiagnoses. Accordingly, through a neurodevelopmentally-aware, trauma-informed lens, consideration of the unique developmental phase of young adulthood, by definition, ought to include consideration of the impacts of early adversity, given the inextricable links between trauma and development.<sup>399</sup> Notably Scotland's recently incorporated Sentencing Young People Guidelines referred to above sets out a "non-exhaustive" list of factors to be assessed when determining the maturity of the young person before the court.<sup>400</sup> Amongst the listed factors are trauma and ACEs.

Thirdly, the use of "diminished culpability" alone fails to reflect neurodevelopmental trauma research. As sentencing discounts sentence merely shorten sentences, harsh punishments which may trigger trauma reactions and further incite system entrenchment may be imposed.<sup>401</sup> When sentencing for more serious offences, with which crossover young adults are more likely to be charged,<sup>402</sup> there is a particularly significant "disconnect" between the recognition by the court of the detrimental impacts of prison on young adults and the sentencing options available to

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<sup>398</sup> *Dodds v R* [2016] NZHC 3003 at [19]. See *Shailer v R*, above n 391, at 43 for similar sentiments regarding mental health disorders more broadly.

<sup>399</sup> *Marsh and Byer*, above n 26, at 2.

<sup>400</sup> *Sentencing young people: Sentencing guideline*, above n 349.

<sup>401</sup> *Fondacaro and others*, above n 181, at 718.

<sup>402</sup> See Chapter II(A)(2).

judges.<sup>403</sup> There are few programmes or specific sentencing options for this age group.<sup>404</sup> In other words, crossover young adults will still often inevitably be subjected to a term of imprisonment, albeit shorter, despite their profound distinctions.<sup>405</sup> As discussed in Chapter III, crossover young adults are highly likely to have negative relational history, characterised by abuse, neglect or inconsistency, alongside a sensitised stress response.<sup>406</sup> Imprisonment has clear implications in terms of issues with personal space likely to compound the maladaptation caused by trauma, rendering it wholly counterproductive.<sup>407</sup> As Woodwork and Lynch note, “while the sentence may be reduced to reflect the age of an offender, the negative impacts of the institution that this is then served in are not fully mitigated”.<sup>408</sup>

Fourthly, there is a related clash between the court’s express acknowledgement of the public interest in rehabilitation and the manner in which it adopts risk rhetoric to polarise rehabilitation and public safety. Arguably, when viewed through a neurodevelopmental lens, rehabilitation and public safety align rather than clash. As noted, punitive responses and a triggering prison environment are likely to encourage maladaptive behaviours and reoffending. By contrast, appropriately targeted positive experiences can facilitate positive change and pathways to healing.<sup>409</sup> By tapping into the potential in young adults to develop, grow and heal from prior adversity as a result of their heightened neuroplasticity, such a cycle can be much more effectively interrupted.

### *3 Trauma as a mitigating factor*

When taking account of age or immaturity as a mitigating factor at sentencing, relevant authorities show engagement with research findings related to normative, age-related neurodevelopment. In the absence of a specific neurodisability, relevant authorities do not demonstrate engagement with research findings related to impacts of trauma or ACEs on the developing brain and, in particular, prospects for healing. Further, the Sentencing Act 2002 does not specifically require childhood adversity or trauma to be considered at sentencing. This

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<sup>403</sup> Woodwork and Lynch, above n 7, at 17.

<sup>404</sup> At 29; see *NZ Police v MQ* [2019] NZYC 456 at [62] and *NZ Police v SD* [2018] NZYC 169 at [40] where Judge Fitzgerald and Judge Walker respectively noted the concerning limit of youth-specific interventions in the adult court.

<sup>405</sup> Woodwork and Lynch, above n 7, at 18.

<sup>406</sup> See Chapter III(F).

<sup>407</sup> Perry and others, above n 24, at 826; Buckingham, above n 100, at 662

<sup>408</sup> Woodwork and Lynch, above n 7, at 17.

<sup>409</sup> Kezelman and Stavropoulos, above n 101, at 36; see Chapter III(G).

calls into question how, if at all, the court takes account of the profound and wide-reaching impacts of ACEs or trauma discussed in Chapter III.

As noted, s 9(2)(e) of the Sentencing Act 2002 stipulates that the court take diminished mental capacity or understanding into account as a mitigating factor. Section 8(h) also requires the court to take into account any particular circumstances of the offender that would render an otherwise appropriate sentence or other means of dealing with the offender disproportionately severe. The court has accordingly recognised Post-traumatic Stress Disorder (PTSD) as a mitigating factor at sentencing.<sup>410</sup> PTSD may warrant a discount when there is an evidential basis that it contributed to or caused the offending, or, where it would render a term of imprisonment disproportionately severe.<sup>411</sup> However, as PTSD is limited to “single event trauma”, often individuals exposed to more diverse trauma types including ongoing or chronic adversity in childhood will not meet its diagnostic criteria.<sup>412</sup> Again, this calls into question how, if at all, the court takes account of the impacts of childhood adversity or trauma at sentencing.

Amongst the wide range of matters the court must consider when determining an appropriate sentence or other means of dealing with a crossover young adult with a wholly or partly rehabilitative purpose are the personal circumstances of the offender, including their personal, family, whānau, community, and cultural background.<sup>413</sup> Accordingly, distinct forms of childhood adversity have been recognised as relevant to sentencing in adulthood, including childhood sexual abuse<sup>414</sup> and physical abuse.<sup>415</sup> The mere fact that the individual being sentenced suffered abuse or maltreatment is not in and of itself sufficient; there must be evidence before the court to support the view that it materially contributed to the offending.<sup>416</sup> Without a neurodevelopmentally-aware, trauma-informed lens, such links may be difficult to establish and open to argument based on supposed common sense or logic that childhood adversity is not current enough to be considered relevant in adulthood.

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<sup>410</sup> *R v Whiu* [2007] NZCA 591; *Zhang v R*, above n 362.

<sup>411</sup> *E (CA689/10) v R*, above n 391 at [68].

<sup>412</sup> B A van der Kolk “Developmental Trauma Disorder: Towards a Rational Diagnosis for Chronically Traumatized Children” (2005) *Psychiatric Annals* 1.

<sup>413</sup> Sentencing Act 2002, s 8(i).

<sup>414</sup> *R v W (CA271/96)* (1996) CRNZ 132 (CA).

<sup>415</sup> *Tuau v R* [2012] NZCA 146.

<sup>416</sup> *R v Whiu* above n 410, at [32].

That said, the courts are increasingly acknowledging the lifelong impacts of childhood trauma. In *Carr v R*, for example, the prosecution raised the argument that the childhood adversity raised in mitigation by the adult defendant was too far in the past to be relevant at sentencing.<sup>417</sup> The Court of Appeal rejected this argument and stated that, although much of the adversity was suffered in childhood, it was clear that Mr Carr’s “early life contributed to the course his life subsequently took”.<sup>418</sup>

As noted in chapter II, childhood adversity does not happen in a vacuum and is often part and parcel of wider systemic and structural factors. As such, impacts of childhood adversity are increasingly coming to the court’s attention at sentencing within the context of “social, cultural and economic deprivation”.<sup>419</sup> Such deprivation or disadvantage includes but is not limited to intergenerational social and cultural dislocation, poverty, substance abuse, unemployment, educational underachievement, and family violence.<sup>420</sup> Whilst systemic deprivation is not limited to one ethnicity or culture, structural disadvantage rooted in loss of land, language, culture, rangatiratanga, mana and dignity are an undeniable reality for Māori in Aotearoa New Zealand’s colonial context.<sup>421</sup>

As acknowledgment of systemic deprivation has expanded and a line of case law developed, it is clear that the courts are taking a less singular level approach to a range of background factors, including childhood trauma. Whilst not necessarily from a neurodevelopmental perspective, the courts are acknowledging adversity and hardship in a person’s upbringing is often associated with trauma, drug and alcohol abuse and mental health issues.<sup>422</sup> Increasingly the court is making the connection and acknowledging the “ripple effect” of collective trauma from the community to the individual and the individual to the community.<sup>423</sup>

As noted previously, the mechanism through which information is coming before the courts relating to background factors including childhood adversity is reports pursuant to section 27 of the Sentencing Act 2002.<sup>424</sup> Importantly, s 27 does not only provide a mechanism for

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<sup>417</sup> *Carr v R* [2020] NZCA 357 at [64].

<sup>418</sup> At [64].

<sup>419</sup> *Zhang v R*, above n 362, at [137].

<sup>420</sup> *Solicitor-General v Heta*, above n 362, at [50].

<sup>421</sup> *Zhang v R*, above n 362, at [159] and [162].

<sup>422</sup> At [145].

<sup>423</sup> J Oudshoorn *Trauma-informed Youth Justice in Canada: A New Framework Toward a Kinder Future* (Canadian Scholars Press, Toronto, 2015) at 113.

<sup>424</sup> *Zhang v R*, above n 362, [161].



information to be provided to the court for the purposes of a retrospective assessment of culpability to be met with a discount. It also provides a promising means through which rehabilitative sentences or interventions may be formulated and proposed.<sup>425</sup> In other words, s 27 is not only a means of obtaining information relating to the past. Rather, it allows the court to look back in order to move forward and, accordingly, is a key vehicle for “engaging with the resources and energy of the ... offender's community”.<sup>426</sup>

However, in practice, the main way that s 27 is used at sentencing is as an information gathering tool, to support arguments for transactional discounts for reduced culpability.<sup>427</sup> Presence of such factors alone is not sufficient. Following *Carr*, there must be “a credible account of matters which might be considered to have impaired choice and diminished moral culpability so as to establish a causative connection to the offending”.<sup>428</sup> The courts have not identified an outer limit of discount that may be available on account of systemic deprivation, including childhood adversity, and have expressly rejected the submission that serious offending is a bar to sentencing discount.<sup>429</sup> Notwithstanding, seriousness of offending may temper the amount of discount.<sup>430</sup> In *Arona v R* the Court of Appeal stated that “sentencing for some offences may be dominated by considerations such as denunciation, victim impact and community protection, reducing and perhaps eliminating any discount...”<sup>431</sup>

Again, when viewed through a neurodevelopmentally-aware, trauma-informed lens, there are a number of shortfalls in the courts’ current treatment of adversity and trauma at sentencing. Firstly, despite the clear relevance of trauma to offending by crossover young adults, the Sentencing Act 2002 does not specifically mandate consideration of trauma as a mitigating factor or otherwise. Responsibility, ultimately, therefore lies with defence counsel to identify and raise trauma as an underlying cause of offending. There is, therefore, potential for inconsistency and for trauma to impact sentencing decisions with “happenstance, speculation, and random extensions of grace and mercy”.<sup>432</sup>

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<sup>425</sup> *Solicitor-General v Heta*, above n 362, at 49.

<sup>426</sup> Williams, above n 359 at 24.

<sup>427</sup> Oliver Fredrickson “Some clarity on cultural discounts” [2020] NZLJ 409.

<sup>428</sup> *Carr v R*, above n 417, at [65].

<sup>429</sup> At [65].

<sup>430</sup> At [65].

<sup>431</sup> *Arona v R* [2018] NZCA 427 at [61].

<sup>432</sup> Buckingham, above n 100, at 657.

Secondly, similar to the issue raised in the context of youth discount, there are limitations to routine recourse to a mitigation model that simply changes the length rather than type of the sentence or intervention imposed. Through a neurodevelopmentally-aware, trauma-informed lens, this constitutes a failure to embrace an opportunity to capitalise on heightened neuroplasticity and to support individual and collective healing. Tokenistic transactional discounts reflect a deficit-based, deterministic approach to trauma which sits at odds with research insights that show trauma responses are adaptive and healing is possible.

Thirdly, tempering recognition of childhood trauma in cases of serious offending in the purported interests of community safety sits at odds with neurodevelopmental research. With an understanding of trauma as an underlying cause of offending, arguably it is in the public interest to facilitate or support healing regardless of offence type. Within the developmental framework of young adulthood, it is important to remember that heightened neuroplasticity is not just a “window of opportunity for untapped potential for growth and maturation”, it is also a “vulnerable period for external influence”.<sup>433</sup> As noted in the context of youth discount, the lack of available sentencing options means that imprisonment is likely in cases of serious offending. Research shows that the most effective and sustainable form of intervention ought to prioritise safety, self-regulation and relational health, facilitating connection to whānau, community, and culture.<sup>434</sup> Imprisonment not only fails to support healing and reduce prospects of reoffending, it retraumatises and disconnects people and thereby escalates a cycle of system entrenchment.

### *C A Return to Zion*

The sentencing decision for Zion, the young man introduced at the beginning of this thesis, provides a clear illustration of how the sentencing framework and the principles discussed apply in the case of a crossover young adult.<sup>435</sup> As set out earlier, Zion’s childhood was characterised by whānau dysfunction and violence.<sup>436</sup> He spent a considerable part of his upbringing moving around state institutions where he was not only disconnected from his whānau, but was also subjected to abuse. Zion disengaged from education and became a regular

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<sup>433</sup> Eslinger and Long, above n 300.

<sup>434</sup> Perry and others, above n 24, at 818.

<sup>435</sup> *Waikato-Tuhega v R*, above n 1.

<sup>436</sup> See [13] and [52].

user of substances at a young age. He became gang affiliated and involved in crime to fund his substance use.

Zion was convicted of two aggravated robberies, a burglary, possession of an offensive weapon, stealing a car and two instances of theft. He committed the offending aged 17 to 19 years. The District Court sentencing judge adopted a starting point of five years and six months' imprisonment.<sup>437</sup> After applying uplifts to reflect the other offending, Youth Court notations and the fact that Zion offended whilst on bail, the final starting point was 10 years' imprisonment. The sentencing judge awarded 25 percent discount for guilty plea and 10 percent to reflect youth, background factors detailed in the s 27 report as well as time spent remanded on electronically monitored bail. Zion appealed his sentence on a range of grounds, including that insufficient discounts were provided to acknowledge youth and background factors presented in the s 27 report.<sup>438</sup>

When considering the issue of Zion's youth, the Court of Appeal cited the neurodevelopmental distinctions of young adulthood as laid out in *Churchward* and repeatedly endorsed as discussed above.<sup>439</sup> The Court considered Zion's offending to be "peer driven" and illustrative of an overvaluation of reward and under-consideration of consequences.<sup>440</sup>

The Court of Appeal noted that "deterrence needs to be considered somewhat differently" in respect of young adults like Zion given that it "requires a person to respond rationally and maturely to risk versus reward".<sup>441</sup> Notwithstanding, the Court concluded that a prison sentence would "undoubtedly have a deterrent effect even on adolescents" and considered that the need to consider deterrence differently was more relevant to determining the length of the sentence.<sup>442</sup> The Court relatedly noted the fact that long sentences can have a "counterproductive, even destructive effect" which may adversely impact the greater rehabilitative capacity of young adult offenders.<sup>443</sup> The Court awarded 15 percent discount on account of Zion's youth.<sup>444</sup>

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<sup>437</sup> *R v Waikato-Tuhega* [2021] NZDC 2506 as cited in *Waikato-Tuhega v R*, above n 1 at [1].

<sup>438</sup> At [2].

<sup>439</sup> At [58]-[70] relying on *Churchward*, above n 375.

<sup>440</sup> At [68].

<sup>441</sup> At [65].

<sup>442</sup> At [66].

<sup>443</sup> At [67] and [70].

<sup>444</sup> At [71].

In respect of the s 27 background factors, after traversing the relevant authorities, the Court of Appeal considered a causal nexus was evident between Zion's background and his offending.<sup>445</sup> The Court identified five key factors that significantly disadvantaged Zion and contributed to his offending: whānau dysfunction and violence; care and protection and youth justice issues, including abuse in state institutions; limited education; alcohol and drugs; and cultural disconnectedness.<sup>446</sup> The Court awarded a further 15 percent discount in respect of s 27 factors.<sup>447</sup> Although the Court considered the s 27 factors separately from youth, it nevertheless acknowledged the intersection by remarking that the s 27 background factors may well have adversely impacted or hindered his development.<sup>448</sup>

Ultimately the Court of Appeal awarded 15 percent discount in respect of youth and 15 percent in respect of background factors detailed in the s 27 report. Combined with other discounts, the end sentence was reduced to four years and five months' imprisonment.

Through a neurodevelopmentally-aware, trauma-informed lens, the Court of Appeal's view that there is value in a deterrent sentence of imprisonment for a young man with significant trauma and adversity in his background, provided that that sentence is not too long, is questionable. As per the first limb of the neurodevelopmentally aware, trauma informed lens, crossover young adults with unresolved trauma are likely to have a sensitised stress response and to exist in a persistent state of fear. A triggering prison environment is, therefore, likely to compound maladaptive behaviours and encourage a cycle of offending and institutionalisation. Further, by sustaining their survival mode and preoccupation with self-preservation, imprisonment would also be likely to limit executive function and the consequent ability to reflect on past behaviour or to be held meaningfully accountable.

Zion's sentencing outcome also sits at odds with the second limb of the neurodevelopmental trauma lens, that is, that healing is possible through positive experience and relational connections. Whilst the Court of Appeal acknowledged Zion's background of childhood trauma, that acknowledgement was limited to deficit-based, deterministic discounts which merely shortened a sentence of imprisonment. Imprisonment constitutes a significant barrier to

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<sup>445</sup> At [41]-[57].

<sup>446</sup> At [52].

<sup>447</sup> At [57].

<sup>448</sup> At [53] and [69].

the single most important intervention for healing as discussed in Chapter III: meaningful connection.

Relatedly, Zion's sentencing decision also conflicts with the third and final limb of the neurodevelopmental trauma lens which relates to the opportunity for healing and growth presented by the particular malleability of the young adult brain. Similar to childhood trauma and background factors, Zion's age-related developmental stage was acknowledged by tokenistic, transactional discount which simply changed the length of an otherwise punitive, developmentally inappropriate sentence.

In short, despite express acknowledgement of Zion's ongoing development and his background of adversity, the Court nevertheless proceeded to impose a sentence entirely at odds with those factors and related interdisciplinary insights.

#### *D Conclusion*

By adopting a neurodevelopmentally-aware, trauma-informed lens, this chapter has demonstrated that the current approach to sentencing for crossover young adults is significantly flawed and at odds with the research insights discussed in Chapter III.

As established in Chapter III, a neurodevelopmentally-aware, trauma-informed lens in this context firstly requires an understanding that crossover young adults, amongst whom childhood trauma is prevalent, may well exist in a constant state of fear. Their emotional, behavioural and cognitive functioning will reflect this state and exaggerate their age-related inclination towards risky behaviours. Seemingly reactive, oppositional or remorseless behaviours can be understood as (mal)adaptive coping mechanisms developed in response to early adversity and trauma. The current approach to sentencing for crossover young adults fails to integrate this key point. Consideration of personal factors, including those related to age and experience of trauma, comes after setting a starting point by reference to the offending committed. By considering the offending first, the courts will inevitably consider surface level behavioural manifestations of trauma in the initial instance, rather than considering their underlying cause. The likelihood of offending behaviours remaining removed from underlying trauma is increased by the fact that trauma is not a mandatory consideration at sentencing so may remain unidentified.

Inherent to an understanding that crossover young adults with unresolved trauma may be in a persistent fear state is an appreciation that punitive, deterrent, cortex-dependent sentences simply will not work and are likely to reinforce and compound pre-existing issues, inhibit learning and contribute to offending.<sup>449</sup> Again, the current approach fails to incorporate this key point. The use of "diminished culpability" merely mitigates sentences. In other words, it changes the length rather than type of sentence but still results in relatively harsh punishments which may further incite system entrenchment rather than positive development. When sentencing for more serious offences, with which crossover young adults are more likely to be charged,<sup>450</sup> this is a particular concern given there are limited alternatives to imprisonment.<sup>451</sup> Imprisonment not only fails to provide safety and connection as two key prerequisites to healing, it presents insurmountable barriers to them.

The second limb of the neurodevelopmentally-aware, trauma-informed lens established in chapter III is an understanding that healing from unresolved trauma is possible through safe, positive experiences and relational connections. Again, the current criminal justice response to crossover young adults fails to reflect an appreciation of prospects for healing or the factors that necessarily support it. Even if the court is furnished with relevant information regarding a young adult's development and trauma, as noted, these factors tend to be met with transactional discounts. This reflects a deterministic, deficit-based response.

Relatedly, the third and final limb of the neurodevelopmentally-aware, trauma-informed lens is an appreciation that young adulthood is a prime phase for addressing trauma as an underlying cause of offending given heightened neuroplasticity. When sentencing crossover young adults, rehabilitation is not given legislative primacy or priority over other factors including deterrence and denunciation. Further, the courts tend to polarise risk management or community safety with rehabilitation resulting in an inherent tension in the treatment of youth and trauma related factors at sentencing.

In short, whilst the courts have acknowledged the relevance of youth and trauma at sentencing when raised in mitigation by defence counsel, fundamentally, criminal justice responses fail to incorporate or integrate the research insights discussed in Chapter III. In response, Chapter V

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<sup>449</sup> Perry and others, above n 24, at 831.

<sup>450</sup> See Chapter II(A)(2) for offending profile of the crossover group.

<sup>451</sup> Woodwark and Lynch, above n 7, at 17.

will pave the way towards a more fair, effective and just approach which is neurodevelopmentally-aware and trauma-informed.

## *V Towards Neurodevelopmentally-Aware, Trauma-Informed Sentencing for Crossover Young Adults*

Chapter IV demonstrated that the current approach to sentencing crossover young adults fails to incorporate relevant neurodevelopmental and trauma research. An overarching retributive, offence-focused sentencing framework means that responses are directed at behavioural manifestations of trauma in the first instance, devoid of their underlying cause. Acknowledgement of the developmental distinctions of young adulthood and a history of trauma is limited to transactional sentencing discounts which simply shorten otherwise punitive outcomes. As discussed in Chapter III, neuroscience shows that punitive sentences are likely to perpetuate a cycle of maladaptation and institutionalisation amongst individuals with unresolved trauma. Contrary to the current deficit-based, deterministic approach to trauma at sentencing, neuroscience also shows that healing is possible and that young adulthood is the “age of opportunity” for growth, recovery from past adversity and interruption of the care to custody pipeline.<sup>452</sup>

By drawing on trauma-informed practice, this chapter will pave the way towards more effective criminal justice responses to crossover young adults at the sentencing stage. Trauma-informed practice is a values-based movement which aims to “recogni[s]e, understand and minimi[s]e” the long-term impact of trauma.<sup>453</sup> It first emerged in addiction and mental health services as a result of growing recognition of the limitations of treatment and service provision directed at symptoms rather than underlying causes.<sup>454</sup> Given that childhood trauma is clearly an underlying cause of offending amongst crossover young adults, criminal justice responses can only be improved by concerted efforts to “recogni[s]e, understand and minimi[s]e” trauma.<sup>455</sup> Randall and Haskell accordingly contend that “more effective, fair, intelligent, and just legal responses must work from a place which is trauma-informed”.<sup>456</sup>

This chapter will begin with a brief note on the emergence of trauma-informed practice. Then, by drawing on key principles and underpinnings of trauma-informed practice, as well as the

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<sup>452</sup> Steinberg, above n 12.

<sup>453</sup> S Kubiak, S Covington, and C Hillier “Trauma-informed corrections” in D Springer and A Robert (eds) *Social work in juvenile and criminal justice systems* (Charles Thomas, Illinois, 2007) at 94.

<sup>454</sup> M Harris and R D Fallot “Envisioning a Trauma Informed service system: a vital paradigm shift” (2001) 89 *New Directions for Mental Health Services* 3.

<sup>455</sup> Kubiak, Covington and Hillier, above n 453, at 94.

<sup>456</sup> Randall and Haskell, above n 307.



research findings discussed in Chapter III, it will set out four guiding principles for neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults. It will also set out four tangible proposals for the implementation and incorporation of those principles into practice.

### *A The Emergence of Trauma-Informed Practice*

As noted in chapter II, the 1998 ACE Study by Felitti and others established a clear link between the number and breadth of ACE exposure and a range of negative outcomes across the life course.<sup>457</sup> The authors of the study suggested that the potential cascade of influences of ACEs include social, emotional and cognitive impairment, adoption of health risk behaviours, disability, disease, social problems and even early death.<sup>458</sup> As discussed in Chapter III, neurodevelopmental research which stemmed from the original ACE study demonstrates the impacts of childhood trauma on the developing brain and provides a common denominator, aetiology or explanation for co-morbidity.

Notwithstanding the increase in research and knowledge of the wide-reaching impacts of childhood trauma, the justice system is not alone in its inadequate acknowledgement and response to it. A range of sectors including mainstream psychiatry have been considered blind to trauma.<sup>459</sup> Clinical recognition of trauma and its impacts can be traced to the emergence of PTSD in the 1980s, following traumatic stress reports by Vietnam War veterans.<sup>460</sup> Clearly PTSD came about when trauma stemming from single events was the key focus of researchers and practitioners.<sup>461</sup> Although the diagnostic criteria have been reworked since, in the interests of clear diagnostic use, they still have narrow definitional parameters including direct or

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<sup>457</sup> Felitti and others, above n 128.

<sup>458</sup> At 256.

<sup>459</sup> Bessel van der Kolk, 'Posttraumatic Stress Disorders and the Nature of Trauma', in Marion F Solomon and Daniel J Siegel (eds) *Healing Trauma: attachment, mind, body, and brain* (Norton, New York, 2003) at 172-173; L Johnstone and others *The Power Threat Meaning Framework: Towards the identification of patterns in emotional distress, unusual experiences and troubled or troubling behaviour, as an alternative to functional psychiatric diagnosis* (British Psychological Society, 2018).

<sup>460</sup> R Kulka and others *Trauma and the Vietnam War generation: Report of findings from the National Vietnam Veterans Readjustment Study* (Routledge, New York 2003) cited in M Liddle and others *Trauma and Young Offenders: A Review of the Research and Practice Literature* (Beyond Youth Custody, London, 2016); E Delgado "Vietnam Stress Syndrome and the Criminal Defendant" (1985) 19 Loyola of Los Angeles Law Review 473 at 478.

<sup>461</sup> Bessel van der Kolk, "Foreword" in Stephen Porges *The Polyvagal Theory* (Norton, New York, 2011) at xi-xii.

indirect exposure to a single, traumatic event causing actual or threatened death, serious injury or sexual violence.<sup>462</sup>

The narrow diagnostic criteria for PTSD fail to engage with diverse experiences and impacts of trauma including childhood adversity. In a study of 14,000 youth in child welfare custody in Illinois, more than 95 percent of the sample were suspected to have experienced trauma and adversity; by definition, they were in custody following abuse or neglect.<sup>463</sup> However, remarkably only 3% met the strict diagnostic criteria for PTSD.<sup>464</sup> Further, as noted in Chapter II, childhood trauma does not happen in a vacuum. Individualised experiences of trauma are typically shaped or even partially caused by the impact of social issues including systemic and structural inequity.<sup>465</sup> Indigenous scholars, including Wirihana and Smith underscore the limitations of western diagnostic definitions which also overlook and silence historical and intergenerational trauma.<sup>466</sup>

When limited to the confines of narrow diagnostic parameters, responding to the complex array of social, emotional and cognitive impacts of childhood trauma discussed in Chapters II and III can result in a range of diagnoses, misdiagnoses and an assortment of separate treatments without consideration of their underlying cause.<sup>467</sup> Van der Kolk states that approaching presenting “symptoms” in a vacuum, rather than focussing on their underlying cause runs the risk of “losing sight of the forest in favour of one tree”.<sup>468</sup> He asserts that “[d]evelopmental trauma sets the stage for unfocused responses...leading to dramatic increases in the use of medical, correctional, social and mental health services.”<sup>469</sup>

It is relatively easy to envision how such unfocused responses may play out in the life course of a crossover young adult. Chapter II noted a range of factors common amongst crossover

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<sup>462</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5) (American Psychiatric Publishing, 2013) at 309.81 (F43.10); Johnstone and others, above n 459; van der Kolk, above n 459, at 168-195.

<sup>463</sup> Gene Griffin and Sarah Sallen “Considering Child Trauma Issues in Juvenile Court Sentencing” (2013) 34(1) *Children's Legal Rights Journal* 1 at 17.

<sup>464</sup> At 17.

<sup>465</sup> Randall and Haskell, above n 307, at 514.

<sup>466</sup> R Wirihana and C Smith “Historical Trauma Healing and Wellbeing in Māori” (2014) 3(3) *Mai Journal* 197.

<sup>467</sup> Harris and Fallo, above n 454; C Evans and K Graves “Trauma among children and legal implications” (2018) 4 *Cogent Social Sciences* 1 at 2; Kezelman and Stavropoulos, above n 101, at xxx.

<sup>468</sup> B A van der Kolk “Developmental Trauma Disorder: Towards a Rational Diagnosis for Chronically Traumatized Children” (2005) *Psychiatric Annals* 1, at 2 and 3.

<sup>469</sup> At 2 and 3.

youth such as educational disengagement, mental health and addiction issues, as well as systemic factors including harsh or differential treatment in the care and justice systems. In school, a child or young person with a background of trauma may present as reactive or in-compliant and be subjected to disciplinary measures for being troublesome or naughty.<sup>470</sup> Similarly, an easily triggered child or young person in state care could be subjected to multiple placement moves or police involvement as a result of their challenging behaviours. Within mental health services, inattentiveness could result in treatment and medication for ADHD.<sup>471</sup> Substance misuse issues could also be separately treated in addiction services without any question of what the individual is attempting to self-medicate.<sup>472</sup> In turn, within the youth and criminal justice systems, the range of issues with which crossover youth and crossover young adults present could result in them being viewed as “problematic, ‘risky’ and therefore undeserving of supportive criminal justice interventions”.<sup>473</sup> This is a particular concern in the adult criminal justice system given the retributive, offence-focused sentencing regime discussed in chapter IV.

Over 20 years ago, not long after the original ACE study’s findings were released, Harris and Fallot made the case for the need for trauma-informed services within mental health and addiction services.<sup>474</sup> Trauma-informed services arose out of concern that service providers may fail to identify trauma as an underlying cause of their client’s presenting issue or issues leading to misdiagnosis, mistreatment and, ultimately, a re-traumatised client.<sup>475</sup> Harris and Fallot distinguished between trauma specific services or specialist interventions and trauma-informed services.<sup>476</sup> Trauma specific services are evidence-based programs or clinical interventions specific to addressing trauma symptoms. Trauma-informed services are those which, regardless of discipline, are characterised by trauma-informed practice. In other words, trauma-informed services demonstrate an awareness and responsiveness to the impacts of trauma and apply “basic knowledge of the impacts of stress on the brain and body and strategies to avoid exacerbating possible trauma-related problems”.<sup>477</sup> Importantly, in addition to

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<sup>470</sup> Perry and others, above n 24, at 827.

<sup>471</sup> Buckingham, above n 100, at 653 citing A Cook and others *Complex Trauma in Children and Adolescents* (National Child Traumatic Stress Network Complex Trauma Task Force, 2003).

<sup>472</sup> G Maté, above n 255.

<sup>473</sup> Fitzpatrick, Williams and Coyne, above n 203, at 8.

<sup>474</sup> Harris and Fallot, above n 454.

<sup>475</sup> Harris and Fallot, above n 454.

<sup>476</sup> At 4-5.

<sup>477</sup> C Kezelman and P Stavropoulos *Trauma and the law: applying trauma-informed practice to legal and judicial contexts* (Blue Knot Foundation, 2016).

recognising negative impacts stemming from trauma, trauma-informed practice simultaneously focusses on strengths and healing.<sup>478</sup>

Rather than being a prescribed blueprint, trauma-informed practice is based on key principles and assumptions.<sup>479</sup> Pioneering efforts have been primarily driven by the Substance Abuse and Mental Health Services Administration (SAMHSA) in America.<sup>480</sup> SAMHSA has led the way with setting out guidance for trauma-informed practice.<sup>481</sup> Their approach is underpinned by four key assumptions: that people at all levels will *realise* the prevalence of trauma, its impacts (individually and collectively) and that it ought to be treated holistically; people at all levels will *recognise* signs of trauma; people at all levels will *respond* appropriately to trauma and will *resist re-traumatisation* of service users and staff.<sup>482</sup> These underpinnings are accompanied by six key guiding principles: safety; trustworthiness and transparency; peer support; collaboration and mutuality; empowerment, voice and choice; and recognition of cultural, historical and gender issues.<sup>483</sup>

Research, guidance and practice resources have since been developed in Aotearoa New Zealand and internationally on how to design trauma-informed service models across a range of disciplines including homelessness services, education, justice and corrections.<sup>484</sup> Atwool notes that many of the iterations draw on the SAMHSA guidelines and that a number of common themes emerge.<sup>485</sup> They each prioritise understanding behaviour through a “trauma lens” and provision of appropriate training to ensure all professionals involved can recognise that a service user may have trauma in their background. Strengths-based approaches are supported and safety and connections are also highlighted as key components of effective intervention.<sup>486</sup>

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<sup>478</sup> Te Pou o te Whakaaro Nui *Trauma Informed Care: Literature Scan* (Te Pou o te Whakaaro Nui, Auckland, 2018).

<sup>479</sup> At 35.

<sup>480</sup> SAMHSA funds two major trauma-related resources, the National Center for Trauma Informed Care (NCTIC) and the National Child Traumatic Stress Initiative (NCTSI).

<sup>481</sup> Substance Abuse and Mental Health Services Administration *SAMHSA'S Concept of Trauma and Guidance for a Trauma Informed Approach* (SAMHSA, 2014)

<sup>482</sup> At 9-10.

<sup>483</sup> At 10-11.

<sup>484</sup> A Quadaro and C Hunter *Principles of Trauma Informed Approaches to Child Sexual Abuse: A Discussion Paper* (Australian Institute of Family Studies, 2016); also see Nicola Atwool “Challenges of Operationalising Trauma Informed Practice in Child Protection Services in New Zealand” (2019) 24(1) *Child and Family Social Work* 25 at 5; Te Pou o te Whakaaro Nui, above n 478; A McAnallen and E McGinnis “Trauma-Informed Practice and the Criminal Justice System: A Systematic Narrative Review” (2021) 18 *Irish Probation Journal* 103.

<sup>485</sup> Atwool, above n 484, at 5.

<sup>486</sup> At 5.

Arguably recognition of trauma is particularly important in the criminal justice context where behavioural manifestations are likely to otherwise be punished and compounded, rather than provided with support to heal. In line with trauma-informed practice, the criminal justice system ought to realise, recognise and respond to trauma amongst crossover young adults and avoid having a re-traumatising effect.<sup>487</sup> Drawing on principles of trauma-informed practice as well as the neurodevelopmental and trauma research discussed in Chapter III, the following section provides four guiding principles for neurodevelopmentally-aware, trauma-informed responses to crossover young adults.

## *B Guiding Principles*

### *1 Understanding of the prevalence and neurodevelopmental impacts of childhood trauma*

Sentencing for crossover young adults ought to be grounded in the understanding that childhood trauma is common amongst crossover young adults and in basic knowledge of the neurodevelopmental impacts of childhood trauma. Integral to this understanding is the fact that challenging behaviour can be recognised as adaptation to circumstances rather than inherent badness or illness.<sup>488</sup> Fundamentally, this will allow for more effective interventions that contribute to public safety.<sup>489</sup> If the criminal justice system continues to be neurodevelopmentally unaware and unresponsive to trauma, similar to misdiagnosis and mistreatment within health services, behavioural manifestations of trauma will inevitably be misinterpreted and met with punitive, triggering responses. Clearly this could result in a “mutually reinforcing cycle”.<sup>490</sup>

Importantly, a revised understanding of the manifestations of trauma as adaptive and a shift away from a fixation on the individual and what is “wrong” with them, turns focus to the experience and the circumstances that gave rise to (mal)adaptive and protective responses,

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<sup>487</sup> G Griffin, E Germain and RG Wilkerson “Using a Trauma Informed Approach in Juvenile Justice Institutions” (2012) *J Child Adolesc Trauma* 5.

<sup>488</sup> Kezelman and Stavropoulos, above n 101, at 44; Randall and Haskell, above n 307, at 508. See Chapter III(C)-(E) for discussion of how the stress response adapts and becomes sensitised as a protective mechanism in response to childhood trauma and the maladaptation this can lead to throughout the life course.

<sup>489</sup> J Levenson and G Willis “Implementing Trauma-Informed Care in Correctional Treatment and Supervision” (2019) 28(4) *J Aggress Maltreat Trauma* 481.

<sup>490</sup> McAnallen and McGinnis, above n 484, at 114.

including structural inequity.<sup>491</sup> As noted in Chapter II, childhood trauma does not happen in a vacuum. Individualised experiences of trauma are typically shaped or even partially caused by the impact of social problems.<sup>492</sup> Clear examples in Aotearoa New Zealand are the impacts of the colonial legacy for Māori and trauma endured by migrants from the Pacific and elsewhere.<sup>493</sup>

Sentencing decisions for crossover young adults ought to reflect an understanding that present troubles are rooted in past harms and of the “ripple effect” of such harms from the individual to the collective, and from the collective to the individual.<sup>494</sup> In other words, sentencing decisions ought to show an understanding and responsiveness to the fact that experience of childhood trauma and criminal justice system involvement is often the product of systemic and structural failings. This heightens the imperative to respond appropriately to trauma, rather than pathologise and criminalise it.

## *2 Strengths-based approach and community empowerment*

Criminal justice responses to crossover young adults at the sentencing stage ought to reflect a shift away from deterministic, deficit-based acknowledgment of manifestations of trauma and towards a commitment to supporting crossover young adults to heal, develop and learn. In the same way that the brain adapts and changes in response to negative experiences such as childhood trauma, positive experiences can facilitate development, recovery from unresolved trauma and rerouting off the care to custody pipeline.<sup>495</sup> Prospects for healing are particularly relevant when situated in the developmental framework of young adulthood which provides an “age of opportunity” in terms of the particular malleability of the young adult brain.<sup>496</sup> Further, given that unresolved trauma can be transmitted to the next generation via a variety of mechanisms including the impact of attachment relationships with care givers, supporting

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<sup>491</sup> Oudshoorn, above 423, at 112.

<sup>492</sup> Haskell and Randall at 514

<sup>493</sup> Wirihana and Smith, above n 466; L Pihama, P Reynolds, P, C Smith, J Reid, L T Smith, and R Te Nana. “Positioning historical trauma theory within Aotearoa New Zealand” (2014) 10(3) *AlterNative: An International Journal of Indigenous Peoples* 248; Atwool, above n 484, at 9.

<sup>494</sup> Oudshoorn, above n 423, at 113.

<sup>495</sup> Kezelman and Stavropoulos, above n 101, at 36. See Chapter III(G) for discussion of neuroplasticity

<sup>496</sup> Steinberg, above n 12.

healing from trauma also assists with the interception of its potential intergenerational effects.<sup>497</sup>

The empowerment of communities and engagement of the largely untapped potential of crossover young adults' community and culture ought to be central to neurodevelopmentally-aware, trauma-informed criminal justice responses. Neurodevelopmental research shows that “[p]romoting relational health by increasing the quality, number, and density of supportive, nurturing and trauma-informed people is the most effective and enduring form of intervention.”<sup>498</sup> It is therefore crucial that whānau, family and community involvement is not limited to sharing of information or peripheral involvement.<sup>499</sup> Approaches to criminal justice and care and protection in Aotearoa New Zealand have typically reserved power for the government.<sup>500</sup> The consequent power differentials and imposition of dominant cultural models not only create barriers to the healing power of sustainable connections to community and culture, they can add further trauma by “replicating the dynamics of power and control involved in family and community violence.”<sup>501</sup> Accordingly, there have been increasing calls for community led justice responses.<sup>502</sup> Such responses need to be resourced and mobilised.

### 3 Safety

Crossover young adults with unresolved childhood trauma are likely to have a sensitised stress response, to be easily triggered and to put themselves and others at risk through “fight, flight or freeze” behaviours.<sup>503</sup> If operating in a persistent state of fear, they will also be preoccupied with self-preservation and have limited ability to learn or develop new skills.<sup>504</sup> The upshot is that individuals with a felt sense of safety are less likely to overreact and are more likely to

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<sup>497</sup> S Zubrick and others *The Western Australian Aboriginal Child Health Survey: The Social and Emotional Wellbeing of Aboriginal Children and Young People* (Curtin University of Technology and Telethon Institute for Child Health Research, 2005) at xxii. See Chapter III(F) for discussion of relational neurobiology.

<sup>498</sup> Perry and others, above n 24, at 818.

<sup>499</sup> L Marqua-Harries, Grant Stewart and Venessa Padayachee “Towards Transforming a System: Re-thinking Incarceration for Youth (and beyond)” (2019) 68 SA Crime Quarterly 33 at 37; Community Connections for Youth *Building Community Capacity to Serve Youth in the Justice System* (South Bronx NY: Alternatives to Incarceration Training Institute, 2015) intro.

<sup>500</sup> *Turuki! Turuki!*, above n 30.

<sup>501</sup> L Drabble, S Jones and V Brown “Advancing Trauma-Informed Systems Change in a Family Drug Treatment Court Context” (2013) 13(1) *Journal of Social Work Practice in the Addictions* 91.

<sup>502</sup> See, for example, *Turuki! Turuki!*, above n 30; *Ināia Tonu Nei*, above n 30.

<sup>503</sup> Baker and others, above n 244, at 277. See Chapter III(C)-(E) for discussion of how the stress response adapts and becomes sensitised as a protective mechanism in response to childhood trauma and the maladaptation this can lead to throughout the life course.

<sup>504</sup> Perry, above n 214, at 243.

successfully engage with new skills and behaviours. Accordingly, effective services or interventions for crossover young adults must be provided in safe settings or environments.<sup>505</sup>

In addition to a safe, stable environment, opportunities must be afforded to learn how to self-regulate, that is, to recognise when their “alarm system is being triggered” and know how to calm down.<sup>506</sup> Neuroscientists suggest that rhythmic activities such as music, dance, waiata, kapa haka and martial arts assist with developing self-regulation skills.<sup>507</sup> Self-regulation requires not just teaching, but also modelling.<sup>508</sup> An understanding of self-regulation amongst everyone involved in responding to crossover young adults would assist with dealing more effectively with reactive behaviours and with supporting transitions from the “survival brain” to the “thinking brain”.<sup>509</sup>

#### *4 Connections*

Neurodevelopmental research shows that “relational health” or “connectedness” offers a unique and unparalleled support for healing from past trauma.<sup>510</sup> Given that connectedness is contingent on social capabilities and relational “opportunities”, it is important to acknowledge that care often severs family and whānau ties which subsequent justice involvement compounds.<sup>511</sup> When the biology of attachment is disrupted by traumatic experiences, it can be very difficult to form healthy relationships.<sup>512</sup> Bloom asserts, therefore, that developmental trauma occurs in a relational context so must also be healed in a relational context.<sup>513</sup> It is therefore paramount that criminal justice responses prioritise regular relational opportunities for crossover young adults and sustainable connections to whānau, family, community and culture.

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<sup>505</sup> S Burrell *Trauma and The Environment of Care in Juvenile Institutions* (The National Child Traumatic Stress Network, 2013) at 30.

<sup>506</sup> Griffen and Sallen, above n 463, at 21.

<sup>507</sup> Hambrick, Brawner and Perry, above n 262, at 42; Nathan Wallace “Ka Tikaka o Ka Roro: The Developing Brain” (Presented at Connecting Foster and Kinship Carers (South Australia) Recharge Event, 26 October 2018).

<sup>508</sup> Marqua-Harries, Stewart and Padayachee, above n 499, at 37.

<sup>509</sup> Atwool, above n 484, at 5.

<sup>510</sup> Perry and others, above n 24, at 825; M W DeVries “Trauma in Cultural Perspective” in B A van der Kolk, A C McFarlane and L Weisaeth (eds) *Traumatic Stress* (New York, NY: Guilford Press) at 398-413 as cited in A L Jackson and others *Making Tracks: A Trauma Informed Framework for Supporting Aboriginal Young People Leaving Care* (Berry Street, 2013) at 19; See Chapter III(F) for discussion of relational neurobiology.

<sup>511</sup> Perry and Winfrey, above n 283, at 242.

<sup>512</sup> Perry, above n 214, at 247.

<sup>513</sup> Bloom, above n 306.



As mentioned in Chapter III, Perry has noted the symmetries between the neurobiology of trauma and traditional Māori approaches to healing. Correspondingly, the findings from He Oranga Ngākau, a recent comprehensive research project which explored Kaupapa Māori Trauma Informed Practice principles noted that whānaungatanga, which “refers more broadly to the relational nature of Māori society” is a “value and practice that is considered to be critical in all Māori healing journeys”.<sup>514</sup>

Within the context of state care and protection, Atwool notes that transition legislation and policy for care leavers is underpinned by western notions of individualism through the concept of “transition to independence”.<sup>515</sup> She notes that this sits at odds with neuroscience and with collectivism which underpins Te Ao Māori. To support successful transition, Atwool argues that a “transition to interdependence” ought to be prioritised.<sup>516</sup> A similar step away from the current individualistic criminal justice responses is also necessary for crossover young adults in order to align with the neurodevelopmental insights and with the worldview of Māori who, as noted in Chapter II, are overrepresented in both care and justice statistics.

### *C Specific Proposals for Implementation*

The following section will put forward a number of tangible proposals or priorities for the implementation and incorporation of the above guiding principles for a neurodevelopmentally-aware, trauma-informed approach to sentencing for crossover young adults.

#### *1 Education and awareness building*

Although the law and, more specifically, the criminal justice system is “deeply involved with regulating and responding to human behaviour”, key players within it have limited if any exposure to research or knowledge about human behaviour.<sup>517</sup> Neurodevelopmentally aware, trauma-informed sentencing for crossover young adults ultimately requires a change in perspective or a revised way of thinking about the behaviour of crossover young adults. In

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<sup>514</sup> Pihama and others *He Oranga Ngākau: Māori Approaches to Trauma Informed Care* (Te Kotahi Research Institute, 2020) at 68.

<sup>515</sup> Atwool, above n 9, at 6.

<sup>516</sup> At 6.

<sup>517</sup> Randall and Haskell, above n 307, at 510.

order to facilitate this shift, education and training ought to be prioritised for everyone involved.

Mechanisms already exist in Aotearoa New Zealand for the implementation of training. For example, Te Kura Kaiwhakawā, the Institute of Judicial Studies facilitates judicial education in the form of seminars and online resources.<sup>518</sup> The Law Society also regularly facilitates Continuing Professional Development courses for lawyers on a range of areas.<sup>519</sup> The Public Defence Service recently hosted FASD training for lawyers.<sup>520</sup> Interagency training would be a valuable step away from fragmented responses and towards collaborative efforts needed to support healing amongst crossover young adults.

Training content would need to cover how to incorporate neurodevelopmental and trauma research into practice. This could include, for example, how to recognise trauma and how to interview clients about trauma and its impacts without triggering or retraumatising them. Agreed statements of relevant neurodevelopmental and trauma research could be drafted for use as evidence in court.

Frequently, uptake of trauma research is limited to a focus on lasting damage with minimal consideration of reversibility.<sup>521</sup> Importantly, a substantial component of training or education for those involved in sentencing crossover young adults would need to relate to healing. Anda, one of the researchers behind the original ACE Study, has turned his attention to “translational science”, making the findings of the ACE Study accessible and workable for public audiences from varying disciplines.<sup>522</sup> Anda’s organisation is called “NEAR Sciences”, which refers to the research areas that underpin its trainings: Neuroscience, Epigenetics, ACEs and Resilience.<sup>523</sup> Notably, the entire second half of the NEAR Science trainings focus exclusively on the “science of hope”, how to repair harm and build resilience through developing positive connections, creating supportive environments, and teaching the skills to recognise and

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<sup>518</sup> Te Kura Kaiwhakawā/Institute of Judicial Studies < <https://www.tkk.justice.govt.nz> >.

<sup>519</sup> “Continuing Professional Development” New Zealand Law Society  
<<https://www.lawsociety.org.nz/professional-practice/continuing-professional-development/>>.

<sup>520</sup> “Public Defence Service: FASD training for lawyers” (29 March 2022) Fetal Alcohol Spectrum Disorder Care Action Network (FASDCAN)

<[https://www.fasdcn.org.nz/public\\_defen.ce\\_service\\_rolls\\_out\\_fasd\\_training\\_for\\_lawyers](https://www.fasdcn.org.nz/public_defen.ce_service_rolls_out_fasd_training_for_lawyers)>.

<sup>521</sup> Müller and Kenney, above n 295, at 1230.

<sup>522</sup> At 1235.

<sup>523</sup> At 1235.

regulate stress responses.<sup>524</sup> Inspiration could be drawn from overseas trainings such as that provided by NEAR Science. That said, caution ought to be exercised against wholesale grafting of “another generation of the latest idea that’s come from somewhere else” without consideration of the unique context of Aotearoa New Zealand.<sup>525</sup>

In addition to education for those involved in the system, in order to maintain confidence in justice responses, raising broader public awareness would also be a necessary component of implementing neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults. Without an appropriate level of understanding of relevant research, trauma-informed approaches are susceptible to being misconstrued as lenient or taking insufficient account of victim interests.<sup>526</sup>

As noted, in Scotland, effective as of January 2022, a Sentencing Young People Guideline applicable to those who are under the age of 25 years, amongst other things, mandates that particular regard be had to rehabilitation and that a range of factors including ACE exposure and trauma to be taken into account at sentencing.<sup>527</sup> Analysis of a public consultation on the draft Sentencing Young People Guideline demonstrated lesser confidence amongst the broader public in the proposed guidelines than individuals and organisations working within the justice sector.<sup>528</sup> The consultation attributed this disparity to the fact that individual members of the public misunderstood the current sentencing framework and, in contrast to individuals and organisations working within the justice sector, did not have as sound a grasp of the underlying research base.<sup>529</sup> This demonstrates the need for education, awareness building and media engagement in order to build and sustain public confidence in justice responses.

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<sup>524</sup> At 1236.

<sup>525</sup> L Tuhiwai Smith “Land, Language and Learning: Living in Good Relations - Understanding trauma and healing from a Māori perspective - He Oranga Ngākau presentation” Kotahi Research Institute <<https://www.waikato.ac.nz/rangahau/koi-te-mata-punenga-innovation/research/hauora-health/well-being>> at 55:30.

<sup>526</sup> *Sentencing young people: Scottish Sentencing Council report on public consultation exercise* (Scottish Sentencing Council, September 2021) at [153].

<sup>527</sup> *Sentencing young people: Sentencing guideline* (Scottish Sentencing Council, 26 January 2022) at [9].

<sup>528</sup> At [144]; Krista Johnson “Youthful Excess: What Price?” (2022) 2(1) *Journal of the Law Society of Scotland* 1.

<sup>529</sup> *Sentencing young people: Sentencing guideline*, above n 349.

## 2 Prioritise rehabilitation

Neurodevelopmental research discussed in Chapter III shows that childhood trauma can be resolved, its behavioural implications which lead to justice system involvement alleviated, and its intergenerational effects intercepted.<sup>530</sup> Neurodevelopmental research also shows that, as a result of heightened neuroplasticity, young adulthood is a “window of opportunity for untapped potential for growth and maturation”.<sup>531</sup> This revised perspective reframes the sentencing stage for crossover young adults as an opportunity to assist recovery from trauma and to interrupt a cycle of offending and institutionalisation. Accordingly, rehabilitation ought to be given primacy as a purpose of sentencing or otherwise dealing with crossover young adults.

It is notable that, in Scotland, the Sentencing Young People Guideline referred to above mandates that particular regard be had to rehabilitation when sentencing those who are under the age of 25.<sup>532</sup> Aotearoa New Zealand does not have a sentencing council or sentencing guidelines. Rather, developments in sentencing practice are implemented by statutory change or senior court precedent. In the context of young adults in the criminal justice system as a broader group, Lynch has noted that steps taken to date to better align with research insights have been judicially driven.<sup>533</sup> Correspondingly, as demonstrated in Chapter IV, uptake of age-related neurodevelopmental distinctions and of the lifelong impacts of trauma as a basis for sentencing discounts has emerged through case law rather than statute. Government approaches to criminal justice in Aotearoa New Zealand are persistently driven by populist notions rather than research findings.<sup>534</sup> Arguably it is time for amendments to the Sentencing Act 2002 to reflect current neurodevelopmental research insights.

In the absence of statutory uptake of neurodevelopmental research, there is an opportunity and arguably a responsibility for lawyers to raise issues of trauma and brain development to advocate for rehabilitative outcomes for crossover young adults.<sup>535</sup> Education and training as discussed above would go some way to safeguarding against piecemeal or inconsistent

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<sup>530</sup> Kezelman and Stavropoulos, above n 101, at 36.

<sup>531</sup> Eslinger and Long, above n 300.

<sup>532</sup> *Sentencing young people: Sentencing guideline*, above n 349.

<sup>533</sup> Lynch, above n 7, at 7.

<sup>534</sup> Peter Gluckman and Ian Lambie *Using Evidence to Build a Better Justice System: The Challenge of Rising Prison Costs* (Office of the Prime Minister’s Chief Science Advisor, March 2018).

<sup>535</sup> Gohara, above n 132.

consideration of neurodevelopmental and trauma research at sentencing for crossover young adults.

It could be argued that prioritising rehabilitation is a “soft approach” which does not achieve accountability. Accountability is frequently equated with just desserts and questions of what punishment fits the crime.<sup>536</sup> However, accountability requires empathy, thought and reflection.<sup>537</sup> When in a fear state, common amongst those with a sensitised stress response as a result of childhood adversity, the only part of the brain functioning is the “survival brain”.<sup>538</sup> In other words, an individual with unresolved trauma is more likely to be preoccupied with survival or self-preservation than the impacts of their actions on others or learning from past actions.<sup>539</sup> Arguably without triggering punitive responses and loss of connection, crossover young adults are more likely to develop empathy and, therefore, to be held meaningfully accountable.<sup>540</sup>

Along similar lines, it could also be argued that prioritising rehabilitation gives rise to community safety concerns. As noted in Chapter IV, rehabilitation is often polarised against risk containment and community safety resulting in an inherent tension in the treatment of youth and trauma related factors at sentencing for crossover young adults. However, neurodevelopment and trauma research show that containment and risk focus amount to a short term focus which is detrimental to long term public safety.<sup>541</sup> Punitive, deterrent sentences are likely to trigger maladaptive behaviours and increase the risk of reoffending.<sup>542</sup> On that basis, prioritising healing and rehabilitation ought not to be perceived as in opposition to risk management; rather, it aligns with it given that rehabilitation is most likely to achieve community safety.<sup>543</sup> From a “utilitarian” perspective, Gohara argues that justice systems

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<sup>536</sup> Conrad G Brunk, “Restorative Justice and the Philosophical Theories of Criminal Punishment,” in M Hadley (ed) *The Spiritual Roots of Restorative Justice* (State University of New York Press, New York, 2001) at 35.

<sup>537</sup> Oudshoorn, above n 423, at 195; Randall and Haskell, above n 307, at 525.

<sup>538</sup> See Chapter III(D)-(E) for discussion of sensitisation of the stress response and the implications for social, emotional, behavioural and cognitive functioning.

<sup>539</sup> Randall and Haskell, above n 307, at 526.

<sup>540</sup> At 525.

<sup>541</sup> Oudshoorn, above n 423, at 194.

<sup>542</sup> Perry and others, above n 24, at 831. See Chapter III(D)-(E) for discussion of sensitisation of the stress response and the implications for social, emotional, behavioural and cognitive functioning.

<sup>543</sup> K J McLachlan “Same, same or different? Is Trauma Informed sentencing a form of therapeutic jurisprudence?” (2021) 25(1) *Journal of European Current Legal Issues* 1.

should prioritise minimising the risk that interventions will cause further trauma and encourage reoffending.<sup>544</sup>

Concerns could also arise that focussing on defendants' backgrounds of trauma runs the risk of detracting from the harm suffered by victims.<sup>545</sup> Gohara also rejects such contentions by arguing that learning how defendants' own victimisation has influenced their behaviour will provide context that may be "illuminating" to some victims and, most importantly, that victims will be better served by defendants receiving meaningful responses which are more likely to prevent their reoffending.<sup>546</sup>

Mulcahy aptly sums up the position by stating that taking a rehabilitative or healing focused approach to sentencing individuals with unresolved trauma "is not soft on crime or coddling wrongdoers..."<sup>547</sup> Rather, "[i]t is a mechanism for improving community safety."<sup>548</sup> Notwithstanding, she further notes it is "also morally right that the State attempt to repair the harms caused to offenders as innocent children in their homes, communities and the systems that failed them along the way."<sup>549</sup> This is particularly fitting given that for many crossover young adults like Zion, the young man introduced at the beginning of this thesis, involvement in the criminal justice system is often demonstrative of the "culmination of multiple systems prior that have ineffectively served them".<sup>550</sup>

### *3 Mandate consideration of trauma*

Neurodevelopmental research shows that trauma is clearly an underlying cause of offending which ought to be identified and responded to as such. Whilst a history of childhood trauma does not necessarily excuse offending behaviour, it is integral to understanding why the behaviour occurred and how to minimise prospects of its reoccurrence. In other words,

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<sup>544</sup> Gohara, above n 132.

<sup>545</sup> At 8.

<sup>546</sup> At 8.

<sup>547</sup> Mulcahy, above n 21, at 13.

<sup>548</sup> At 13.

<sup>549</sup> P Carlen, "Against Rehabilitation: For Reparative Justice" (Eve Saville Memorial Lecture, Centre for Crime and Justice, London, 2012).

<sup>550</sup> Alisha Moreland-Capuia *Training for Change: Transforming Systems to be Trauma-Informed, Culturally Responsive, and Neuroscientifically Focused* (Springer, Cham, 2019) at 1.

considering and responding to trauma is necessary for more effective interventions that contribute to public safety.<sup>551</sup>

As noted in Chapter IV, although the Sentencing Act 2002 provides scope for childhood trauma and its impacts to be considered by a judge who is deciding how to sentence or otherwise deal with a crossover young adult, it does not specifically mandate its consideration. Responsibility lies with defence counsel to identify and raise trauma as a live issue, to persuade the court of its relevance to the offending and the most appropriate response. This means that there is potential for trauma to remain unidentified and its behavioural manifestations to be misinterpreted and, ultimately, met with a harsh response.

There is a well-established line of case law which shows acceptance of the relevance of the neurodevelopmental distinctions and immaturity amongst young adults to culpability.<sup>552</sup> However, as demonstrated in Chapter IV, the research relied upon tends to remain within the confines of normative, age-related developmental factors. Given the prevalence of childhood trauma amongst crossover youth and the inextricable links between trauma and development, arguably consideration of developmental distinctions at sentencing ought to include consideration of the impacts of trauma.<sup>553</sup> Correspondingly, the Scottish Sentencing Young People Guidelines effective from January 2022 set out a “non-exhaustive” list of factors to be assessed when determining the maturity of the young adult before the court for sentencing.<sup>554</sup> Amongst the listed factors are trauma and ACEs. Arguably a similar approach ought to be mandated in respect of crossover young adults in Aotearoa New Zealand in order for responses to reflect research insights.

Mandating consideration of trauma, either by statute or senior court precedent, would ensure it is identified, safeguard against its wrongful treatment as an aggravating factor and reduce prospects of counterproductive punitive responses. Again, in the absence of a statutory mandate, lawyers have a key role to play in raising issues of trauma at sentencing. As noted above, education and awareness building can assist with reducing inconsistency in

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<sup>551</sup> Levenson and Willis, above n 489.

<sup>552</sup> *Churchward*, above n 375; *Rolleston*, above n 375; For an overview of a similar approach in American case law see L Steinberg and E Scott “Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty” (2003) 58(12) *Am Psychol* 1009.

<sup>553</sup> Marsh and Byer, above n 26, at 2.

<sup>554</sup> *Sentencing young people: Sentencing guideline*, above n 349.

representation, advocacy and treatment of trauma amongst crossover young adults at sentencing.

Mandating and encouraging consideration of trauma at sentencing ought to be supported by collaboration and information sharing across state agencies and sectors. An initial step to that end would be extension of the information sharing protocol discussed in Chapter IV beyond the pilot Young Adult List initiative. Consideration would also need to turn to the possibility of trauma screening.

#### *4 Presumption against imprisonment*

A sentence of imprisonment will inevitably compound unresolved trauma and maladaptive behaviours and contribute to a cycle of system entrenchment. Mulcahy accordingly states that an “unsafe, abusive, punitive prison environment will maintain prisoners predisposed since childhood to a state of near-permanent hyperarousal, to be ceaselessly fearful and on edge.”<sup>555</sup> This carries significant weight given recent reports of alarming practice in prisons in Aotearoa New Zealand.

In 2021, the District Court found that a young woman, Mihi Bassett, had been subject to “inhuman” and “degrading” treatment whilst serving a prison sentence imposed when she was 23 years of age.<sup>556</sup> Amongst Judge McNaughton’s findings were that she had been confined illegally for months in a segregation unit, been forcibly removed from her cell with pepper spray, been forced to lie on the ground next to the toilet with her hands behind her back in order to be provided with meals, and been made to remove her clothes and underwear in front of male corrections officers.<sup>557</sup> Most troublingly of all, Ms Bassett had a background of significant trauma including exposure to physical and emotional abuse by a parent, sexual abuse, exposure to violence, drug and alcohol abuse and loss of close family members at a young age.<sup>558</sup> A psychiatrist’s report provided to the court confirmed, somewhat unsurprisingly, that her experience in prison seemed to have compounded her past trauma and led to a major depressive

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<sup>555</sup> Mulcahy, above n 21, at 9.

<sup>556</sup> *R v Bassett* [2020] NZDC 24454 at [92]; *R v Bassett* [2021] NZDC 5067 at [19]; See Mariah Hori Te Pa and Alex Gordon “KIA KAHA, KIA TOA, KIA MANAWANUI E: Mihi Bassett and the Auckland Women’s Prison” [2021] NZWLJ 47.

<sup>557</sup> *R v Bassett* [2020] NZDC 24454.

<sup>558</sup> At [108]-[109].



disorder.<sup>559</sup> Mihi Bassett’s story leaves little scope to justify imprisonment as anything other than a measure of absolute last resort for crossover young adults.

Further, it is important to note the intergenerational reach of the detriment of imprisonment given that “[i]ndividual incarceration is a collective experience”.<sup>560</sup> Aotearoa New Zealand has one of the highest incarceration rates per head of population in the developed world with statistics repeatedly showing the stark overrepresentation of Māori.<sup>561</sup> A recent Aotearoa New Zealand based ACE study found the highest exposure to childhood adversity amongst Māori participants.<sup>562</sup> A key concern in the study was the high rate of Māori participants who reported having an incarcerated household member.<sup>563</sup> The Public Health Advisory Committee correspondingly has estimated upwards of 20,000 children, mostly Māori, may be intergenerational victims of incarceration.<sup>564</sup> Hasan-Stein and Toki suggest that the correlation between childhood adversity and later life health and wellbeing established by the ACE study assist with understanding that some of the worst wellbeing outcomes for indigenous peoples can arise as a consequence of childhood adversity.<sup>565</sup> Given the wide range of lifelong impacts of ACEs, overexposure can filter into a range of further negative outcomes, compounding the disparities across the life course.<sup>566</sup>

It follows that a shift towards neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults ought to entail a presumption against imprisonment. Ideally, such a presumption would be given statutory footing. Similar to the previous two proposals, in the absence of statutory uptake of neurodevelopmental research, lawyers can play a key role in raising neurodevelopmental and trauma research insights in their submissions to persuade the Court of the counterproductive impact of a sentence of imprisonment for crossover young adults.<sup>567</sup>

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<sup>559</sup> At [108]-[109].

<sup>560</sup> McIntosh, above n 58, at 9.

<sup>561</sup> Gluckman and Lambie, above n 534.

<sup>562</sup> L Hashemi and others, above n 55, at 8

<sup>563</sup> Te Pou o te Whakaaro Nui, above n 478.

<sup>564</sup> Public Health Advisory Committee *The Best Start in Life: Achieving Effective Action on Child Health and Wellbeing* (Ministry of Health, 2010).

<sup>565</sup> Linda Hasan-Stein and Valmaine Toki “Reflections from the Roundtable: Access to Justice – How Do We Heal Historical Trauma?” (2017) 15 Yearbook of New Zealand Jurisprudence 183 at 194.

<sup>566</sup> M Merrick, D Ford and K Ports “Prevalence of adverse childhood experiences from the 2011–2014 behavioral risk factor surveillance system in 23 states” 172(11) JAMA Pediatrics 1038; D Walsh and others “Relationship between childhood socioeconomic position and adverse childhood experiences (ACEs): A systematic review” (2019) 73(12) J Epidemiol Community Health 1087 cited in L Hashemi and others, above n 55.

<sup>567</sup> Gohara, above n 132.

A presumption of imprisonment is of course only feasible if supported by viable alternatives. As noted in Chapter IV, the mechanism through which information is increasingly coming before the courts at sentencing relating to background factors including childhood adversity is reports pursuant to s 27 of the Sentencing Act 2002.<sup>568</sup> Section 27 allows the defendant to request that the court hear any person or persons speak on matters including their personal, family, whānau, community, and cultural background, how it may have related to the commission of the offence, to moral culpability and, importantly, to how it may be relevant to any possible sentence. In other words, s 27 does not just provide a mechanism for information to be provided to the court for the purposes of a retrospective assessment of culpability to be met with a discount. Crucially, it also provides a key vehicle for “engaging with the resources and energy of the ... offender's community”.<sup>569</sup>

Notably, in addition to s 27, the Court of Appeal has recently made strong statements encouraging use of s 25 of the Sentencing Act 2002 as a further related “valuable tool in the sentencing judge’s toolkit”.<sup>570</sup> As noted briefly in Chapter IV within discussion of the Young Adult List, s 25 of the Sentencing Act 2002 allows the sentencing judge to adjourn sentencing for rehabilitative or restorative interventions to be completed. The Court of Appeal, when encouraging greater use of s 25,<sup>571</sup> noted that the clear legislative intent was to encourage participation in rehabilitative interventions which if successfully completed could mean incarceration could be avoided.<sup>572</sup> These mechanisms, coupled with the Court of Appeal’s endorsement of their engagement, provide hope for a way forward and for imprisonment to be a measure of absolute last resort for crossover young adults. However, if communities are not mobilised with resource, these mechanisms and court changes intended to give crossover young adults the best chance to thrive will ultimately fail.

Whilst from a developmentally-aware, trauma-informed perspective institutionalisation should be a measure of last resort, it is acknowledged that some crossover young adults may pose a threat to the community for whom a community sentence may be unrealistic. Where institutionalisation is required, however, facilities should be very different to current prisons. Miller and Najavits’ view is that although custodial sentences are inherently counter to any

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<sup>568</sup> *Zhang v R*, above n 362 at [161].

<sup>569</sup> Williams, above n 359, at 24.

<sup>570</sup> *Zhang v R*, above n 362, at [179] and [186].

<sup>571</sup> At [179].

<sup>572</sup> At [176].

approach that could be considered trauma-informed given the host of “unavoidable triggers” prisons entail, efforts should be made to introduce trauma-informed practices that minimise such triggers and avoid recreating aspects of past abuse.<sup>573</sup>

In Aotearoa New Zealand there have been several calls for over 30 years for reformation of the prison system, and for an increased focus on the rehabilitation of offenders rather than punishment.<sup>574</sup> Among other things, these recommendations include the gradual replacement of prisons with community-based “habilitation” centres and partnerships with iwi and community groups.<sup>575</sup> In 2019, Sir Kim Workman, drawing on the work of Yvonne Jewkes and others regarding “healthy prisons”, put forward the idea of a “whānau-facing prison”.<sup>576</sup> By contrast to the austere, disciplinarian nature of current prisons, an alternative would “nurture positive staff–prisoner relationships; foster feelings of decency, safety, trust, compassion and respect; and attempt to encourage the flourishing of potential, as opposed to the breaking of spirits”.<sup>577</sup> Such a facility is envisioned to be similar to a well-designed healthcare facility or any other kind of “normal” social environment.<sup>578</sup> Importantly, amongst the key basic components of “whānau-facing prison” would be regular, high-quality whānau visits.<sup>579</sup> By removing unnecessary triggers, a disciplinarian ethos and disconnection from whānau, families, communities and culture, a “whānau-facing prison” would be much more in line with neurodevelopmental insights discussed in Chapter III and to intercept a cycle of trauma and institutionalisation.

#### *D Conclusion*

Trauma-informed practice was coined by Harris and Fallot over 20 years ago in acknowledgement that services which fail to realise, recognise and respond to trauma can be experienced as re-traumatising and compound pre-existing issues.<sup>580</sup> Chapters III and IV clearly demonstrated that the same concerns arise in respect of criminal justice responses for

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<sup>573</sup> N Miller and L Najavits “Creating Trauma Informed Correctional Care: A Balance of Goals and Environments” (2012) 3(1) *Eur J Psychotraumatol* 17246.

<sup>574</sup> *Turuki! Turuki!*, above n 30, at 53; C Roper *Te Ara Hou: The New Way* (Committee of Inquiry into the Prisons System, 1989).

<sup>575</sup> *Turuki! Turuki!*, above n 30, at 19.

<sup>576</sup> Workman, above n 55, at 10 citing Y Jewkes “Just design: Healthy prisons and the architecture of hope” (2018) 51(3) *Australian & New Zealand Journal of Criminology* 319.

<sup>577</sup> Workman, above n 55, at 10.

<sup>578</sup> At 10.

<sup>579</sup> At 10.

<sup>580</sup> Harris and Fallot, above n 454.

crossover young adults. Sentencing decisions which respond to behavioural manifestations of trauma rather than their underlying cause are likely to compound pre-existing issues and, ultimately, to contribute to a cycle of offending and reoffending. Given the prevalence of childhood trauma amongst crossover young adults, the principles and underpinnings of trauma-informed practice, coupled with the neurodevelopmental and trauma research findings discussed in Chapter III, offer a more effective, fair and just way forward.

As such, this chapter set out four key guiding principles to pave the way towards neurodevelopmentally-aware, trauma-informed sentencing for crossover young adults. First, sentencing for crossover young adults must be grounded in the understanding of the prevalence of childhood trauma amongst crossover young adults as well as basic knowledge of its neurodevelopmental impacts. Integral to this knowledge is an appreciation that punitive, deterrent sentences simply will not work for crossover young adults with unresolved trauma and are likely to reinforce and compound pre-existing issues, inhibit learning and contribute to offending as discussed in Chapter III.

Secondly, sentencing must be strengths-based, healing-focused and committed to empowering crossover young adults and their whānau, families and communities. The criminal justice system must capitalise on the “two great interrelated gifts of our species—the remarkable malleability of [the] brain in early life and the power of relationships”.<sup>581</sup>

Thirdly, safety and self-regulation ought to be prioritised in sentencing or disposition outcomes for crossover young adults. Crossover young adults with unresolved childhood trauma are likely to have a sensitised stress response, to be easily triggered and to put themselves and others at risk through “fight, flight or freeze” behaviours.<sup>582</sup> As discussed in Chapter III, facilitating a felt sense of safety and the capacity to self-regulate are non-negotiable preconditions to healing and to transitioning out of the “survival brain” to the “thinking brain”.

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<sup>581</sup> B Perry and E Jackson “The long and winding road: from neuroscience to policy, program, practice” (2014) 9 *Insight: Victorian Council of Social Services Journal* 4 at 14.

<sup>582</sup> See Chapter III(D)-(E) for discussion of sensitisation of the stress response and the implications for social, emotional, behavioural and cognitive functioning.

Fourthly, criminal justice responses to crossover young adults ought to prioritise the single most effective intervention for those with unresolved trauma according to neurodevelopmental insights: positive connections.<sup>583</sup>

This chapter also set out four tangible proposals for the implementation of developmentally-aware, trauma-informed responses to crossover young adults. First, education, training and awareness building must be facilitated in order to support the change of perspective necessary for the adoption of a neurodevelopmentally-aware, trauma-informed approach to crossover young adults.

Secondly, rehabilitation ought to be prioritised as a purpose of sentencing. Young adulthood offers a prime opportunity for healing and positive development given the heightened susceptibility of the brain to change.<sup>584</sup> Further, with a revised understanding that challenging and reactive behaviours can be recognised as adaptation to circumstances, it becomes clear that it is in the public interest for the criminal justice system to prioritise minimising the risk that interventions will cause further trauma and encourage reoffending.

Thirdly, given that responding to trauma is necessary for more effective interventions that contribute to public safety, its consideration at sentencing for crossover young adults ought to be mandated.

Finally, given that prison will inevitably compound pre-existing issues, escalate maladaptive behaviour and contribute to a cycle of intergenerational trauma and system entrenchment, it must be a measure of absolute last resort.<sup>585</sup> There is significant social and economic interest in the resourcing of community alternatives. Where institutionalisation is deemed necessary, facilities must reflect research findings by reducing avoidable triggers and ensuring that sustainable connections are viable.

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<sup>583</sup> Perry and others, above n 24, at 825; M W DeVries “Trauma in Cultural Perspective” in B A van der Kolk, A C McFarlane and L Weisaeth (eds) *Traumatic Stress* (New York, NY:Guilford Press) at 398-413 as cited in A L Jackson and others *Making Tracks: A Trauma Informed Framework for Supporting Aboriginal Young People Leaving Care* (Berry Street, 2013) at 19. See Chapter III(F) for discussion of relational neurobiology.

<sup>584</sup> See Chapter III(G) for a discussion of neuroplasticity.

<sup>585</sup> See Chapter III(D)-(E) for discussion of sensitisation of the stress response and the implications for social, emotional, behavioural and cognitive functioning.

## *VI Conclusion*

There is general acceptance that crossover youth up to 17 years are a complex group facing multiple challenges. Judge Fitzgerald describes their youth justice system involvement as “an almost anticipated result of the traumatic life of abuse and neglect they have suffered”.<sup>586</sup> Statistics show that crossover youth are the most likely group to continue offending into adulthood.<sup>587</sup> However, beyond the youth justice age limit of 17 years, minimal attention has turned to the care-crime connection.

Young adults in the criminal justice system as a broader cohort are increasingly acknowledged as a distinct group given their unique developmental stage.<sup>588</sup> Neuroscience shows that the human brain develops into the mid-twenties.<sup>589</sup> Notably, neuroscience also shows that childhood trauma disrupts development.<sup>590</sup> The central premise of this thesis, therefore, is that sentencing for crossover young adults ought to be developmentally-aware and trauma informed.

Chapter II set the scene by building a profile of crossover young adults’ characteristics and pathways. Given that they are an unexplored group, Chapter II drew on local and international research relating to crossover youth and young adults as two separate groups. Drawing links between the research insights relating to crossover youth and young adults assisted understanding of how their unique complexities might intersect and compound amongst crossover young adults.

A key underlying cause of the overrepresentation of crossover youth in the justice system is the ongoing impacts of their exposure to childhood adversity and trauma. Felitti and colleagues’ pioneering ACE study and research which built upon its findings demonstrate that childhood adversity can result in a range of negative outcomes which, if unresolved, continue to have impacts across the life course.<sup>591</sup> The neurodevelopmental research which built upon the ACE study’s findings clearly shows that childhood trauma has a major role to play in

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<sup>586</sup> At 16.

<sup>587</sup> See Chapter II(A).

<sup>588</sup> See Chapter II(B).

<sup>589</sup> See Chapter II(B)(3), III(B).

<sup>590</sup> See Chapter III(C)-(F).

<sup>591</sup> Felitti and others, above n 128.

shaping the developing brain. In other words, Chapter II demonstrated that trauma is prevalent amongst crossover youth and that it is relevant as an underlying cause of offending at all stages of the care to custody pipeline, not just when aged 17 years or under.

Chapter II considered interdisciplinary research which confirms that a key driver of offending amongst crossover young adults is their unique developmental stage. Young adults present with a range of psychosocial limitations which increase their inclination for risky behaviour and often lead to justice involvement. Research therefore increasingly draws attention to the need to distinguish young adults in the criminal justice system on purely age-related developmental factors. Given the prevalence of childhood trauma amongst those with a care background and the inextricable links between trauma and development, Chapter II made the case that developmentally appropriate criminal justice responses for crossover young adults ought to include consideration of the impacts of trauma.

Chapter III, therefore, integrated key neuroscientific findings relating to young adult brain development with those related to the impacts of childhood trauma on the developing brain. From the neuroscientific insights discussed, Chapter III formulated a neurodevelopmentally-aware, trauma-informed lens made up of three key points through which to critique the current approach to crossover young adults at sentencing in Chapter IV.

The first limb of the neurodevelopmentally-aware, trauma-informed lens established in Chapter III requires an understanding that crossover young adults, amongst whom childhood trauma is prevalent, may well exist in a constant state of fear. Their emotional, behavioural and cognitive functioning will reflect this state and exaggerate their age-related inclination towards risky behaviours. Seemingly reactive, oppositional or remorseless behaviours can be understood as (mal)adaptation to adverse experiences or circumstances in childhood. Chapter IV demonstrated that the current approach to sentencing for crossover young adults fails to integrate this key point. Consideration of personal factors, including those related to age and experience of trauma, comes after setting a starting point by reference to the offending committed. By considering the offending first, the courts will inevitably consider surface level behavioural manifestations of trauma in the initial instance, rather than considering their underlying cause.

Inherent to an understanding that crossover young adults with unresolved trauma may be in a persistent fear state is an appreciation that punitive, triggering sentences simply will not work and are likely to compound pre-existing issues, hinder learning and contribute to offending. Again, Chapter IV demonstrated that the current approach fails to incorporate this insight. Youth and trauma are acknowledged with transactional sentencing discounts which merely shorten otherwise harsh punishments that are likely to incite further offending.

The second limb of the neurodevelopmentally-aware, trauma-informed lens established in chapter III requires an understanding that healing from unresolved trauma is possible through safe, positive experiences and relational connections. Chapter IV showed that the current criminal justice response to crossover young adults at sentencing fails to reflect an appreciation of prospects for healing or the factors that necessarily support it. Even if the court is furnished with relevant information regarding a young adult's development and trauma, these factors tend to be met with transactional discounts. This reflects a deterministic, deficit-based response which fails to capitalise on heightened neuroplasticity and prospects for healing. When sentencing for more serious offences, this is a particular concern given there are limited alternatives to imprisonment. Imprisonment not only fails to provide connection, it presents a significant barriers to it.

The third and final limb of the neurodevelopmentally-aware, trauma-informed lens set up in Chapter III requires an appreciation that heightened neuroplasticity during young adulthood offers an "age of opportunity" for healing and rerouting the care to custody pipeline. Chapter IV also demonstrated that the current approach to sentencing crossover young adults is starkly at odds with this key point. Rehabilitation is not given legislative primacy or priority over other factors including deterrence and denunciation when sentencing crossover young adults.

In short, whilst the courts have acknowledged the relevance of youth and trauma at sentencing when raised in mitigation by defence counsel, fundamentally, criminal justice responses and substantive outcomes fail to incorporate or integrate the research insights discussed in Chapter III.

In response, Chapter V paved the way towards a more effective, fair and just approach to sentencing for crossover young adults. By drawing on trauma-informed practice, a values-



based approach for service delivery, as well as the neurodevelopmental insights in Chapter III, Chapter V set out four guiding principles for developmentally-aware, trauma-informed responses to crossover young adults.

First, sentencing for crossover young adults must be anchored in the knowledge that the vast majority of crossover young adults have a history of childhood adversity which may have significantly disrupted their neurodevelopment. Integral to this is an appreciation that challenging behaviours can be recognised as adaptive responses and that deterrent sentences are likely to be triggering, compounding and counterproductive.

Secondly, criminal justice responses to crossover young adults at sentencing must be strengths-based, healing-focused and committed to empowering crossover young adults and their whānau, families and communities. In the same way the brain adapts and changes in response to negative experiences, positive experiences and supportive relational connections can facilitate positive changes and recovery from unresolved trauma. Community mobilisation and empowerment are key to facilitating healing opportunities for crossover young adults.

Thirdly, criminal justice responses to crossover young adults at sentencing ought to prioritise safety and self-regulation. As crossover young adults with unresolved childhood trauma are likely to have a sensitised stress response, they will be easily triggered and likely to put themselves and others at risk through “fight, flight or freeze” behaviours. Facilitating a felt sense of safety and the capacity to self-regulate are non-negotiable preconditions to healing, to transitioning out of the “survival brain” to the “thinking brain” and intercepting the care to custody pipeline.

Fourthly, criminal justice responses to crossover young adults ought to prioritise the single most effective intervention for those with unresolved trauma: positive connections to whānau, family, community and culture.

Chapter V also set out four proposals for the implementation of developmentally-aware, trauma-informed responses to crossover young adults at the sentencing stage. First, education, training and awareness building ought to be facilitated as a necessary support to the required

change of perspective for the adoption of a neurodevelopmentally-aware, trauma-informed approach.

Secondly, rehabilitation ought to be prioritised as a purpose of sentencing for crossover young adults. Young adulthood offers a prime opportunity for healing and positive development given the heightened susceptibility of the brain to change. Further, with a revised understanding that challenging and reactive behaviours can be recognised as adaptation to circumstances, it becomes clear that it is in the public interest for the criminal justice system to prioritise minimising the risk that interventions will cause further trauma and encourage reoffending.

Thirdly, given that responding to trauma is necessary for more effective interventions that contribute to public safety, its consideration at sentencing for crossover young adults ought to be mandated.

Finally, given that prison will inevitably compound pre-existing issues, escalate maladaptive behaviour and contribute to a cycle of intergenerational trauma and system entrenchment, it must be a measure of absolute last resort. Where institutionalisation is deemed necessary, facilities must reflect research findings by reducing avoidable triggers and ensuring that sustainable connections are viable.

It is important to note that a neurodevelopmentally-aware, trauma-informed approach to crossover young adults is not a “soft approach”. Trauma is clearly an underlying cause of their offending and ought to be responded to as such as a matter of public safety. Imposing punitive, retributive sentences on crossover young adults is a waste of resource and human potential. There is clear social and economic interest in a shift to a neurodevelopmentally-aware, trauma-informed approach and the resourcing of communities to implement it.

As mentioned in the introduction to this thesis, crossover young adults have entitlements to support and advice under the extended care and protection provisions enacted in 2019.<sup>592</sup> Notably the stated purposes of the renewed provisions include preparing young people to be ready to “thrive” as young adults.<sup>593</sup> A retributive stance at sentencing and adoption of the

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<sup>592</sup> Oranga Tamariki Act 1989, ss 386AAA-386C.

<sup>593</sup> Oranga Tamariki Act, 1989, s386AAB.

language of risk ought not to absolve the state of its responsibilities to assist crossover young adults to navigate a particularly challenging transition to adulthood. Arguably, the strengths-based orientation of a neurodevelopmentally-aware, trauma-informed approach would better align with the extended care provisions and be more likely to intercept the care to custody pipeline.

By focusing on the sentencing stage of proceedings for crossover young adults, this thesis has highlighted a neglected group and a valuable, overlooked opportunity to interrupt the care to custody pipeline and its potential intergenerational effects. By drawing connections between trauma and development, this thesis has highlighted that developmentally-aware approaches to crossover young adults ought to include consideration of childhood trauma.

Whilst this thesis has a narrow remit given its chosen subject group of crossover young adults, its contributions are potentially of broader application. Childhood trauma is prevalent amongst crossover youth and crossover young adults but it is by no means exclusive to them. Most people in prison in Aotearoa New Zealand, for example, have reportedly experienced abuse or maltreatment in childhood.<sup>594</sup> By highlighting the need for any approach that claims to be developmentally appropriate to also be trauma-informed, therefore, this thesis adds to the wider conversation relating to young adults as a broader cohort in the criminal justice system in Aotearoa, amongst whom trauma is also likely to be prevalent.

Word count: 38,790

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<sup>594</sup> e.g. *Turuki! Turuki!*, above n 30, at 11.

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