

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/dlm3360350.html>.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF CHILD COMPLAINANT PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/dlm3360352.html>.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 130/2024
[2026] NZSC 19**

BETWEEN G (SC 130/2024)
Appellant

AND THE KING
Respondent

Hearing: 22 July 2025

Further
Submissions: 6 August 2025

Court: Winkelmann CJ, Glazebrook, Williams, Kós and Miller JJ

Counsel: L C Ord and E T Blincoe for Appellant
M F Laracy, J M Pridgeon and W J Harvey for Respondent

Judgment: 24 March 2026

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The proceeding is remitted to the District Court for resentencing.**
- C The applications to adduce further evidence and for name suppression are dismissed.**

D Bail is granted on the terms currently applicable, as amended by this Court’s minute of 10 March 2026. Any application for variation to bail shall be addressed by the District Court.

REASONS

	Para No
Winkelmann CJ, Glazebrook, Williams and Kós JJ	[1]
Miller J	[103]

WINKELMANN CJ, GLAZEBROOK, WILLIAMS AND KÓS JJ
(Given by Williams J)

Table of Contents

	Para No
Background	[1]
<i>Introduction</i>	[1]
<i>The offending</i>	[11]
Rape charge	[11]
Unlawful sexual connection charges	[12]
<i>Sentence</i>	[14]
<i>Court of Appeal decision</i>	[21]
Submissions	[28]
<i>Appellant’s submissions</i>	[28]
<i>Crown’s submissions</i>	[31]
<i>New evidence</i>	[33]
Analysis	[35]
<i>Introduction</i>	[35]
<i>OTA and Sentencing Act compared</i>	[38]
Offending by young people	[38]
OTA purposes, principles and considerations	[39]
OTA processes	[41]
OTA “off-ramps” to the Sentencing Act	[45]
Youth as a factor for aged-out offenders under the Sentencing Act	[47]
<i>The approach to aging out elsewhere</i>	[57]
<i>Compatibility, consistency and culpability</i>	[66]
The consistency principle is not otherwise displaced	[75]
<i>The correct approach</i>	[80]
Start with the OTA outcome	[81]
Community-based sentences may still be inappropriate	[84]
A summary	[87]
G’s case	[93]
Suppression	[95]
Result	[99]

Background

Introduction

[1] How should an adult be sentenced for offending committed as a young person? When a person offends before turning 18, but is not charged until they are 19 or older, this becomes an issue. That is because the Oranga Tamariki Act 1989 (OTA) provides that such a person is not required to be brought before the Youth Court under the OTA—instead they are treated as, in effect, having “aged out” of the youth justice system and so they must be sentenced under the Sentencing Act 2002.¹

[2] The appellant G is caught by this aging-out provision. He was 19 years old when, in 2021, three sexual violation charges were laid against him: two of unlawful sexual connection against separate victims, T and F, and one of rape against a third victim, J.

[3] The most serious charge was the rape of J, committed in 2017 when G was 15. He chose to go to trial on that charge, was found guilty and was sentenced under the Sentencing Act.² Had he been charged before his 19th birthday, the OTA would have applied.³

[4] G was 18 when he committed the two unlawful sexual connection offences in 2020, so the OTA did not govern their disposition.⁴ He pleaded guilty to those charges.⁵

[5] In the District Court, the rape was effectively taken as the lead offence and, despite discounts for youth and other factors, G was sentenced to a total of three years and four months’ imprisonment on all three charges.

[6] We were referred in argument to a number of cases involving sexual offending by young people charged later, sometimes much later, as adults. The pattern is that

¹ See Oranga Tamariki Act 1989 [OTA], s 2(2)(d).

² *R v [G]* [2024] NZDC 7663 (Judge Nicholls) [Sentencing notes].

³ OTA, ss 2(2)(a) and (b), and 272(3).

⁴ Section 2(1) definition of “young person”.

⁵ Sentencing notes, above n 2, at [4].

sexual offending by a young person (particularly if committed against a young victim) comes to the attention of authorities long after it occurred because the victim, older and more mature, then feels able to complain to the police. In G's case, it was the bringing of an unlawful sexual connection complaint by F in 2020 (by which time G was 18) that led to J coming forward in 2021 in respect of the offending against her four years earlier. These matters suggest that transition out of the youth justice regime by aging out is not a rare phenomenon.

[7] G says that, though now an adult, his sentence should have drawn on the OTA's youth justice principles because he was 15 when he committed the lead offence.⁶ These principles emphasise the well-being of the young offender—such that their application avoids incarceration except as an absolute last resort. The Crown, on the other hand, says the Sentencing Act is, by design, the controlling regime for offenders like G, and the OTA has no role. Under the Sentencing Act, the Crown submits, other relevant factors such as denunciation and general deterrence are victim and community-centred rather than offender-centred, and must be taken into account alongside the offender's youth.⁷

[8] We have concluded that the sentencing Court should have taken into account the likely outcome had G been charged with the rape of J in time to be dealt with under the OTA when it sentenced G under the Sentencing Act.

[9] In summary, the reasons for our approach are these. First, the gravity of offending and the culpability of an offender (assessed at stage one of the normal sentencing methodology) does not increase with the passage of time, and therefore with the aging out of a young offender. Second, and in light of the foregoing consideration, the fundamental importance of consistency in sentencing requires the same judicial response to offending young persons, regardless of whether they are charged before or after they have aged out. Third, tariff consistency in sentencing requires reference to the likely sentence had the offender been sentenced at the time of the offence. Fourth, the Sentencing Act, correctly construed, does not require otherwise—indeed, it provides processes that approximate those in the OTA in

⁶ See OTA, s 208.

⁷ See Sentencing Act 2002, s 7(1)(e) and (f).

function. Fifth, taking any other approach would place New Zealand peculiarly out of step with cognate jurisdictions such as England and Wales, Canada and Australia. In order to properly address these matters, we set out the correct approach at the end of these reasons.⁸

[10] Our focus here is on aged-out cases as described above. We do not address, nor need to address, other circumstances where young offenders are removed from the youth justice system to the general courts.⁹ It is not strictly necessary in this appeal to address issues arising in non-aged out removals. Nor are we required to consider the correct approach to youth discounts more generally.

The offending

Rape charge

[11] J was the victim of the rape. She was 19 at the time. A relationship of trust existed between J and G. They were home alone and had been consuming recreational drugs and alcohol. G also gave J sleeping tablets. The net effect of these substances on J was that she was unable to stay alert or maintain control of her body. G touched her body with his hand. She tried to push it away. He pulled her pyjama shorts down, pulled her underwear to the side, climbed on top of her and raped her.

Unlawful sexual connection charges

[12] The first unlawful sexual connection offence occurred in April of 2020 when G was staying temporarily at the victim T's house. He slept on a couch in the lounge. T was 29 at the time. T has a child with a disability who had kept her up the night before, so on the night in question, she was in a deep sleep. G came into T's bedroom, got into her bed and lay down behind her. He pulled her pants down and inserted a finger into her vagina. The offending stopped when T's children came into the bedroom, waking T. She subsequently made it very clear to G that his behaviour was unacceptable.

⁸ See below at [81]–[92].

⁹ See below at [45]–[46].

[13] The second unlawful sexual connection offence occurred seven months later. G was living temporarily at the address. The victim, F, and her partner were visiting. F was 16 at the time and three months pregnant. G knew this. When F and her partner were in the spare bedroom asleep, G sneaked into their room and lay down next to F. He then positioned himself on top of F, groped her breast and held her down. He reached under her clothes and inserted his fingers into her vagina. F woke but did not immediately realise it was G. When F realised what was happening, she woke her partner who chased G out.

Sentence

[14] As noted, the District Court Judge effectively selected the rape offence as the lead offence for the purposes of sentencing. It was the most serious offending. The Judge placed that offending in the middle of rape band one of the Court of Appeal's guideline decision in *R v AM (CA27/2009)*.¹⁰ The range in band one is six to eight years and was described by the Court in *AM* as follows:

[93] This band will be appropriate for offending at the lower end of the spectrum; that is, offending where the aggravating features are either not present or present to a limited extent. Rape band one is not an appropriate band for offending where the level of violence is serious, the case involves an extended abduction, a victim who by reason of factors such as age (children or elderly persons) or mental or physical impairment is vulnerable or an offender acts in concert with others. Where none of the factors referred to above at [37]–[52] which increase the seriousness of the offending are present a starting point at the bottom end of this band would be appropriate. Where one or more of these factors is present to a low or moderate degree, a higher starting point within the band would be required.

[15] In addition to those listed above, the aggravating features referred to in *AM* include, for example, any breach of trust, the degree of violation as well as the extent of the harm to the victim.¹¹

¹⁰ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

¹¹ At [37]–[52].

[16] The Judge set a starting point of seven years' imprisonment for the rape in light of the following aggravating features of that offending:¹²

- (a) The use of drugs and alcohol. While these were not forced on J, they nonetheless made her vulnerable.
- (b) G persisted when J said no.
- (c) On the other hand, the incident was relatively brief and there was no additional violence beyond that inherent in rape itself.
- (d) Breach of the relationship of trust between G and J.
- (e) The significant negative effect on J's well-being of both the offending and her disclosure of it.

[17] The Judge adopted a starting point of four years' imprisonment in relation to the two unlawful sexual connection charges the subject of guilty pleas.¹³ The Judge referred to the following relevant factors:¹⁴

- (a) There were separate offences against different victims, both of whom were asleep and vulnerable for that reason.
- (b) Having been told by T that what had occurred was unacceptable, G repeated the behaviour later the same year.
- (c) The offending against T was relatively brief and without aggravating violence but the offending against F was more persistent and involved holding her down.
- (d) F was young and particularly vulnerable—she was pregnant, as G knew.

¹² Sentencing notes, above n 2, at [19]–[21].

¹³ At [18]. The Judge recorded that this four-year starting point was consistent with a sentencing indication he had earlier given: see [16].

¹⁴ At [17].

[18] The four-year unlawful sexual connection starting point together with the seven-year rape starting point produced a combined starting point of 11 years' imprisonment. Applying the sentencing principle of totality, the Judge adjusted this starting point downwards by two years.¹⁵ This produced an overall starting point of nine years' imprisonment.¹⁶

[19] Turning to personal mitigating factors, the Judge applied a 20 per cent discount for the guilty pleas entered in relation to the two unlawful sexual connection charges only. This resulted in a discount from the starting point of eight months.¹⁷ He then applied an overall discount of 40 per cent for G's youth, noting, in particular, G's age at the time of the lead offence and the importance of consistency in treatment of youth offenders.¹⁸ This reduced the starting point by 43 months.¹⁹ As to G's family background, the Judge considered that he "had a childhood that no one in New Zealand should have".²⁰ A further reduction of 10 per cent, or 11 months, was applied for that.²¹ The Judge also allowed a relatively generous one-for-one reduction for the six months G had spent on electronically monitored (EM) bail.²²

[20] With these reductions of slightly more than 60 per cent from the nine-year starting point, the overall end sentence of three years and four months' imprisonment was reached.²³

Court of Appeal decision

[21] The Court of Appeal held that the sentencing Judge did not err in locating the rape in band one of *R v AM (CA27/2009)* nor in adopting a starting point of seven years' imprisonment for the rape charge.²⁴ J was vulnerable at least to a moderate

¹⁵ See Sentencing Act, s 85.

¹⁶ Sentencing notes, above n 2, at [22].

¹⁷ At [24]–[25]. This was calculated by taking the proportion of the starting point for the sexual violation by unlawful sexual connection charges from the total 11-year starting point (36 per cent), and applying that to the adjusted starting point of nine years, which equalled 39 months. The 20 per cent reduction was then calculated based on that figure.

¹⁸ At [26]–[27].

¹⁹ At [27].

²⁰ At [29].

²¹ At [30].

²² At [31].

²³ At [36].

²⁴ *[G] v R* [2024] NZCA 626 (Palmer, Fitzgerald and Grice JJ) [CA judgment] at [82].

degree, as she had consumed alcohol, drugs and sleeping tablets, rendering her unable to stay alert and in control of her body. She also reported substantial harm as a result of the offending. The Court considered that breach of trust was relevant to a more limited extent, given that G had only been living at the same house as the complainant for a year or so prior to the offending.

[22] The starting point, the Court accepted, was consistent with the cases referred to by the Crown. They involved rape offending where the complainants were asleep and significantly affected by alcohol, recreational drugs or medication, and starting points of between six and eight years were adopted.²⁵

[23] Further, the unlawful sexual connection offending was appropriately located within band one of the *AM* unlawful sexual connection bands, and the starting point of four years' imprisonment in respect of those two charges was appropriate.²⁶ The Court accepted the Crown's submission that the relevant aggravating factors were the vulnerability of the complainants, both of whom were asleep, and the significant harm caused to them, as well as the particular vulnerability of F.

[24] As to discounts for youth and personal factors, the Court of Appeal said that while the sentencing Judge did not set out the relevant personal factors in detail, he was clearly cognisant of those factors, including that G had established his own young family.²⁷ The reduction for youth and personal factors was generous, the Court noted, as was the six-month credit given for EM bail.²⁸ But the Court rejected the suggestion that the *AM* bands should be adjusted to take account of the circumstances of young offenders.²⁹

We do not accept the submission that the cases cited can be indicative of a broader category of young or disadvantaged offenders who will receive a starting point below band one. That possibility was explicitly ruled out in this Court's recent decision in *Liddington*, where it was noted it is "not necessary or appropriate to revisit the bands identified in [*R v AM (CA27/2009)*]", and that age is not a factor to be considered in setting an appropriate starting point for serious offending, but must be taken into account at stage two of the

²⁵ At [82] citing *Harris v New Zealand Police* [2019] NZHC 2846, *Edri v R* [2013] NZCA 264, *Cook v R* [2023] NZCA 342, *R v Chetty* [2016] NZHC 1957 and *Tahiri v R* [2013] NZCA 73.

²⁶ At [83]–[84] citing *R v AM (CA27/2009)*, above n 10, at [114].

²⁷ At [89].

²⁸ At [91]–[92].

²⁹ At [79] (footnotes omitted) citing *Liddington v R* [2024] NZCA 457 at [56]–[57].

sentencing process. A flexible approach at that stage “provides ample opportunity to achieve justice in individual cases”.

[25] It was also acknowledged that a non-custodial sentence would have been more likely had G been charged with the rape alone before he turned 19. But the Court considered “the reality of the offending and the subsequent recidivist pattern of conduct” could not be ignored.³⁰ That a young offender may now be an adult of subsequent good character was not, the Court considered, a good reason to depart from a guideline judgment or orthodox sentencing methodology.³¹

[26] Finally, the Court referred to s 128B of the Crimes Act 1961 which contains a presumption that imprisonment will be the appropriate sentence for sexual violation. The Court held the presumption was not displaced in this case. Instead, the vulnerability of the complainants, the relative youth of two of them and the enduring impact of the offending outweighed all mitigating factors including that G was now in a stable relationship and had children.³² Reference was made to the observation in *Hopkins v R* that although “an offender is entitled to credit for curbing their predilections and leading a constructive life”, the impact of the offending on the complainants must be borne in mind.³³

[27] The Court concluded therefore that imprisonment was appropriate, and the final sentence of three years four months’ imprisonment was well within range. The appeal was dismissed.

Submissions

Appellant’s submissions

[28] The essence of the appellant’s submissions is that the OTA and Sentencing Act are not incompatible. It is submitted that an adult court tasked with sentencing an offender for offending as a young person can impose a sentence that best reflects the likely OTA outcome by applying the relevant provisions of the Sentencing Act.

³⁰ At [98]. The Court in fact said a non-custodial sentence would have been *less* likely if G had been convicted of the rape closer to when it occurred, but that seems to be a typographical error.

³¹ At [98].

³² At [99].

³³ At [99] citing *Hopkins v R* [2022] NZCA 317 at [22].

These provisions must, it is submitted, be read in light of art 37(b) of the Convention on the Rights of the Child (UNCROC) which provides that imprisonment is a “last resort” for offending committed as a young person.³⁴

[29] It is submitted that the District Court should begin with the likely outcome in the Youth Court at the time of the offending. On this proposed comparative analysis, the District Court would only resort to a sentence of imprisonment or home detention if other options were considered inadequate. Even if imprisonment is considered necessary, it is submitted that starting points for youth rape offending must be set at a level that both reflects the gravity of the offence actually committed and enables home detention to be considered.

[30] The result in this case, it is submitted, is that G has been subjected to a considerably harsher penalty than would have been imposed under the OTA, by virtue only of the timing of the complaint and charge.

Crown's submissions

[31] The Crown submits that the appellant’s argument requires the court to disregard the legislation and sentencing methodology applicable to sentencing in the general criminal jurisdiction and to apply instead the approach provided in a statute (the OTA) that Parliament has clearly ruled inapplicable. Section 283(o), which empowers the Youth Court to transfer young persons to the general courts for sentence under the Sentencing Act, makes that clear. Further, it is submitted that the Sentencing Act already makes special provision for the consideration of offender age in s 9(2)(a) and that this is done at stage two of the sentencing assessment in accordance with the sentencing methodology in *R v Taueki*.³⁵ The Crown also points out that the focus of the OTA is the well-being of the young offender whereas the focus of the Sentencing Act is broader. All of this means that the approach to sentencing promoted by the appellant would require legislative amendment. In particular, the Crown submits that creating an effective presumption against imprisonment for

³⁴ Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCROC]. New Zealand ratified UNCROC on 6 April 1993. It entered into force for New Zealand on 6 May 1993 in accordance with art 49(2).

³⁵ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

serious young offenders who have aged out would contravene the presumption of imprisonment for sexual violation contained in s 128B of the Crimes Act.

[32] The Crown points out that, in G's case, a total discount of 63 per cent was applied at stage two including 40 per cent for youth and related factors. This, it is submitted, demonstrates the established methodology enables sufficient recognition of an offender's youth at the time of offending.

New evidence

[33] In support of his argument, G seeks to adduce an affidavit of Ms Karen Bailey addressing how the Youth Court deals with sexual violation by young people when charges are laid in that Court. G also seeks to adduce a letter from Ms Jasmine Bowie, a WellStop clinician, and an updated psychological report by Ms Shelly Lomas, a clinical psychologist. The Crown opposes the admission of each document on the basis they are neither fresh nor cogent. It submits that Ms Bailey's evidence is not cogent because youth justice principles do not apply.³⁶ Ms Bowie's letter is said not to be cogent because it would become relevant only if the disposition of this appeal required us to resentence G. Ms Lomas' evidence is said not to be cogent because, to the extent it elaborates on G's mental health post-sentence, that does not bear on the correctness of his sentence at the time it was imposed.

[34] In the event, as will become clear, we have not considered it necessary to refer to this material. In reaching that view, we are not to be taken to accede to the Crown's submission about Ms Lomas' evidence: we accept, for instance, that such information may be relevant to an assessment of rehabilitation options and performance. However, in this case we are satisfied that the provisions of the OTA, together with the sample of Youth Court cases provided by counsel, gave us a sufficiently detailed picture of that Act's operation.³⁷ And since we have elected to remit G for resentencing in the District Court, the disposition of this appeal has not required reference to the material relating to his psychological state and rehabilitative progress.

³⁶ We note that, contrary to this submission, we have held that youth justice principles—specifically those in the OTA—do apply in aged-out cases like G's: see below at [68]–[74].

³⁷ See below at [43]–[44] and n 57.

Analysis

Introduction

[35] We begin our analysis with a brief review of the reasons for treating youth offending differently to adult offending. We then overview the OTA and Sentencing Act approaches. We comment, with reference to relevant statutory language and cases, on how the Acts contrast and where they converge. We then compare the current approach to aged-out offenders in New Zealand with the approach in other jurisdictions.

[36] We conclude that, under current sentencing practice, aged-out offenders are likely to receive harsher penalties under the Sentencing Act than equivalent offenders charged in time to be dealt with under the OTA and that this is for reasons unrelated to either the offence or the offender. This cannot be justified. It is a fundamental value of the law that those whose circumstances are materially similar should be treated consistently.³⁸ This value must be given effect unless statutory language plainly requires otherwise, especially in sentencing. The Sentencing Act does not plainly require such differentiated treatment. On the contrary, ss 7, 8 and 9 allow sentencing judges to prioritise consistency of treatment over other sentencing purposes and principles. This is consonant with the intent of the *Taueki*-based methodology under the Sentencing Act which was designed to ensure greater sentencing consistency. The correct approach to sentencing aged-out offenders is the one that will enable OTA-consistent outcomes where appropriate, as set out below.³⁹

[37] It is necessary, finally, to reiterate that our focus here is on aged-out cases. We do not address, nor need to address, sentencing in the general courts via other off-ramps from the OTA to the Sentencing Act.⁴⁰ Offence category and gravity play an important role in the removal decisions—whether statutory or judicial—in those cases. The distinctive characteristic of s 2(2)(d) of the OTA is that it is driven by timing alone. Issues arising in non-aged out removals are not before us in this appeal,

³⁸ As this Court made clear in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [22] and [90] per Winkelmann CJ, William Young, Glazebrook and Williams JJ and [200] per Ellen France J.

³⁹ See below at [81]–[92].

⁴⁰ See below at [45]–[46].

nor is it necessary for us to address the correct approach to youth discounts more generally.

OTA and Sentencing Act compared

Offending by young people

[38] Settled science and years of judicial experience in relation to the distinctive nature of offending by young people have been usefully summarised in leading appellate decisions. We set the essential propositions out here as relevant background:⁴¹

- (a) Adolescent behaviour is driven by biology. It reflects the fact that development of the parts of the brain that control executive functioning is not complete until around age 25. Young people tend therefore to undervalue risk, lack foresight and impulse control, and be more susceptible to peer influence.
- (b) Young people who commit serious offences will often also have intellectual deficits, mental illness and/or have suffered abuse or other childhood trauma. These characteristics also tend, separately, to mitigate culpability.
- (c) Prison is particularly harmful for young people: they are often targeted by older, hardened prisoners; they tend to engage in peer and adult-led antisocial behaviours in prison; and, whether seeking protection from endemic prison violence or a secure sense of identity, young people are

⁴¹ For reasons that will become clear, these decisions were made under the Sentencing Act: *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]–[86] citing *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[55] and [77]–[91]; *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [33]; and *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [61]. See also Kelci Alderton-Armstrong “The Judicial Approach to the Youth Discount in Aotearoa New Zealand” [2024] NZ L Rev 1 in relation to young adult offending.

far more likely to take on rigid counter-social identities while serving prison sentences.⁴²

- (d) On the other hand, if they can be kept out of prison, young people are more receptive to treatment than adult offenders and therefore have better prospects of rehabilitation, this because anti-social behaviours tend to be less entrenched than is the case for adult offenders.
- (e) Young offending is almost always a passing phase;⁴³ at best imprisonment lengthens the phase, delaying eventual desistance, and at worst it turns a temporary phenomenon into a resilient characteristic or even a life course.⁴⁴

OTA purposes, principles and considerations

[39] Parts 4 and 5 of the OTA apply to offending by children (under 14) and young people (between 14 and 17).⁴⁵ Relevant to their application are the “four primary considerations” for decision-makers set out in s 4A(2)⁴⁶ and, sitting beneath those, the general principles in s 5, and the 11 youth justice principles contained in

⁴² See also Ian Lambie and Peter Gluckman *It's never too early, never too late: A discussion paper on preventing youth offending in New Zealand* (Office of the Prime Minister's Chief Science Advisor, 12 June 2018); and Office of the Inspectorate | Te Tari Tirohia *Young people and young adults in Corrections' custody* (December 2024).

⁴³ This is particularly so for sex offending where recidivism as an adult is especially low: Riddhi Blackley and Lorana Bartels *Sentencing and treatment of juvenile sex offenders in Australia* (Australian Institute of Criminology, Trends & issues in crime and criminal justice series paper no 555, July 2018) at 5–6; and Ian Lambie *Getting it right: An evaluation of New Zealand community treatment programmes for adolescents who sexually offend: Ka pu te ruha, ka hao te Rangatahi* (Ministry of Social Development | Te Manatū Whakahiato Ora, August 2007) at 27.

⁴⁴ See also Ian Lambie and Isabel Randell “The impact of incarceration on juvenile offenders” (2013) 33 *Clinical Psychology Review* 448.

⁴⁵ “Child” and “young person” are both defined in s 2(1).

⁴⁶ The s 4A(2) “four primary considerations” are (a) the well-being and best interests of the child or young person, (b) the public interest (which includes public safety), (c) the interests of any victim and (d) the accountability of the child or young person for their behaviour.

s 208(2) and (3).⁴⁷ Together, these considerations and principles endeavour to define a regime where the interests of the young person, the public and victims may be promoted while still holding the young person accountable for their offending. They do so in a statutory context that expressly incorporates New Zealand's obligations under UNCROC and places the well-being of the child or young person "at the centre of decision making".⁴⁸

[40] The unique characteristics of young offenders and young offending explain the OTA's distinctive response. The purpose of pts 4 and 5 is, as far as possible, to keep children and young people out of the general courts, and to avoid the imposition of criminal sanction, especially custodial sanction. As a result, and by contrast to the Sentencing Act's framework approach, the applicable OTA provisions are prescriptive as to procedure and disposition.

OTA processes

[41] Foremost among the OTA's processes is the family group conference or FGC. Convened by youth justice co-ordinators⁴⁹ under the auspices of Oranga Tamariki | the Ministry for Children, FGCs bring together the offender; their family or whānau; the victim (or victim's representative if participation in person is too difficult) and their family or whānau support; the prosecutor or representative from the relevant enforcement agency; relevant iwi, cultural or other social service representatives; and professionals such as social workers.⁵⁰

⁴⁷ The youth justice principles "guide" the court and other officials exercising OTA powers when "weighing" the four primary considerations in individual cases. Included for example are the principles of avoiding the institution of criminal proceedings if there are alternatives (s 208(2)(a)); of strengthening and enabling family, whānau, hapū and iwi to address the offending behaviour themselves (para (c)); and of applying sanctions or measures that promote the development of the child or young person within their family or whānau (para (f)(i)). Courts are encouraged to adopt the least restrictive response appropriate (para (f)(ii)), and to address the underlying causes of the offending in their decision making (para (fa)). On the other hand, the interests and views of victims must be considered, including through their participation in disposition processes, and proper regard must be had to the impact of offending on victims (para (g)).

⁴⁸ Section 5(1)(b).

⁴⁹ Youth justice co-ordinators are statutory officers appointed by the Chief Executive of Oranga Tamariki, though they need not be employees of that agency: s 425.

⁵⁰ Section 251.

[42] Fundamentally, the FGC process promotes responses to youth offending that can be sustained within the family or whānau context.⁵¹ For young offenders, accepting accountability for their wrongdoing can be particularly challenging, so the informal and iterative nature of FGCs can be an effective means of achieving this result.⁵² The aim is that, through informed, facilitated discussion, the FGC will formulate a proposed plan for the offender to be considered by the Youth Court in its disposition of the case.⁵³

[43] Turning to those disposal options now, s 282(1) provides that the Court may “discharge the charge”. The effect of this is that the charge is “deemed never to have been filed”.⁵⁴ Under s 283, a list of 18 other possible judicial responses to the offending is provided.⁵⁵ These are arranged hierarchically in seven groups from least serious (discharge of the offender without further order or penalty under para (a)) to most serious (conviction followed by sentencing in a general court under para (o)). Section 283(o) is the only OTA procedural pathway that can result in a conviction. It is resorted to relatively rarely. Almost all other disposal options in the Youth Court involve only a finding that the charge has been “proved”.⁵⁶ A notation to that effect is then recorded on the offender’s record along with any other steps the offender was required to take in response to the offending.

⁵¹ The young offender’s family or whānau are encouraged to develop their own responses to the offending and the offender’s needs within the context of views expressed by other family group conference [FGC] participants—especially the victim: see s 208(2)(c) and (g); and see Nessa Lynch *Youth Justice in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2019) at [6.2.5]. The offender in turn is encouraged to embrace accountability to their own family or whānau and to the victim: see s 4A(2)(c) and (d).

⁵² It has been suggested that conferencing processes akin to FGCs “have the potential to offer victims a greater degree of justice” than conventional court processes: Kathleen Daly and Sarah Curtis-Fawley “Restorative Justice for Victims of Sexual Assault” in Karen Heimer and Candace Kruttschnitt (eds) *Gender and Crime: Patterns of Victimization and Offending* (New York University Press, New York, 2006) 230 at 237.

⁵³ OTA, s 284(1)(h).

⁵⁴ Section 282(2).

⁵⁵ Section 284(1) lists a number of mandatory considerations that apply when a court is deciding whether to make an order under s 283. These include the nature and circumstances of the offence (para (a)), the young person’s background and their attitude to the offence (paras (b) and (c)), the response of the young person’s family or whānau to the offending (paras (d) and (e)), the effect of the offending on the victim (para (f)), the outcome of any FGC (para (h)) and the causes underlying the young person’s offending (para (i)).

⁵⁶ Section 282(3) and chapeau to s 283. The exception is s 282(1) where the charge may be discharged “after an inquiry into the circumstances of the case”, without satisfaction the charge is proved. In such circumstances none of the accompanying disposal orders in s 283(e)–(j) are available to the Court: see s 282(3).

[44] It appears that charges of sexual violation are frequently dealt with either by way of a s 282 discharge (of the charge) or a s 283(a) discharge (of the offender), usually following successful completion of the FGC plan.⁵⁷

OTA “off-ramps” to the Sentencing Act

[45] The OTA is not a complete code for youth justice. It contains off-ramps to the Sentencing Act and the general courts. We have already mentioned one, which is the discretionary removal power contained in s 283(o). Section 283(o) permits removal to the general courts where the young person is at least 15 or, alternatively, 14 and charged with a sufficiently serious offence.⁵⁸ Another off-ramp is in s 275, which provides that certain offending must be resolved in the general courts and transferred accordingly.⁵⁹

[46] A third is s 2(2), the provision that controlled G’s case. It relevantly provides for a general rule that a young person’s age at the date of their *offending* determines whether there is jurisdiction to take any proceedings under the OTA, *unless* the defendant is 19 or older when charged, in which case, proceedings need not be taken in the Youth Court.⁶⁰ The exception was enacted in 1994 because of issues around the application of the OTA’s special safeguards for children and young people in ss 215

⁵⁷ The appellant referred us to a number of Youth Court cases resolved in this way: see for example *New Zealand Police v OV* [2018] NZYC 490; *New Zealand Police v SA* [2020] NZYC 437; *New Zealand Police v WP* [2021] NZYC 2 citing *R v NB* [2019] NZYC 225 and *New Zealand Police v HC* [2016] NZYC 218; *New Zealand Police v WH* [2021] NZYC 171 citing *R v ND* [2018] NZYC 602; and *R v IK* [2021] NZYC 333.

⁵⁸ Pursuant to s 283(o)(i), a 14-year-old offender may only be removed to the District Court for sentencing if they are charged with a category four offence or if they are charged with a category three offence which is punishable by up to 14 years’ imprisonment. Section 283(o)(ii) allows for removal to the High Court if the young person is charged with a category four offence or an offence for which the maximum penalty available is life imprisonment and the court considers a sentence of life imprisonment may be appropriate. Section 284(1A) sets out matters that must be considered and given “greater weight” by the court in any removal decision. The factors suggest that transfer will be appropriate where the more serious or restrictive sanctions available under the Sentencing Act are required.

⁵⁹ Included in the list are homicides, other category three or four offences for which trial by jury has been elected by the young person charged, offences tried by jury with adult co-defendants and sch 1A offences where the young person charged is 17. Schedule 1A offences include sexual violation and other serious violent, property and drug offending. Charges related to sch 1A offending must also be transferred with the sch 1A charge under s 276AB. Because G was 15 at the time of committing a category 3 offence, he was not caught by s 275. See also s 272(4A).

⁶⁰ Section 2(2)(a) and (d).

and 221.⁶¹ There were obvious concerns about the appropriateness of these extra safeguards when, at the time charges were contemplated, the defendant was an adult.⁶² Importantly though, the exception was not introduced out of a desire to adjust substantive sentencing outcomes for aged-out offenders.⁶³

Youth as a factor for aged-out offenders under the Sentencing Act

[47] Under the Sentencing Act, offender age is an express mitigating factor according to s 9(2)(a), and is a factor of varying mitigatory potency for young offenders transferred out of the OTA system and for emerging adult offenders aged up to around 25.⁶⁴ While the principles of sentencing in s 8 (which are mandatory relevant considerations) do not refer to age expressly, age is also an implicit feature of the following matters:

- (a) offender culpability in assessing the gravity of the offending (s 8(1)(a));
- (b) the desirability of consistent sentencing for similarly situated offenders who commit similar offences in similar circumstances (s 8(1)(e));
- (c) the potential effect of imprisonment on the offender given their circumstances (s 8(1)(h)); and
- (d) the appropriateness of a rehabilitative sentence given the prisoner's background (s 8(1)(i)).

[48] The Sentencing Act also provides certain special protections for offenders who were under 18 at the time of the offence. For example ss 15B(1) and 18 effectively

⁶¹ The former requires that the young person's rights be explained to them (in age appropriate language: see s 218) prior to taking a formal statement, and the latter renders inadmissible statements not preceded by such explanation.

⁶² See generally *Police v Edge* [1993] 2 NZLR 7 (CA), the effect of which was codified in amendments to s 2(2) of the OTA by s 2(6) of the Children Young Persons and Their Families Amendment Act 1994.

⁶³ See at 16 per Gault J, noting s 2(2) was at that time applied without an exception for aged-out offenders in the Youth Court and had not been the subject of any recommendation for change in a then-recent review of the OTA's operation: Ken Mason, Georgina Kirby and Robin Wray *Review of the Children, Young Persons, and their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare* (Department of Social Welfare, 24 February 1992).

⁶⁴ See generally Alderton-Armstrong, above n 41.

provide that such offenders must not be sentenced to home detention or imprisonment for category 1 or 2 offending or category 3 offending for which the maximum penalty is not at least 14 years' imprisonment (or life imprisonment). Further, ss 87(2)(b) and 103(2B) prevent such offenders being sentenced to preventive detention or (in the case of a murder conviction) life without parole.

[49] Despite these protections, the Court of Appeal has said repeatedly that the Sentencing Act's multi-factorial approach applied using the *Taueki* methodology governs the sentencing of young people in the general courts. And while acknowledging an overlap between Sentencing Act purposes, principles and sentencing factors and the OTA's primary considerations and youth justice principles, that Court has been clear that general guideline judgments must apply to starting points for youth offending as for all offending. The Court has also stated that youth is therefore a potential mitigating factor at stage two of the assessment, but starting points are as set out in the guideline judgments whether the offender is a child or an adult.⁶⁵

[50] In *Pouwhare v R*, the Court of Appeal expressed the position this way:⁶⁶

[76] In the Youth Court the primary focus in the balance to be struck between offence and offender is the young person. In the principles the [OTA] obliges the sentencing Judge to take into account, and in the repertoire of orders that it allows, it calls for the least restrictive and most positive of orders to be made; orders that extend beyond simply holding the young person accountable, that strengthen and assist him or her to make better choices; and highly desirably, with the active support of their families.

[77] In the District or High Courts, under the Sentencing Act, by contrast, the Judge is obliged to begin with the offence in its objective seriousness and only then to look to the offender. The Judge must set about this process taking into account generally stated purposes, principles and factors that are in contrast, in tension or are even opposed. In striking a sentence that is just for the offence and for the offender the Judge must choose, broadly speaking, between the most restrictive and punitive on one hand, and the least restrictive and most rehabilitative on the other. So even where s 208 [OTA] principles and Sentencing Act purposes, principles and factors coincide, they differ in purpose, specificity and weighting.

⁶⁵ *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [91]; *Overton v R* [2011] NZCA 648 at [22]; *Wiwarena v R* [2023] NZCA 384 at [34]; *Liddington v R*, above n 29, at [48]–[49] and [56]–[57]; and *F (CA126/2025) v R* [2025] NZCA 385 at [16]–[17].

⁶⁶ *Pouwhare v R*, above n 65 (footnote omitted).

...

[83] In the end, a Judge sentencing a young person under the Sentencing Act must always weigh the young person's age and the reasons why he or she offended, against the seriousness of his or her offending and prospects of rehabilitation. Sometimes the young person's age will be a mitigating factor of high, perhaps decisive, significance not to be circumscribed by any fixed outer percentage. Equally, there can be no warrant for saying that youth, of itself, must always prevail as the paramount value on sentence, or that youth alone can justify radically reducing the sentence which would otherwise be proper.

[51] The recent decision of the permanent Court in *Liddington v R* confirms that the *Pouwhare* approach continues to be applied.⁶⁷ The Court in *Liddington* reiterated what it characterised as the important differences between Youth Court and general court sentencing methodology and rejected appellant counsel's invitation to create a special sub-band for youth offenders alongside (and presumably below) the *AM* bands. Three reasons were offered: first, age is not relevant to starting point; second, age is a mandatory factor to be taken into account at stage two; and third, youth discounts at stage two provide ample opportunity to achieve justice in individual cases.⁶⁸ But the Court also acknowledged that youth deductions "rarely exceed 40 per cent" despite the suggested flexibility in both stages.⁶⁹ As noted above at [24], the Court of Appeal in this appeal cited *Liddington* as resolving the question of whether adjustments to the *AM* bands might be justified.

[52] Finally, it is appropriate to note at this point that, following the hearing of the appeal before us, the parties provided a sample of youth sentencings in the District Court, although it is apparent that not all sentencings related to aged-out offenders.⁷⁰ The Crown focused on non-custodial sentences, suggesting that the appellant overstated the prospect of imprisonment for aged-out offenders. The appellant responded with examples where prison sentences were imposed. Counsel had to use their networks to obtain relevant information, which is not optimal, but the sample provided helpful, if impressionistic, context. We are grateful for the assistance provided by counsel in this respect.

⁶⁷ *Liddington v R*, above n 29.

⁶⁸ At [56]–[57].

⁶⁹ At [49], and see [55] and [57(c)].

⁷⁰ The Crown provided us with 49 judgments and the appellant provided 27.

[53] Overall, the examples confirmed that the approach adopted in the District Court is generally that reflected in *Pouwhare* and *Liddington* as would be expected—although there were more than a few exceptions, as the Crown pointed out. It can however be said that an aged-out offender sentenced within *AM*'s rape bands or its upper unlawful sexual connection bands is likely to go to prison unless either their personal circumstances are exceptional (for reasons other than, and in addition to, youth), or the court is prepared to sentence outside the *AM* bands.⁷¹ The Court of Appeal recently warned that a “non-custodial sentence cannot be artificially reached by setting a low starting point and applying overly generous discounts”.⁷²

[54] By contrast, a young sex offender sentenced in the Youth Court for the same offence will not be placed in secure residential care unless there is a very good reason related to the offender and their family circumstances to require it. Nor, unless the circumstances of the offence or offender are of a particularly serious kind, are they likely to be convicted and transferred via s 283(o) to the District Court for sentence.⁷³

[55] We do acknowledge that the Crown examples suggest that there is also complexity and a degree of inconsistency within the pattern just described. This is perhaps unsurprising. We noted the observation in the sentencing notes of one experienced Judge that sentencing aged-out offenders was particularly difficult knowing the Youth Court outcome would have been different.⁷⁴

[56] In light of this and the limitations inherent in the sample itself, we prefer to focus on the in-principle issues at stake in this appeal.

The approach to aging out elsewhere

[57] England and Wales, which also uses a structured, staged approach to sentencing broadly similar to *Taueki*, has, since the 2002 decision of the Court of

⁷¹ Note that the rape bands also cover penile penetration of the mouth or anus and violation involving objects: *R v AM (CA27/2009)*, above n 10, at [65]. As to the availability of starting points below *AM* band one, see *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454 at [96]–[98] per Kós P.

⁷² *Wiwarena v R*, above n 65, at [43].

⁷³ See above at [44].

⁷⁴ *R v West* [2023] NZDC 12218, [2023] DCR 155 at [39]–[40]. See also *R v Leau* [2020] NZDC 11268 at [20].

Appeal in *R v Ghafoor*, taken a different approach to the issue.⁷⁵ The starting point is the likely sentence if the offender had been sentenced as a young person. The Court made three points in support of its approach: first, young offenders are less responsible and therefore less culpable than adults for the offences they commit; second, this means rehabilitation will generally be emphasised at the expense of “retribution and deterrence”; and third, “justice requires” that imposing a harsher sentence than is likely taking a youth sentencing approach requires a “good reason”.⁷⁶ The Court suggested that if, for example, in the intervening period, the offender has proven to be a “dangerous criminal”, that might be a good reason to depart from the starting point.⁷⁷ Where however the offending and sentence are relatively proximate in time, it would rarely be appropriate to depart from the youth sentence.⁷⁸

[58] The Court confirmed this approach recently in *R v Ahmed*.⁷⁹ But the Court still took the time to reiterate that lower culpability and moral responsibility are the underlying reasons for the approach taken in that guideline. Young offenders are not, the Court said, just “cut-down versions of adult offenders”.⁸⁰ And the passage of time “does not increase the culpability which [the offender] bore at the time” of the offending.⁸¹

[59] The Courts of Appeal in Victoria and Queensland have taken a similar approach. *R v Boland*, for example, involved multiple indecent acts, including what in this country would constitute unlawful sexual connection, against the victim who was aged between six and 12.⁸² The appellant was aged between 13 and 19 when the

⁷⁵ *R v Ghafoor* [2002] EWCA Crim 1857, [2003] 1 Cr App R (S) 84.

⁷⁶ At [31]–[32].

⁷⁷ At [33].

⁷⁸ At [34]. The period between offending and sentencing in that case was just over eight months. Under the statutory scheme, however, age for sentencing purposes was the age at the time of conviction: see [22].

⁷⁹ *R v Ahmed* [2023] EWCA Crim 281, [2023] 1 WLR 1858. See also *R v Limon* [2022] EWCA Crim 39; [2022] 4 WLR 37.

⁸⁰ *R v Ahmed*, above n 79, at [21].

⁸¹ At [22].

⁸² *R v Boland* [2007] VSCA 242, (2007) 17 VR 300. We note that *Boland* has been approved of in Tasmania and is cited as authoritative in the Australian federal sentencing guide: see *TAP v Tasmania* [2014] TASCRA 5 at [28]; and Desmond Lane *Sentencing of federal offenders in Australia: a guide for practitioners* (7th ed, Office of the Director of Public Prosecutions (Cth), Barton, 2024) at [355], n 528.

offending occurred. The Court of Appeal of Victoria held that while offending against young victims calls for sentences that emphasise deterrence and denunciation:⁸³

... it is different where the offender was a young offender at the time of the offending and has been rehabilitated in the meantime. Prima facie general deterrence and denunciation do not play the same role in the sentencing of young offenders, and in my view it would be illogical and unfair to lose sight of that when it comes years later to sentencing the offender as an adult.

[60] The Court noted specifically:⁸⁴

Although [an aged-out] offender falls to be sentenced as an adult, common sense and fairness dictate that the assessment of the nature and gravity of the crime, and of the offender's moral culpability, take into account that what was done was done as a child, or as a person of immature years, and not as an adult or a person of greater maturity.

[61] The Court placed particular reliance on the fact that the appellant had lived a crime-free life for the 24 years subsequent to the offending.

[62] In Queensland, and in contrast to this country, s 144 of the Youth Justice Act 1992 (Qld) expressly addresses sentencing of aged-out offenders. Subsection (2)(b) requires the Court to have regard to “the sentence that might have been imposed upon the offender if sentenced as a child”. In *R v LAL*, the appellant was 15 at the time of offending which comprised what in this country would be two unlawful sexual connection charges of moderate seriousness arising from a single course of conduct against a girl about six years younger than him.⁸⁵ LAL was 32 when sentenced and had no other criminal convictions. In accordance with s 144(2)(b) the Court considered the probable sentencing outcome under the Youth Justice Act—called the Juvenile Justice Act at the time of offending—against the suspended prison sentence imposed 17 years later under the Penalties and Sentences Act 1992 (Qld), following a defended trial. The Court found that the outcome under the Juvenile Justice Act would have been a period of probation with no conviction recorded.⁸⁶ It would not therefore have been so serious both in terms of liberty risk and collateral effects such as placement on a register of sex offenders. By allowing the appeal and imposing a \$500

⁸³ At [22] per Nettle JA, with whom Ashley and Dodds-Streeton JJA agreed.

⁸⁴ At [16] per Nettle JA, with whom Ashley and Dodds-Streeton JJA agreed.

⁸⁵ *R v LAL* [2018] QCA 179, [2019] 2 Qd R 115.

⁸⁶ At [116].

good behaviour bond for two months, the Court affirmed that the offender-centred purposes of the Juvenile Justice Act effectively displaced the wider purposes of the Penalties and Sentences Act. Our view of the principles in relation to sentencing of aged-out offenders is consistent with this approach. In other words, there is no fundamental disjunct between the statutory schemes of Queensland and New Zealand.

[63] The aging out issue does not arise in Canada as a matter of definition. Application of the youth sentencing regime provided for in the Youth Criminal Justice Act 2002 (Can) depends on age at the time of offending, not when charged.⁸⁷ However, that Act does provide that an adult sentence may be imposed in response to offending committed by a young person if the Youth Justice Court is satisfied that the prosecution has rebutted the presumption that the offender has diminished moral blameworthiness and a youth sentence would be insufficient in the circumstances.⁸⁸

[64] This presumption was the subject of two recent decisions of the Supreme Court of Canada, *R v IM* and *R v SB*, heard as companion appeals.⁸⁹ Since the aging out issue does not arise in Canada, the details of those cases are not relevant here. However, the Court did take the opportunity to emphasise important general principles: it noted that children and youth have reduced maturity and moral capacity, which justifies a regime of diminished moral blameworthiness for criminal conduct.⁹⁰ Indeed, the presumption of diminished moral blameworthiness was “fundamental to the operation of a fair legal system”.⁹¹ The Court plainly did not consider this comment limited to the statutory context in which it was made.

[65] We acknowledge that, as the Crown submitted, there are significant and important differences between the sentencing regimes in this jurisdiction and the jurisdictions canvassed above. However, the cases demonstrate that the sentencing

⁸⁷ See Youth Criminal Justice Act SC 2002 c 1, s 2 definition of “young person”, together with s 14(1) and (5).

⁸⁸ Section 72(1).

⁸⁹ *R v IM* 2025 SCC 23; and *R v SB* 2025 SCC 24.

⁹⁰ *R v IM*, above n 89, at [97] per Wagner CJ, Karakatsanis, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ citing *R v DB* 2008 SCC 25, [2008] 2 SCR 3 at [47]–[59] per McLachlin CJ, Binnie, LeBel, Fish and Abella JJ.

⁹¹ *R v IM*, above n 89, at [111] per Wagner CJ, Karakatsanis, Martin, Kasirer, Jamal, O’Bonsawin and Moreau JJ citing *R v DB*, above n 90 at [61]–[67] per McLachlin CJ, Binnie, LeBel, Fish and Abella JJ.

principles engaged in this case—the importance of consistency and a proper assessment of culpability—are of general application. They are not limited to the statutory sentencing regimes in which they were applied. We therefore consider these cases relevant in the present context.

Compatibility, consistency and culpability

[66] It is convenient now to draw these themes together.

[67] The Sentencing Act is not the OTA, and the Sentencing Act will apply to offenders charged after they have turned 19. Also, the Sentencing Act’s purposes, principles and sentencing factors cover a much broader range of elements than the OTA’s primary considerations and youth justice principles. Some of the Sentencing Act elements such as deterrence and denunciation run directly contrary to the OTA’s more therapeutic offender-centred preferences. These conflicts reflect the fact that the Sentencing Act must respond to a far wider range of offenders and offending. But the differences should not be overstated. Section 8(1)(a) of the Sentencing Act specifically references the need to calibrate the offender’s culpability. As the Court in *Ahmed* said, in aging-out cases the passage of time “does not increase the culpability which [the offender] bore at the time” of the offending.⁹²

[68] The Sentencing Act also promotes consideration of an offender’s background, their prospects of rehabilitation and achieving offender accountability through restorative justice.⁹³ These are central considerations in the OTA’s youth justice system as well. Further, the procedures in ss 25–27 of the Sentencing Act can be deployed in a manner that at least approximates the OTA’s FGC procedures.⁹⁴ Taken together, and as a series of appellate judgments make clear, these matters demonstrate that it is a function of the Sentencing Act’s regime that the purposes of sentencing will sound differently in different cases.⁹⁵

⁹² *R v Ahmed*, above n 79, at [22].

⁹³ See ss 7(1)(a)–(b) and (h), and 8(1)(h)–(j).

⁹⁴ As to the operation of ss 25–27, see the discussion in *Berkland v R*, above n 38, at [130]–[147] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

⁹⁵ See for example *Berkland v R*, above n 38, at [19]–[21] per Winkelmann CJ, William Young, Glazebrook and Williams JJ; *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [37]; *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [4]; and *Poi v R* [2020] NZCA 312 at [27].

[69] We cannot therefore accept the *Pouwhare* view that the two Acts are incompatible such that OTA-based outcomes are irrelevant to the particular circumstances of aged-out offenders.⁹⁶ The *Pouwhare* approach is incorrect, at least for aged-out cases. On the contrary, provided the circumstances of the offence and offender justify it, there is room within the Sentencing Act for general courts to reach outcomes that are broadly consistent with those of the OTA. This overlap between the two Acts is important. It enables s 8(1)(e)—the “general desirability” of consistent treatment for “similar offenders committing similar offences in similar circumstances”—to be given effect. This principle reflects a fundamental value of the law, but it is particularly important in the sentencing context which involves the exercise of the state’s coercive powers. Indeed to ignore it in aging-out cases would put New Zealand peculiarly out of step with cognate jurisdictions in the common law world.

[70] In light of the foregoing considerations, and the fact that there are structural connections between the OTA and Sentencing Act, we conclude it would be wrong to artificially restrict the consistency principle’s scope to comparative outcomes under the Sentencing Act only. It follows that for aged-out offenders, the consistency principle enables rehabilitative and reparative purposes to be prioritised over deterrence and denunciation purposes if this avoids inconsistency between the OTA and Sentencing Act outcomes that cannot be justified by reference to the offence or offender.

[71] This approach conforms with the underlying intention of the *Taueki* sentencing framework, which was introduced to promote consistency in sentencing, this in response to the enactment of s 8(1)(e).⁹⁷ Given that intention, it would be perverse to apply the *Taueki* methodology in a way that produces greater inconsistency.

[72] Further, as *Taueki* and its predecessor, *R v Mako*, make clear, the starting point under the *Taueki* methodology “is the sentence considered appropriate for the particular offending (the combination of features) for an adult offender after a

⁹⁶ As to the *Pouwhare* approach, see above at [50].

⁹⁷ See *R v Taueki*, above n 35, at [10].

defended trial”.⁹⁸ Current guideline judgments proceed on that premise, and it may be necessary to consider at a future point whether they deal appropriately with sentencing of youth offenders outside the Youth Court in cases other than the aged-out offenders we are dealing with here. However it is unnecessary for us to address that in this appeal.

[73] There is a further reason to have recourse to the OTA outcome. This is the tariff-consistency principle that, in historical offending, has long recognised the relevance of the likely sentence had the offender been sentenced at the time of offending. This is unrelated to youth versus adult status and the non-retrospectivity principle in s 6 of the Sentencing Act and s 25(g) of the New Zealand Bill of Rights Act 1990.⁹⁹ According to *Adams on Criminal Law*:¹⁰⁰

The non-retrospectivity principle does not require the courts to attempt to apply the “tariff” or pattern of sentencing that applied at the time of the offence. Nevertheless, where there has been a significant change in the sentencing tariff, particularly in relation to historic offences that are being dealt with many years later, the courts have regarded it as a matter of good sentencing practice and fairness to take a conservative sentencing approach and adopt the sentencing patterns that were applicable at the time of offence or, if that is not possible, to make some adjustment to the sentence that would now be imposed ...

[74] We conclude that an appropriate adjustment to the *Tauaki* framework is necessary to ensure that consideration is given at the outset to the likely outcome under the OTA in the case of aged-out offenders.

The consistency principle is not otherwise displaced

[75] We turn now to consider other provisions in the Sentencing Act and Crimes Act that may bear upon this issue.

[76] Beginning with the special protections in ss 15B, 18, 87 and 103 of the Sentencing Act for young offenders in the general courts, we do not consider that they

⁹⁸ At [8] citing *R v Mako* [2000] 2 NZLR 170 (CA) at [34].

⁹⁹ As to the non-retrospectivity principle, see *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.

¹⁰⁰ Mathew Downs (ed) *Adams on Criminal Law – Sentencing* (looseleaf ed, Thomson Reuters) at [SA6.07] citing *R v Accused (CA463/97)* (1998) 15 CRNZ 602 (CA); *R v Fahey* CA184/00, 2 November 2000; and *O’Reilly v R* [2015] NZCA 604.

establish by implication an exception to the consistency principle. They demonstrate no intention to displace the Sentencing Act's framework of purposes and principles in sentencing young offenders in the general courts. Rather, they affirm that special consideration should be given to the circumstances of young offenders.

[77] Secondly, as we noted above at [26], s 128B of the Crimes Act contains a presumption of imprisonment for sexual violation offences. While this presumption is important, we do not consider that it displaces consistency where that principle would lead to a result other than imprisonment. The section provides, in relevant part:

- (2) A person convicted of sexual violation must be sentenced to imprisonment unless, having regard to the matters stated in subsection (3), the court thinks that the person should not be sentenced to imprisonment.
- (3) The matters are—
 - (a) the particular circumstances of the person convicted; and
 - (b) the particular circumstances of the offence, including the nature of the conduct constituting it.

[78] This expresses in clear terms Parliament's view that sexual violation is a serious offence. It displaces the general preference for keeping offenders in the community, contained in s 16 of the Sentencing Act. But, unlike the strong presumption of life imprisonment for murder, s 128B stops well short of requiring all sexual violations to be marked by imprisonment unless that would be "manifestly unjust".¹⁰¹ Section 128B is more nuanced: it says that unless the court's assessment of the circumstances of offence and offender suggests otherwise, the sentence for sexual violation will be imprisonment.

[79] This formulation does not absolve the court from undertaking a proper evaluation of the appropriateness of imprisonment in every case. In that evaluation, the youth-based considerations discussed above remain highly material. So will the desirability of consistent treatment with those who offend when aged below the OTA threshold, and the UNCROC directive that such offenders should not be imprisoned

¹⁰¹ Sentencing Act, s 102(1).

except as a last resort.¹⁰² These pull against the s 128B presumption because they suggest the circumstances of the offender are likely to be exceptional.¹⁰³ But, as we go on to discuss, they may not prevail on a full evaluation if there are countervailing factors going to the offence or offender. For these reasons, s 128B does not unduly narrow the circumstances in which non-custodial sentences, driven by the general desirability of consistency, may be imposed for aged-out youth offending.

The correct approach

[80] We turn now to set out the approach that must be taken when sentencing aged-out offenders.

Start with the OTA outcome

[81] The first issue when sentencing aged-out offenders is whether an OTA-consistent, community-based response is still appropriate despite the lapse of time. A comparison exercise is therefore required as a first step. Sentencing courts must begin by establishing what the likely outcome would be under the OTA. Establishing this likely outcome at the outset is more transparent because the consistency question is addressed openly and early. Once established, the weight to be given to it must be commensurate with the importance of the consistency principle.

[82] We acknowledge that constructing a likely outcome of youth sentencing, sometimes years later, may present challenges for judges and counsel, but the challenges are not insurmountable. In fact, this kind of inquiry is already undertaken where, usually in historic offending, there has been a substantial upward shift in tariff between commission of the offence and sentencing.¹⁰⁴ Further, sentencing courts are

¹⁰² Article 37(b). As this Court noted in *M (SC 13/2023) v R*, above n 41, at [54], it is well settled that domestic legislation should be interpreted to achieve consistency with New Zealand's international obligations generally and UNCROC specifically. Counsel for G also referred to Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* UN Doc CRC/C/GC/24 (18 September 2019) at [29]–[31], which recommends that aged-out offenders should be sentenced according to the applicable youth sentencing system of the state.

¹⁰³ Similar reference to the circumstances of the offence and offender in s 102(1) of the Sentencing Act were held not to be conjunctive mandatory requirements in *Van Hemert v R* [2023] NZSC 116, [2023] 1 NZLR 412 at [56]–[62] per Glazebrook, O'Regan, Ellen France and Kós JJ. That is, in the case of murder, the circumstances of the offender may, without more, be sufficient to render life imprisonment “manifestly unjust”.

¹⁰⁴ See above at [73].

not without tools to build the likely Youth Court outcome; they can seek the assistance of counsel, refer to relevant Youth Court authorities,¹⁰⁵ enable inquiries to be made under s 25(1)(a) of the Sentencing Act or seek reports under ss 26(1) and 27(1)(e). In any event, whatever the challenges may be, they cannot lead us to dispense with a value as fundamental to justice as consistent treatment.¹⁰⁶

[83] We also acknowledge that, for the appellant, Ms Blincoe proposed a new, six-step approach to sentencing offenders in G's position and for young offenders transferred under s 283(o) by the Youth Court to (usually) the District Court. On reflection, such an approach is unnecessarily complicated compared to placing aged-out offending appropriately within the normal *Taueki* sentencing process as we say below. As noted, we make no findings about the correct approach to cases transferred under s 283(o).

Community-based sentences may still be inappropriate

[84] All of that said, the likely outcome under the OTA may not, in the event, produce a community sentence. For example, the seriousness of the index offending or the culpability of the offender may mean discharge or a community-based sentence was never going to be appropriate even at the time of the offending. Sections 275 and 283(o) provide potential examples of this class of exception.¹⁰⁷

[85] A community-based sentence may also not be appropriate where the offending has become an established pattern persisting well into adulthood that may suggest rehabilitation is too unlikely a prospect to be pursued through such a sentence. In other words, a longstanding pattern of similar offending may suggest that the earlier offending was not a passing phase typical of young offenders, but a more resilient trait. If so, general deterrence, denunciation and community safety may need to carry greater weight in sentencing.

[86] Where the offender is also being sentenced, as in this case, for offending committed as an adult, the sentence for the adult offending would proceed in

¹⁰⁵ As this Court had occasion to do in *H (SC 1/2024) v R* [2025] NZSC 62, [2025] 1 NZLR 165.

¹⁰⁶ The same point is made in *R v Ahmed*, above n 79, at [24].

¹⁰⁷ Although we again emphasise that we do not deal with these classes of offending in this appeal.

accordance with the relevant guideline judgment, which may mean a custodial response. (In this case, if sentencing for the unlawful sexual connection offences alone, the sentencing Judge would have imposed a sentence well below two years' imprisonment.)¹⁰⁸ The sentencing judge will then need to consider the effect (if any) of the non-adult offending and the response that would have been reached under the OTA in setting the final sentencing outcome. Because youth-related circumstances and considerations will already have shaped the OTA response for the aged-out offending, only the *adult* offending will be likely to attract a further youth discount where the facts warrant it.

A summary

[87] To sum up, in aging-out cases, the likely outcome under the OTA must be considered as part of the normal sentencing methodology.

[88] If a community-based response would have been reasonably likely under the OTA, then the court must normally apply a consistent outcome in setting the starting point at stage one of the normal sentencing methodology under the Sentencing Act.

[89] As noted, ss 25–27 of the Sentencing Act can if necessary do some of the facilitative work of FGCs under the OTA in this respect in terms of encouraging offender responsibility and accountability.

[90] It is acknowledged that an outcome absolutely identical to that likely under the OTA may not be possible under the Sentencing Act or even appropriate given the offender's maturity when sentenced, but imposing an identical outcome is not the point. Rather the key objective is to achieve substantively consistent justice despite the changed circumstances of the offender.

[91] The question is therefore whether a community-based sentence is still appropriate to the circumstances of this (now adult) offender. If yes, then, within the

¹⁰⁸ As noted above at [20], the Judge applied discounts totalling slightly more than 60 per cent to G's sentence, in circumstances where he identified that a starting point of four years' imprisonment would have been appropriate for the unlawful sexual connection offending alone: see above at [17].

range of options available to the court under the Sentencing Act, from discharge without conviction to imposing the maximum period of home detention with conditions, an appropriate sentence must be arrived at that reflects relevant sentencing purposes, principles and factors.

[92] For the reasons set out above at [84]–[86], there may be circumstances in which a community-based sentence is not appropriate.

G’s case

[93] Because G was not sentenced in the manner set out above, the appeal must be allowed and he must be resentenced on all three charges. Given this includes offending as an adult, what we say above at [86] will be relevant.

[94] We gave consideration to resentencing G in this Court to time served, given the length of time he has spent in prison and on restrictive bail conditions akin to home detention.¹⁰⁹ But there is also a need to provide for G’s rehabilitation, in keeping with the principles that apply to youth. On the information before us, for example, there is a pressing need for G to receive treatment for mental health and substance use before he can begin to address his other issues. That objective is best addressed by the District Court on the basis of current and comprehensive information. We consider it appropriate therefore to remit G for resentencing in the District Court.

Suppression

[95] G seeks name suppression pursuant to s 200(2)(a) and (f) of the Criminal Procedure Act 2011. The former permits the court to suppress a defendant’s name if publication would be likely to cause a defendant (or someone connected with

¹⁰⁹ Post-trial and pending sentence, G was in prison for a month before being granted bail due to the birth of his child. After he was sentenced six months later, G spent two further weeks on bail before returning to prison for roughly 11 months. He was then granted bail by this Court on 15 April 2025 on conditions including 24-hour curfew (except between a specified three-hour period once a week to attend appointments) and non-contact with victims: *[G] v R* [2025] NZSC 41 (Ellen France, Kós and Miller JJ). His bail conditions were subsequently, on 3 February 2026, varied to permit G to leave his bail address for 30 minutes daily provided he did not leave the road on which that address is located. A further variation was granted on 10 March 2026 permitting G to leave his bail address between the hours of 8 am and 6 pm, seven days a week: *G v R* SC 130/2024, 10 March 2026 (Winkelmann CJ, Glazebrook, Williams, Kós and Miller JJ).

them) extreme hardship. The latter permits suppression if publication of the defendant's name would be likely to lead to the identification of another person whose name is already suppressed—in this case, T, F and J.¹¹⁰ In the alternative, G seeks anonymisation of his name in this judgment, in accordance with the approach taken in *D (SC 31/2019) v New Zealand Police*.¹¹¹

[96] G relies on *M (SC 13/2023) v R*, where this Court held that “youth principles are a primary consideration to be given powerful weight” when determining questions of name suppression.¹¹² As was the case in *M (SC 13/2023)*, G says the factor giving rise to a risk of extreme hardship is the risk to his mental health. G notes as relevant context that if he had been charged with the rape of J at the time it occurred, he would have received automatic name suppression.¹¹³

[97] G's application for suppression is opposed by the Crown. It says that G is not at risk of extreme hardship and publication of his name will not risk identifying T, F or J. The Crown notes that two of G's offences occurred after he had aged out of the Youth Court's jurisdiction, so would not have attracted automatic name suppression. It also reports that T and F both oppose G receiving name suppression (J could not be contacted). As to anonymisation, the Crown abides the Court's decision.

[98] We have decided it is appropriate to dismiss G's application for suppression but, as will be self-evident, to anonymise this judgment. We consider this sufficiently addresses any risk of identifying T, F and J. On the other hand, principles of open justice, accountability and deterrence have been satisfied by the fact that G was named at the time of sentencing and in the Court of Appeal. Anonymisation in this Court strikes an appropriate balance between the primary importance of open justice and the needs of G, particularly in respect of his rehabilitation. As noted in *M (SC 13/2023)*, rehabilitation in this context is not concerned solely with preventing further offending,

¹¹⁰ Who are subject to automatic name suppression by operation of s 203 of the Criminal Procedure Act 2011.

¹¹¹ *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213. See also *W (SC 17/2025) v New Zealand Police* [2025] NZSC 46.

¹¹² *M (SC 13/2023) v R*, above n 41, at [66]. We note that this Court in *M* also rejected a presumption in favour of name suppression for youth (also at [66]).

¹¹³ Pursuant to s 438(3)(a) of the OTA.

but also with reintegration into society more generally.¹¹⁴ Anonymisation will avoid the disproportionate notoriety that comes not from the offending but from the tendency for there to be greater public interest in judgments of this Court.

Result

[99] The appeal is allowed.

[100] The proceeding is remitted to the District Court for resentencing.

[101] The applications to adduce further evidence and for name suppression are dismissed.

[102] Bail is granted under s 57(1)(b) of the Bail Act 2000 on the terms currently applicable, as amended by this Court's minute of 10 March 2026. Any application for variation to bail shall be addressed by the District Court.

MILLER J

Table of Contents

	Para No
Introduction	[103]
Proportionality and <i>Taueki</i>	[104]
<i>Pouhara v R</i>	[111]
Accounting for youth at sentencing in an adult court	[118]
The present appeal is a product of <i>AM</i>	[124]
Consistency of treatment as between sentencing regimes	[133]
G's offending	[137]
<i>The facts</i>	[138]
<i>G is not an aged-out offender</i>	[144]
<i>The sentence</i>	[146]
<i>My assessment</i>	[148]
<i>An alternative approach, using existing methodology</i>	[150]
Resentencing	[153]
Name suppression	[154]

¹¹⁴ *M (SC 13/2023) v R*, above n 41, at [87].

Introduction

[103] I agree that G must be resentenced but my reasons differ from those of the majority. By way of summary:

- (a) When an adult court sentences an “aged-out” offender for offences committed as a young person it may take into account, when selecting the starting point under the *R v Taueki* methodology,¹¹⁵ what would have happened had the offender been dealt with in the Youth Court at the time of the offending.
- (b) On the facts, G did not appear in the District Court only because he was “aged out”. He had committed other, very similar offences as an adult, and he had elected trial by jury. All of his offending was correctly sentenced together. His age at the time of the first offence remained a highly relevant consideration. But there was no need, on these facts, to take into account a notional Youth Court outcome which assumed he would have been dealt with at that time.
- (c) I agree with the majority that this case can be accommodated under the *Taueki* methodology and counsel’s invitation to replace it should be rejected. In my view the sentence of imprisonment in this case should not be viewed as a product of that methodology, which afforded G very deep discounts. It should be seen as a product of the starting point bands in *R v AM (CA27/2009)*,¹¹⁶ the sexual offending guideline judgment. I accept, as explained below, that sentencing practice under *AM* may need to be revisited.
- (d) The sentence passed in the District Court has not been shown to be wrong. Had G admitted responsibility and had he not reoffended, his age of 15 at the time of the first offence would have permitted a community-based sentence under *AM*, notwithstanding that delays in

¹¹⁵ *R v Taueki* [2005] NZCA 174, [2005] 3 NZLR 372.

¹¹⁶ *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

prosecution led to him appearing for sentence as an adult. A failure to recognise that would require appellate intervention. But that is not what happened.

- (e) It is nonetheless in the interests of justice that G should be resentenced having regard to what has happened since the Court of Appeal decision in his case.
- (f) G should not be given name suppression.

Proportionality and *Taueki*

[104] I begin my reasons with the *Taueki* methodology. Counsel for G, Ms Blincoe, invited us to discard it as a judicial construct that was grafted inappropriately onto the Sentencing Act 2002. I explain below that there is reason to inquire into the operation of the methodology in practice, in cases governed by the guideline judgment for sexual offending, *AM*. But legislative policy made the methodology itself, or something very like it, necessary. And that remains the case.

[105] The desert principle holds that the severity of punishment for an offence should be proportional to the offender's degree of moral blameworthiness.¹¹⁷ A sentence should be as severe as necessary to mark the community's disapproval, but no more. The principle ranks sanctions according to the comparative seriousness of offences, both intrinsically and by reference to the offender's role. It differs from utilitarian or consequentialist theories of sentencing, such as incapacitation, deterrence and rehabilitation, in that it focuses on the offending itself, not on the defendant's future.

[106] The desert principle occupies an important position in sentencing policy because it accords with community intuitions about crime and punishment.¹¹⁸ That is not to suggest that it offers a complete account of sentencing policy. It does not, principally because it is concerned with relative or ordinal proportionality, and not the kind and length of sentences. It is fully consistent with a principle that sentences

¹¹⁷ Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing: Readings on Theory and Policy* (3rd ed, Hart Publishing, Portland, 2009) at 102–107.

¹¹⁸ Paul H Robinson and John M Darley “The Utility of Desert” (1997) 91 *Nw U L Rev* 453 at 477.

should not be disproportionately severe.¹¹⁹ It is also fully consistent with a principle that imprisonment should be a last resort.¹²⁰

[107] For these reasons the desert principle does not account for the heavy use of imprisonment in New Zealand practice. That is a function of: (a) other sentencing purposes and principles, notably community protection, denunciation and deterrence;¹²¹ (b) choices made over time about maximum sentences, which have had an important impact on guideline decisions;¹²² and (c) minimum periods of imprisonment in cases that meet statutory criteria.¹²³ Relevantly, the Crimes Act 1961 also establishes a presumption that sexual violation should be met with imprisonment.¹²⁴ Although it does not apply in this case, the Sentencing (Reform) Amendment Act 2025 must now be added to this list. It is unique among legislative interventions in that it deals with sentencing methodology, principally by capping discounts.¹²⁵

[108] The background to the Sentencing Act was usefully surveyed by Professor Julian Roberts in a 2003 article.¹²⁶ He observed that the Act was designed to promote proportional, just-deserts sentencing, but it also incorporated utilitarian purposes, notably deterrence, rehabilitation and incapacitation, and did not establish a hierarchy of sentencing goals.¹²⁷ That left judges with considerable discretion. But Professor Roberts pointed out that s 8 recites sentencing principles, the first five of which are all concerned with proportionality.¹²⁸ The point which I take from this is

¹¹⁹ See Sentencing Act 2002, s 8(1)(h); and New Zealand Bill of Rights Act 1990, s 9.

¹²⁰ See Sentencing Act, ss 8(1)(g) and 16(2). In this case that principle is however subject to s 128B(2) of the Crimes Act 1961.

¹²¹ Sentencing Act, s 7(1)(e)–(g).

¹²² Including *Taueki* itself, which was concerned with sentencing for offences of grievous bodily harm following the enactment of s 8(1)(c) of the Sentencing Act, which provides that the maximum sentence must be imposed if the particular offending is among the most serious of its kind unless an offender's circumstances make that inappropriate: *Taueki*, above n 115, at [24].

¹²³ See Andrew Ashworth "Prisons, Proportionality and Recent Penal History" (2017) 80 MLR 473 at 482–483. In *Taueki*, the Court of Appeal also responded to the 2004 amendment of s 86(2) of the Sentencing Act, which changed the criteria for setting minimum periods of imprisonment: *Taueki*, above n 115, at [52].

¹²⁴ Section 128B(2).

¹²⁵ Sentencing (Reform) Amendment Act 2025, s 10.

¹²⁶ Julian V Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36 ANZJ Crim 249.

¹²⁷ At 254–256.

¹²⁸ At 258–259.

not that some hierarchy of principles ought to be read into the Act. It is merely that the desert principle, with its insistence on proportionality, does play a central part.

[109] It is also necessary to accommodate the secondary sense in which s 8 pursues proportionality by providing in subs (1)(e) that like cases should be treated alike. This principle is obviously concerned with consistency of outcome, taking account of personal circumstances, but also with consistency of methodology.¹²⁹

[110] The *Taueki* methodology addresses these features of the Sentencing Act and seeks to reconcile them with the legislative policy choices about maximum sentences and minimum periods to which I have referred.¹³⁰ In *Taueki* the Court of Appeal explained that it was responding to the then-recent legislation, observing that s 8(1)(e) of the Act gave statutory backing to the objective of consistency in sentencing.¹³¹ By consistency, the Court meant in particular that starting points should reflect the relative seriousness of the particular offence and care should be taken to choose starting points which properly reflected the culpability inherent in the offending.¹³² Consistency of outcome, in this sense, would be delivered by methodological consistency and transparency.¹³³

Pouwhare v R

[111] I agree with the majority that the Oranga Tamariki Act 1989 provides a distinctive response to offending committed as a child or young person, and with what is said about the Act and its processes at [39]–[44]. I also agree that the Act envisages that not all youth offending will be dealt with in the Youth Court. Notably, it envisages in s 283(o) that a person of 15, as G was, may be sentenced in the District Court.¹³⁴ Under s 284(1A), the Youth Court must, when considering transfer, take into account

¹²⁹ Lyndon Harris *Achieving Consistency in Sentencing* (Oxford University Press, Oxford, 2022) at 23; and *Moses v R* [2020] NZCA 296, [2020] 3 NZLR 583 at [4] as cited in *Berkland v R* [2022] NZSC 143, [2022] 1 NZLR 509 at [24] per Winkelmann CJ, William Young, Glazebrook and Williams JJ.

¹³⁰ See also *Moses*, above n 129, at [8].

¹³¹ *Taueki*, above n 115, at [10].

¹³² At [42].

¹³³ At [10] and [43].

¹³⁴ Section 283(o)(i)(B) also allows for a 14-year-old to be transferred to an adult court where the charge proved against them is a category four offence or a category three offence for which the maximum penalty is at least 14 years' imprisonment.

the factors listed in subs (1) and must in addition “consider and give greater weight to” the seriousness of the offending, the criminal history of the young person, the interests of the victim and the risk that the young person poses to other people. In short, a young person of 15 may be dealt with in the District Court, under the Sentencing Act, if their index offending and/or risk of reoffending is sufficiently serious.

[112] In *Pouwhare v R* the Court of Appeal confirmed that when a young person is transferred to the District Court for sentence, the Sentencing Act governs the sentencing and the youth justice principles in s 208 of the Oranga Tamariki Act do not apply.¹³⁵ It bears emphasis that that conclusion is no longer controversial. It must follow that the Crown’s submission before us was correct: the District Court cannot simply adopt the outcome that would have been appropriate under legislation that no longer applies to the offender.

[113] It also follows that, as the Court of Appeal observed in *Pouwhare*, the sentencing purposes of denunciation, personal deterrence and public protection are applicable when a young person is sentenced in an adult court.¹³⁶ That is so because these purposes are among those listed in s 7 of the Sentencing Act.¹³⁷

[114] The Court of Appeal described these three sentencing purposes as “clearly incompatible” with the Oranga Tamariki Act’s youth justice principles.¹³⁸ That observation is not now accurate, to the extent it suggests that public protection and accountability cannot be accommodated under the Oranga Tamariki Act. Since 2019, s 4A(2) has required a court to consider the public interest, which expressly includes public safety and the accountability of a child or young person for their behaviour.

[115] However, the point I wish to emphasise is this: to say that public protection, accountability and deterrence are applicable considerations when young persons are sentenced in an adult court is not to assert that those considerations must prevail, nor

¹³⁵ *Pouwhare v R* [2010] NZCA 268, (2010) 24 CRNZ 868 at [74].

¹³⁶ At [80].

¹³⁷ Section 7(1)(e)–(g).

¹³⁸ *Pouwhare*, above n 135, at [80].

even that they will affect the sentence. The Sentencing Act envisages that these considerations will affect the sentence only to the extent applicable in the particular circumstances of the offence and the offender. Manifestly, they may not be significant for a young offender who, in the nature of things, will mature and may well not reoffend if offered support and guidance. It all depends on their individual circumstances.

[116] The Court of Appeal recognised this point in *Pouwhare*. It noted that the Sentencing Act restricts the availability of imprisonment for young offenders to serious offences and treats imprisonment as a last resort.¹³⁹ It also emphasised that a judge who is sentencing a person under the age of 18 must also, so far as is consistent with the Sentencing Act, act in accordance with the United Nations Convention on the Rights of the Child and, in particular, should treat the young person's best interests as a primary consideration and impose a sentence which takes account of the offender's age and the desirability of promoting reintegration.¹⁴⁰ That approach would permit Youth Court outcomes to be taken into account although, as the Court held, judges are not obliged to do so under the legislation.¹⁴¹

[117] *Pouwhare* still stands as authority that youth is recognised at sentencing in an adult court by way of discounts from the starting point applicable to an adult offender. However, the Court clarified that there is no fixed limit to the discounts that may be given for youth: "the fact [that] an offender is a young person can sometimes be given radical effect on sentence, unconstrained by any normative percentage, even where offending is serious".¹⁴² The Court found that the sentencing Judge had erred to the extent he held there was an outer limit to the discount for youth, leading him to impose a sentence of two and a half years' imprisonment on the appellant who was 16 years old at the time.¹⁴³ I infer that the Court accepted he might have imposed the sentence of home detention that, but for this error, he considered appropriate.¹⁴⁴ However, the appellant was by then a considerable way through her sentence and would soon be

¹³⁹ At [81] citing ss 17–18. See also s 16(2).

¹⁴⁰ At [82] citing Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 1, 3(1) and 40(1).

¹⁴¹ At [97].

¹⁴² At [96].

¹⁴³ At [1], [36], [41] and [98].

¹⁴⁴ At [4].

eligible for parole.¹⁴⁵ Presumably for that reason, the Court did not order that she be resentenced.¹⁴⁶

Accounting for youth at sentencing in an adult court

[118] The reasons why youth offending is less culpable are well-known: young people are less capable of good judgement, more vulnerable to negative influences, and less able to appreciate the consequences of their actions for themselves and for others affected by them.¹⁴⁷ In addition, there are powerful utilitarian or consequentialist¹⁴⁸ reasons for treating young people leniently: in the nature of things, they can be expected to mature and become contributing members of the community if given time and appropriate support, and harsh sentences may prevent that from happening.¹⁴⁹

[119] The Sentencing Council for England and Wales' guidelines for sexual offending by young people state that sentencing in such cases involves a number of different considerations.¹⁵⁰ In particular, the Council emphasises that young people are less emotionally developed, and offending may arise through inappropriate sexual experimentation, gang or group pressure, or a lack of understanding about consent, exploitation, coercion and appropriate sexual behaviour.

[120] I observe in passing that few of these characteristics of youthful sexual offending appear to have been present in G's case. For example, he could not claim that his offending against the sleeping 2020 victims had anything to do with misunderstanding consent. Nor is there any reason to think that his offending was impulsive; without wishing to overstate its seriousness, there was a predatory quality

¹⁴⁵ At [99].

¹⁴⁶ The Court might have done so under ss 121(1) and 144B of the Summary Proceedings Act 1957 (now repealed).

¹⁴⁷ *Churchward v R* [2011] NZCA 531, (2011) 25 CRNZ 446 at [50]–[54] and [77]–[80]; and *Dickey v R* [2023] NZCA 2, [2023] 2 NZLR 405 at [76]–[86]. See also *H v R* [2019] NZSC 69, [2019] 1 NZLR 675 at [33]; and *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [61]–[62].

¹⁴⁸ So described because they concern the consequences of punishment for the future of the offender and the community.

¹⁴⁹ *Churchward*, above n 147, at [78]. See also *M (SC 13/2023)*, above n 147, at [63].

¹⁵⁰ Sentencing Council for England and Wales *Sentencing Children and Young People: Overarching Principles and Offence Specific Guidelines for Sexual Offences and Robbery – Definitive Guideline* (1 June 2017) at 36.

to it. But other characteristics of youth offending were present. It seems evident that he failed to appreciate the impact of his behaviour on the victims, partly through age and partly because of his own childhood experiences. He evidently did not appreciate the consequences of his behaviour for his own future either.

[121] Public protection, deterrence and denunciation may be relevant considerations when young offenders are sentenced in an adult court, as I have explained.¹⁵¹ But for the reasons just mentioned it is very often not necessary to attach material weight to deterrence and denunciation when the offender was a young person at the time. Public protection may not be a significant issue either, unless (as was the case in *Pouwhare*, where the offender was transferred under s 283(o)) there is a real risk of reoffending in the short term. The significance of these considerations for sentencing purposes ordinarily depends on the offender's age and maturity *at the time of the offence*. That remains the position when the offending does not come to light until the offender is significantly older. Of course it is also necessary to take age at sentencing into account when assessing considerations such as remorse, and the sentencing options are those available in the adult court. I accept that sentencing can sometimes be adjourned to explore processes which may avoid the need for a custodial sentence.¹⁵² It is far from inevitable, under existing methodology, that the end sentence in an adult court need be more severe by reason only of the passage of time.

[122] To the extent that age does foreclose some sentencing options, that is a consequence of a legislative choice not to deal in the Youth Court with adult offenders who were young people at the time.¹⁵³ I observe for example that many intermediate disposition options under the Oranga Tamariki Act expire at age 19.¹⁵⁴

[123] The principle of consistency of treatment in s 8 of the Sentencing Act strictly applies when a court is sentencing or otherwise dealing with an offender *under that Act*. The legislature has chosen a different regime for those appearing in the

¹⁵¹ See above at [112]–[113].

¹⁵² See above at [68] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

¹⁵³ See Oranga Tamariki Act 1989, s 2(2)(d).

¹⁵⁴ Under s 296(2), orders of the kinds listed in subs (1) generally expire at 19 for offenders who are being dealt with in the Youth Court because charging documents were filed there in time. They include certain supervision orders, mentoring programmes and parenting education programmes.

Youth Court. However, I agree with the majority, for the reasons given at [104]–[110] above, that consistency is a principle of general application, necessary to ensure that sentences remain proportional.

The present appeal is a product of *AM*

[124] The problem for the District Court in *Pouwhare* was that a guideline judgment, *R v Mako*, applied to the offence of aggravated robbery.¹⁵⁵ In G’s case the problem is the same but the guideline judgment is *AM*. *Mako* and *AM* are not the source of the *Taueki* methodology. They employ it to establish sentencing bands which guide starting points for particular offences of a serious nature.¹⁵⁶ In my view the immediate problem in this case is the application to young offenders of the *AM* bands for sexual violation, not the *Taueki* methodology itself. I observe that in the Court of Appeal, G contended primarily that the *AM* starting point adopted by the sentencing Judge was too high and the discounts were too small.¹⁵⁷ In this Court his counsel maintained that criticism of the *AM* bands, should the Court decline to abandon the *Taueki* methodology for offenders in G’s position.

[125] Ms Blincoe contended before us that courts are not choosing starting points of less than six years’ imprisonment for rape cases that fall below *AM*’s rape band one. She argued that imprisonment is essentially inevitable because courts are adopting lower starting points only in cases of withdrawn consent (in which penetration was initially consensual). As the Court of Appeal observed in *Crump v R*, a starting point of six years’ imprisonment may effectively preclude a community-based sentence even in cases which present a combination of strong mitigating factors.¹⁵⁸

[126] It is true that in *AM* itself the Court of Appeal instanced a case of a young offender aged 17 and withdrawn consent when explaining that starting points below six years might be appropriate.¹⁵⁹ But it was only one obvious example. The Court

¹⁵⁵ See *Pouwhare*, above n 135, at [25] referring to *R v Mako* [2000] 2 NZLR 170 (CA).

¹⁵⁶ The Court of Appeal judgment in *Mako* predates *Taueki* but used the two-step approach that was later adopted in *Taueki*: see *Taueki*, above n 115, at [8] referring to *Mako*, above n 155, at [34].

¹⁵⁷ *[G] v R* [2024] NZCA 626 (Palmer, Fitzgerald and Grice JJ) [CA judgment] at [59].

¹⁵⁸ *Crump v R* [2020] NZCA 287, [2022] 2 NZLR 454 at [98] per Kós P. Venning and Mallon JJ agreed with Kós P’s judgment on the sentence appeal: at [75] per Venning J and [56] per Mallon J.

¹⁵⁹ *AM*, above n 116, at [96]. *Crump*, above n 158, was also treated as a withdrawn consent case.

expressly recognised that judges might adopt lower starting points in unusual cases.¹⁶⁰ It explained that the guidelines are just that; the Sentencing Act is always the first point of reference.¹⁶¹ It emphasised that judges must always evaluate relevant factors and assign degrees of importance to them, on a case-by-case basis.¹⁶² In *Crump* the Court subsequently emphasised these points, stating that there is actually a band below rape band one.¹⁶³

[127] The understanding that sentencing judges are unwilling to adopt starting points of less than six years was initially reasonable, because data about such sentences is not readily accessible and there is, or rather was, anecdotal information to that effect.¹⁶⁴ But it appears from an exchange of post-hearing memoranda in this Court that the understanding is not generally correct.

[128] The Crown produced a table of 42 recent cases in which end sentences short of imprisonment were imposed. They include cases in which the offender was sentenced in that way because of their youth at the time.¹⁶⁵

[129] Empirical information about sentencing practice that is produced for the first time in this Court must be treated with caution.¹⁶⁶ All that can be said about the material supplied by counsel in this Court is that it does not tend to bear out counsel's contention that courts are choosing starting points under six years only in cases of withdrawn consent. In about half of the 25 cases in which the defendant was sentenced for rape the starting points were below six years' imprisonment.

[130] However, the material does tend to suggest there may be a disparity problem. Divergent outcomes may be evidence of sentences being appropriately tailored to

¹⁶⁰ At [83].

¹⁶¹ At [35] citing *Taueki*, above n 115, at [13].

¹⁶² At [36] and [78]–[79].

¹⁶³ *Crump*, above n 158, at [98] per Kós P.

¹⁶⁴ The Court of Appeal has previously noted anecdotal information that, in practice, “a number of defendants who would otherwise plead guilty, express remorse and atone early for their offending, are instead electing to take their case to trial” on the premise that the likely minimum starting point was six years: at [98] per Kós P.

¹⁶⁵ See for example *Solicitor-General v Rawat* [2021] NZHC 2129 at [54] and [57]; and *R v [D]* [2022] NZDC 4968 at [15] and [17].

¹⁶⁶ I agree with the majority that the affidavit evidence that G offered in this Court about Youth Court practice should not be taken into account: see above at [34] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

circumstances, but the range appears to be so wide as to invite inquiry. I accept that something is wrong if judges feel they cannot deliver community-based sentences in appropriate cases.

[131] I consider that existing methodology is capable of delivering lower starting points for young offenders under *AM*, without necessarily adjusting the starting points for adult offenders.¹⁶⁷ It is possible to distinguish among culpability factors that go into the bands. Culpability factors under *AM* include the physical act, the violence with which it was done, the use of weapons, the injury inflicted on the victim and so on.¹⁶⁸ These may be classified as “harm” factors, as they are under English sentencing guidelines.¹⁶⁹ Other culpability factors go to the offender’s knowledge: premeditation, knowledge of consequences, knowledge of victim vulnerability, and the like.¹⁷⁰ These may vary with age. Where that is the case, lower starting points are possible under *AM*.

[132] This approach is consistent with *Taueki*, provided the starting point continues to recognise harm factors, as it would for an adult offender, and provided there is no double-counting when it comes to discounts. It may better achieve proportionality as between adult and youth offenders.

Consistency of treatment as between sentencing regimes

[133] That brings me to whether the general principle of consistency of treatment of like offenders extends to offenders who are sentenced in an adult court but who might have been dealt with in the Youth Court in different circumstances.

[134] It is not self-evident that the Sentencing Act calls for such a comparison. The exercise does not directly compare similar offenders, offences and circumstances, as s 8(1)(e) of the Sentencing Act envisages. Rather, it compares the treatment of the

¹⁶⁷ I recognise that in *Liddington v R* [2024] NZCA 457 the Court of Appeal took the view that it was not necessary to alter the *AM* bands themselves, having regard to the availability of a “band zero”: at [56]–[57]. Although not strictly relevant to this appeal, I consider that it may become necessary to do so for other reasons, notably the need to ensure sentences remain proportional following the Sentencing (Reform) Amendment Act.

¹⁶⁸ *AM*, above n 116, at [38]–[52].

¹⁶⁹ Sentencing Council for England and Wales, above n 150, at [1.9], [4.4], [4.6] and 37; and Sentencing Council for England and Wales *Sexual Offences: Definitive Guideline* (1 April 2014).

¹⁷⁰ *AM*, above n 116, at [37].

same offender under different sentencing regimes. Nor can the comparison be a close one, if only because: (a) it must account for the reasons why the offender is being dealt with under the Sentencing Act; (b) it rests on the final outcome in the Youth Court rather than respective starting points; and (c) there probably will be material differences in the circumstances of the offender by the time they eventually appear for sentencing. I agree with the majority that the comparison may not be insurmountable,¹⁷¹ but I wonder whether it will be a reliable guide to judgement in practice.

[135] The justification for taking the notional Youth Court outcome (as opposed to the offender's youth at the time) into account is that: (a) they should not be held responsible for the fact that they appear in an adult court; and (b) there is reason to think the outcomes under the Sentencing Act and Oranga Tamariki Act would be materially different. Hence the focus is on offenders who are dealt with in an adult court solely because of a delay in charging.

[136] I accept there may be circumstances in which it is unfair to hold an offender responsible for a delay in charging (although that will not always be true, especially for sexual offending within an ongoing social context that includes the offender). In such cases the general principle of consistency of treatment allows adult courts to give some weight, when selecting the *Taueki* starting point, to the hypothetical outcome for the same offender had they been dealt with in the Youth Court at the time. Whether any given offender falls into this category is a question of fact. G does not, as I next explain.

G's offending

[137] As explained earlier, I accept that G should be resentenced, but not that his sentence was manifestly excessive at the time it was passed.

¹⁷¹ See above at [82] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

The facts

[138] G's first offence happened in September 2017, when he was 15 and the victim, J, was 19. The level of violence was limited to that inherent in the offence, but she was vulnerable by reason of intoxication and there was also a relationship of trust. G's denials led to J becoming alienated from important mutual connections. She has since disengaged from the court process because, as she sees it, G has dragged it out for so long and he would not admit that it caused her unnecessary stress.

[139] The charge of sexual violation by rape was not laid immediately because J did not go to the police at the time. The charge was laid in December 2021, after the two charges of sexual violation by unlawful sexual connection with the other two victims had been laid. As noted, G was 18 when he committed the latter offences.

[140] The offending against the second victim, T, happened in April 2020, while he was staying with her. When she was asleep he entered her bedroom, lay behind her and pulled down her pants before digitally penetrating her vagina. Her children came into the room and their voices woke her. She screamed at him and he ran out of the room.¹⁷²

[141] The offending against the third victim, F, occurred in November 2020. He was living at an address where she was staying overnight with her partner. She was 16 and, to his knowledge, pregnant. He entered her bedroom, groped her breast and digitally penetrated her vagina. She was awoken by his weight on her. She alerted her partner who chased G from the room.

[142] G was 19 when the charges were laid. The 2017 rape charge was joined to the 2020 charges following a pretrial ruling on 30 June 2022 on the basis that the evidence of the three complainants was cross-admissible propensity evidence.¹⁷³ At that time the 2020 offending had an imminent trial date, but the proceeding was adjourned. The trial was not held until August 2023.

¹⁷² G was also charged with a separate indecent assault against T in May 2020. She had been invited to G's father's house for drinks, and eventually went to sleep on a couch in the lounge. At about 5.30 am, G allegedly entered the lounge area and masturbated near T's face until she woke up and screamed at him. This charge was subsequently withdrawn in July 2023.

¹⁷³ *R v [G]* [2022] NZDC 12079 (Judge Becroft).

[143] G pleaded guilty to the 2020 offending at the commencement of his trial, meaning that the complainants were forced to prepare for trial. J gave evidence. The 2020 victims did not, but a summary of the 2020 offending was admitted in the form of an agreed statement, under s 9(2) of the Evidence Act 2006. I infer that it was treated as propensity evidence. The jury found him guilty on the rape charge.

G is not an aged-out offender

[144] The majority take the view that s 2(2)(d) of the Oranga Tamariki Act controlled G's case, meaning that he was dealt with in the District Court only because he was aged out by the time he was charged. I recognise that we cannot exclude the possibility that he would have admitted responsibility had he been required to account for himself in the Youth Court at the age of 15 or 16. But the facts are that he denied the rape, elected trial by jury, and continued at sentencing to deny all the offending and accuse the victims of lying about it. He maintained that stance in the Court of Appeal, disputing both reliance on propensity evidence and the sufficiency of the Judge's directions on reasonable belief in consent.¹⁷⁴ Only in this Court did he abandon his challenge to the verdict. The inference I draw is that he probably would have behaved in the same way had J complained to the police at the time of the rape.¹⁷⁵ So I do not accept that G ought to have been treated, as a matter of process, as aged out in respect of the first offence. He would have reached the District Court by a different pathway. And as a matter of fact he reoffended at 18. All the offending was correctly dealt with in the same sentencing, and not merely because separate offences engage the totality principle. It spoke to a pattern.

[145] For these reasons it was not necessary to take a notional Youth Court outcome into account when sentencing G, though I repeat that his age at the time of the first offence remained an important consideration.

¹⁷⁴ CA judgment, above n 157, at [5].

¹⁷⁵ It would have been possible for G to elect a jury trial in the District Court even if he had been charged before turning 19, as s 274(1) of the Oranga Tamariki Act provides that a young person of or over 14 may elect jury trial if charged with a category 3 offence.

The sentence

[146] G was sentenced on 9 April 2024.¹⁷⁶ He was 22. Judge Nicholls had before him a pre-sentence report, an alcohol and drug assessment, and a psychological report from Shelly Lomas, a consultant clinical psychologist. Ms Lomas prepared two subsequent reports, one for the hearing in the Court of Appeal and one for the hearing in this Court, both at the request of G's counsel. Another clinical psychologist, Cristina Fon, also prepared a report for the Court of Appeal, to assess G for foetal alcohol spectrum disorder (he was not found to suffer from it). I agree with the majority that it is not necessary to refer to this material.¹⁷⁷

[147] The sentence calculation has been outlined in the majority reasons.¹⁷⁸ The effective starting point was nine years' imprisonment (allowing two years for totality).¹⁷⁹ That reflected the repeated nature of G's offending and his persistence in the face of the victims' anger and distress. The Judge allowed effective discounts of 63 per cent to reach the end sentence of three years and four months' imprisonment. These comprised 20 per cent for guilty pleas to the 2020 offending,¹⁸⁰ 40 per cent for youth,¹⁸¹ 10 per cent for personal difficulties,¹⁸² and six months (a one-for-one allowance) for time on electronically monitored bail.¹⁸³ The Judge declined a discount for prior good character.¹⁸⁴

My assessment

[148] In my view, these allowances were liberal and that must be taken into account when deciding whether the starting point resulted in a manifestly excessive sentence. First, there was no need for any guilty plea discount for the 2020 offending; not until trial did G plead guilty and it seems likely he did so for tactical reasons. Second, he was 18 when he offended in 2020. That must limit the discount for youth that would have been appropriate had he offended only once, at the age of 15. The rape could no

¹⁷⁶ *R v [G]* [2024] NZDC 7663 (Judge Nicholls) [Sentencing notes].

¹⁷⁷ See above at [34] per Winkelmann CJ, Glazebrook, Williams and Kós JJ .

¹⁷⁸ Above at [13]–[19].

¹⁷⁹ Sentencing notes, above n 176, at [22].

¹⁸⁰ At [24].

¹⁸¹ At [27].

¹⁸² At [30].

¹⁸³ At [31].

¹⁸⁴ At [32]–[33].

longer be treated as an aberration; it evidenced a propensity or pattern that had survived into young adulthood. No question of retrospectivity arises. Third, his conduct throughout did nothing to alleviate the impact of his behaviour on the victims, and there was no evidence of acceptance or remorse. Fourth, he had few strategies for addressing the behaviours, including drug abuse, that had led to his convictions.

[149] He also denied all the offending and made clear that he regretted his guilty pleas, which he said his lawyer had forced on him. He also spoke offensively about the victims. However, Judge Nicholls did not allow this unsatisfactory attitude to increase the effective sentence. The Judge merely recorded that no discount could be given for remorse.¹⁸⁵ That was plainly correct.

An alternative approach, using existing methodology

[150] So far I have assessed the sentence on the orthodox basis that the rape was the lead offence. However, I accept G's submission that the Judge might have chosen to take one of the unlawful sexual connection offences as the lead. That could be justified on the basis that the overall gravity of the rape was less than the lead unlawful sexual connection offence, having particular regard to G's age at the relevant times. *AM* band one for unlawful sexual connection is two to five years' imprisonment.¹⁸⁶

[151] That approach might result in a lower overall starting point under the *AM* bands as they stand. But in this case it is unlikely that it would make very much difference. The unlawful sexual connection offences were quite serious offences of their kind. The victim of the last offence was younger, at 16. The Judge described the offending as more persistent, and G was more aggressive; he restrained her by holding her down.¹⁸⁷ He knew she was pregnant. So the starting point might be placed in the middle of band one.¹⁸⁸ Uplifts would be needed for the other offences. G was also older in 2020 and that would affect the overall discount for youth. In the result, the starting point might have been lower than the nine years' imprisonment adopted by the

¹⁸⁵ At [33]–[34].

¹⁸⁶ *AM*, above n 116, at [114].

¹⁸⁷ Sentencing notes, above n 176, at [17].

¹⁸⁸ I note that the Judge chose a combined starting point of four years for the two unlawful sexual connection offences, which was plainly within the available range: at [18].

Judge, but I expect G would still have ended up with a sentence of imprisonment that was too long to convert to home detention.

[152] For these reasons I am not persuaded that the sentence passed in the District Court was manifestly excessive.

Resentencing

[153] I nonetheless agree that G should be resentenced in the District Court, for two reasons, both of which are particular to this case. First, he has been on bail (granted by this Court when he sought leave) since April 2025. That period can be taken into account on resentencing, but would not count towards his sentence expiry date under s 95(1) of the Parole Act 2002, were he required to resume serving the existing sentence. The bail conditions included a 24-hour curfew until very recently. For that reason it would be unjust if time spent on bail was not brought into account. Second, I agree with the majority that, based on reports supplied to this Court in connection with his bail conditions, there is a pressing need for treatment for mental health and substance abuse issues.¹⁸⁹ The sentence will need to support his rehabilitation and preserve the relationships upon which he depends.

Name suppression

[154] I agree with the majority that G should not receive name suppression.¹⁹⁰ The fact that he would have received automatic suppression had he been charged with the rape of J at 15 and been dealt with in the Youth Court is not material in circumstances where he reoffended as an adult.¹⁹¹ He was publicly named at sentencing and such evidence as we have is that his victims do not support suppression. I defer to the majority view that his name should be anonymised.

Solicitors:

Ord Legal, Wellington for Appellant

Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

¹⁸⁹ See above at [94] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

¹⁹⁰ See above at [98] per Winkelmann CJ, Glazebrook, Williams and Kós JJ.

¹⁹¹ Section 438(3)(a) of the Oranga Tamariki Act prohibits publication of the name of a young person involved in Youth Court proceedings.