A Critical Analysis of Section 27 of the Sentencing Act (2002)

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Abstract

This thesis analyses the effectiveness of Section 27 of the Sentencing Act (2002) in achieving its primary objective of addressing the high rate of Māori incarceration. This problem largely stems from the destruction of Māori culture through colonisation and is held in place by systemic and institutional racism in the contemporary context. Theoretically, Section 27 provides a mechanism to off-set the societal dislocation and disadvantage Māori have experienced as a result of colonialism, crime control policies and urbanisation.

Analysis of the operational reality of Section 27 focused on the following questions:

- Is Section 27 being utilised as intended by legislation?
- What are the underlying rationale and reasons why the Section is utilised by Court officials?
- What are the underlying rationale and reasons why the Section is not utilised by Court officials?
- What changes to legislation, policy or institutional practice are required to enhance the use of Section 27?

The research involved qualitative interviews of eight lawyers from two different geographic locations in New Zealand, and four cultural consultants (those employed to write professional Section 27 reports). Their responses

were analysed and grouped into three different themes: *benefits*, *barriers*, and *improvement to legislation and practice*.

Major findings of the research include positive outcomes such as improved community re-engagement for offenders and improved sentencing outcomes. On the other hand, however, there is an inconsistency of use of Section 27, as well as a variable impact when it is used during the sentencing process. This inconsistency appears due to a lack of cultural knowledge and understanding within the court system. Thus, there is a need for cultural education of those working within the court system and for the development of a framework and guidelines. For this to be imbedded as a consistent practice for use in sentencing decisions it needs to be backed up with adequate government funding and legislative and policy support.

Acknowledgements

Life, sometimes, has an interesting way of pushing you in unexpected directions – along unclear paths. That is most definitely the case for this research. My knowledge of the very existence of Section 27 of the Sentencing Act came to pass during research I was doing in the context of Māori women's incarceration in New Zealand. This ignited a sense of bewilderment as to why such a seemingly useful and beneficial piece of legislation has been underutilised.

I would like to thank all participants in the study. This research would not have been possible without them. Their willingness to speak openly and frankly was of enormous benefit. It was heartening to find that all participants seemed to care very deeply about their clients, the shortcomings of the criminal justice system, and the need to ensure more positive outcomes for Māori within that system.

I am extremely grateful to Dr Juan Tauri for his guidance throughout the entire process. His knowledge and experience were freely and very generously given. Thank you, Juan.

None of this would have been possible without the support and love of my family. Thank you for your patience and care Paul. Thank you, Joe, Indigo

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List of Abbreviations

Sentencing Act (2002) ..... SA
Criminal Justice Act (1985).... CJA
Restorative Justice .....RJ
Family Group Conference .....FGC
Criminal Justice System .....CJS
Lawyer Location 1 ..... LL1
Lawyer Location 2 ..... LL2
Cultural Consultant..... CC

List of Legislation

Native Schools Act (1858)
Native District Regulations Act (1858)
Settlements Act (1858, 1863)
Suppression of Rebellion Act (1863)
Native Land Act (1865)
Residents Magistrates Act (1867)
Native District Circuit Courts Act (1867)
Tohunga Suppression Act (1907)
Criminal Justice Act (1985)
State Sector Act (1988)
Children Young Persons and Their Families Act (1989)
Sentencing Act (2002)
Sentencing and Parole Reform Act (2010)

List of Māori language (te reo) to English translations

hapū: subtribe
hīkoi: to march/walk
iwi: tribe
kanohi ki te kanohi: face to face, in person
kaupapa Māori: customary Māori approach/philosphy/ideology
kōrero: to speak, to address
marae: Māori place of community
muru: to plunder or confiscate as form of restorative justice
pakeha: European descendant
runanga: discussion in an assembled group
tangata whenua: at home, naturalised, associated with people and belonging
tapu: sacred, forbidden
taua: war party
te ao Māori: Māori world view
tikanga: the correct way, meaning, method of customary practice
tino rangatiratanga: sovereignty, self-governement, self-determination
tohunga: skilled person, expert, leader, priest
utu: avenge
whakapapa: genealogy, lineage, descent
whānau: extended family

Chapter 1: Introduction

> *The notion of equality before the law is a corollary of the one law ideal. It is assumed that a common procedure will ensure an equal treatment and equal liability to sanction for all who act in breach of the law. Unfortunately, this philosophy in practice is a legal fiction. It denies the fact that the definition of equality in law is not dependent upon some neutrally common norm but is shaped by many diverse and sometimes conflicting moral or cultural precepts." (Jackson, 1988, p. 266)*

Policy and legislation are two possible levers with which the State and public service can effect positive changes to negative social outcomes such as a growing prison muster and the over-representation of Māori within the system. The policy under review in this thesis, Section 27 of the Sentencing Act 2002 (previously known as Section 16 of the Criminal Justice Act 1985) is one such lever. Section 27 was implemented with the aim of enhancing the effectiveness of the judicial system's acknowledgement and response to the cultural needs of Māori so as to effect positive change in the rate of Māori imprisonment (Burt, 2011). Sentencing decisions can be understood as a vantage point from which over-representation in the criminal justice system is affected (Jeffries & Stenning, 2014).

Contrary to the intention behind Section 27's implementation however, statistics show that between the years 1985-2017 the number of Māori

sentenced by a New Zealand court to prison rose from 1864 to 4823 (Stats NZ, 2019). So, whilst Section 27 appears to enable a corrective effect on chronic Māori over-representation, it appears to have had little impact on the issue – the reasons for which are discussed later in the thesis. Foucauldian philosophy would view such a legislative imposition as merely a means to placate disaffected communities, thus producing the desired "docile bodies" for ease of *governing* (Foucault, 1977, p. 136). This view aligns with perspectives pertinent to New Zealand during the mid-1980s and early 1990s (at the inception of the original Section 27 legislation). During this time there was an upsurge of changes in legislation and extensive programmes by government agencies of adopting and co-opting elements of Māori culture in an overarching strategy of biculturalisation (Tauri, 2011). Commentators have argued that these changes were introduced to cool the rising tide of discontent from Māori of governmental practice, while at the same time enabling the State to retain its administrative power, thus nullifying any real change to be realised (Tauri, 2011). Critique of this programme is offered in Chapter 2 of this thesis. This research therefore aims to fill a gap in current knowledge of the context of Sections 27's introduction and the ongoing lived experience of its implementation. By focusing on the barriers and possible improvements to the legislation's use, the analysis endeavours to provide information enabling a deeper understanding of the day-to-day possibilities of the Section in meeting its original purpose within the current political and societal climate.

The views of both the lawyers working in defence of Māori offenders, and the cultural consultants contracted to write these reports, are gathered for this research to ascertain the impact of the day-to-day implementation of Section 27 within the criminal justice system. Thus, the research seeks to identify barriers that are restricting potential effectiveness and improvements to process that might achieve more successful outcomes for Māori.

This research is an exploratory phase designed to lead into a significantly more detailed Doctoral thesis, for which a wider participation will be sought. A significant motivation for this study is that, despite Section 27 being implemented in 1985, the research on the extent to which the legislation is fulfilling its purpose is notably sparse. The key questions of this research are, therefore:

- Is Section 27 being utilised as intended by legislation?
- What are the underlying rationale and reasons why the Section is utilised by Court officials?
- What are the underlying rationale and reasons why the Section is not utilised by Court officials?
- What changes to legislation, policy or institutional practice are required to enhance the use of Section 27?

Chapter 2: Background

> *"There is no correlation anywhere in the world between the imprisonment rate and the crime rate. The imprisonment rate is not a measure of crime; it is a measure of the consumption of punishment. New Zealand society does not just have a tolerance for a high incarceration rate it has an enthusiasm for it."* (McIntosh, 2015, p. 2)

New Zealand is one of the most punitive developed nations, rating only second to the United States (Norris, 2017). However, sitting within this statistic is the fact that between the years of 1999 and 2009 New Zealand overtook the US for first place in incarceration of those individuals classified "of colour" (Norris, 2017). Currently, although Māori only represent 15% of the general population of New Zealand, they make up 50% of New Zealand's prison population (SUPERU, 2015). Whilst there are many arguments as to why this is a reality, what cannot be ignored is that these are by no means unique circumstances and are reflected in the incarceration rates of Indigenous communities in colonised countries around the globe (Ross, 2016).

While McIntosh and Workman (2017, p. 726) describe New Zealand prisons as being "largely holders of Māori flesh and blood", they also highlight that the prisons are "holders of particular veins of Māori society" (p.726). They ascertain that were the problem simply a "Māori issue" there would be a cross-section of Māori from all socio-economic groups. What is apparent,

however, is that it is those already living in deprivation that fill the overwhelming statistics and that the prisons are a direct reflection of society's poor (McIntosh & Workman, 2017; Workman & Mcintosh, 2013). Māori, aligning with worldwide patterns of Indigenous symptoms of colonialism, are socio-economically disadvantaged, dispossessed and culturally alienated (Clark, 2014). In terms of basic economic status, statistics show that in New Zealand individuals in poverty, or living a low socio-economic existence, are three times more likely to commit crime than those who are financially comfortable (Workman & Mcintosh, 2013).

In addition to the more obvious poverty-related crimes, Crenshaw (2012) also discusses the manifestation of "structural-dynamic discrimination". One example of this is the high rates of Māori unemployment and thus poverty, and the resulting associated numbers on social welfare benefit support (recent statistics show that the average unemployment rate for Māori is twice that of the national average (Stats NZ, 2018, a)). Essentially, those receiving government welfare are exposed to regulations and rules, coupled with punitive possibilities through lack of adherence, that others in society may never encounter (Beddoe, 2014; Burt, 2011; Crenshaw, 2012). In reality, during the September 2019 quarter this manifested in Māori receiving 44.3% of the total sanctions delivered to those on the main welfare benefits (Ministry of Social Development, 2019).

Many also argue that such structural racism and biases, whether conscious or unconscious, have infiltrated and thus influenced much of the State's political and social control structures (Cunneen & Tauri, 2017; McIntosh, 2013; Tauri, 2014). Toki (2005) discusses how the policing of Māori has not adapted over the last 160 years regardless of changes to Māori society. She finds that this has "given rise to accusations by Māori that they are still undergoing a systematic outdated process of colonisation by the police" (p.171). Similarly, Tauri (2014) describes high levels of discretionary surveillance of Māori by police. Another example lies in the negative political rhetoric and terminology often focused on Māori, such as "over-represented", "criminal" and "deviant". McIntosh (2015) describes such terminology as naturalising negative discourses surrounding Indigenous populations, effectively creating a Māori destiny and pathway to prison that has become both well-worn and expected.

The impact of these biases and attitudes can be illustrated by the following statistics: Māori are five times more likely to be apprehended than non-Māori, (Clark, 2014; Crenshaw, 2012); Māori are more than twice as likely to receive a custodial sentence than a European committing the same crime (McIntosh, 2015); and Māori women are ten times as likely to go to prison than non-Māori women (Pack, Tuffin, & Lyons, 2015). A recent publication by the Ministry of Justice (2017) clearly demonstrates this ongoing pattern of bias reflected in the statistics showing that between 2008 and 2017 the percentage of adults convicted who identified as Māori increased from 36% to 42% even though the number of adults convicted over that same period of time had actually fallen.

The intergenerational aspect of incarceration plays a large part in this picture and cannot be ignored. When a parent receives a custodial sentence, their children do also – just a different experience of that sentence (Gordon, 2015). Children experience their 'sentence' as social stigma. They experience the loss of a parent as though grieving their death but receive little societal empathy. Instead, they find themselves amidst an atmosphere of expectation that they too will follow the path of their parent (Allard & Greene, 2011). There is plentiful evidence from several countries indicating that the incarceration of a parent strongly predicts the subsequent criminal behaviour and incarceration of their children (Dawson, Jackson, & Nyamathi, 2012; Minh et al., 2013). In New Zealand, statistics suggest that a child is six times more likely to be incarcerated as an adult if they have suffered the incarceration of a parent than an individual who has not had that experience (SUPERU, 2015).

Of note, it is important to also consider the population profile/pyramid pertinent to this social equation. The Māori population is young; the median age for Māori is 22.7 years in comparison to a New Zealand average of 35.9 years (Webb, 2011). This is particularly relevant because it is more likely for those between the ages of 14 and 30 to come into contact with criminal justice processes (Webb, 2011).

In summary, despite the existence of Section 27 (or its 1985 predecessor), and other policies and programmes focused on reducing their over-representation, Māori continue to be amongst the most legally punished

people in the world and are significantly over-represented at all stages of the New Zealand criminal justice system (Clark, 2014). The causes of this gross over-representation are highly debated, complex and deep-rooted, but are without doubt inextricably intertwined with the Indigenous experience of colonialism and post-colonialism as the following chapter explains.

Chapter 3: Historical Context

This chapter explores the historical context in which the New Zealand criminal justice system and Māori imprisonment has evolved, whilst entangled within colonial constructs. Drawing upon established work by historians and criminologists, from both inside and outside of New Zealand, an examination of the colonial settler states and the ways in which legislation is used as part of the colonial project is given. The execution (and continuation) of colonialism as a project in New Zealand is demonstrated using Tatum's (1994) four phase colonisation theory.

i. Colonialism and Criminality

> *The cycle was set in motion by the demands of colonisation which imposed policies that effectively weakened the economic and spiritual weave which had held the Māori community together. It was continued by the assimilationist aims of the education system and other institutions which sought to fit the Māori into the Pakeha world. It is maintained by the economic imperatives of the twentieth century which have moved the Māori into the cities for employment and thus isolated him from the cultural strengths of his whānau and hapū. It has been an interacting process of social, cultural and economic change which has had far reaching effects. It has created a Māori community which is now largely landless and struggling to preserve its language and culture. (Jackson, 1988, p. 66)*

Is Section 27 even necessary? And what is it about 'being Māori' that justifies the right to cultural understanding when engaging with the criminal justice system? In attempting to understand the existence of Section 27 it is important to approach it from a Māori perspective, and especially within the context of Māori experiences of criminal justice both past and present. Furthermore, authors such as Cunneen, Rowe and Tauri (2017) argue that an important factor, one often missing from the criminal justice system/Indigenous over-representation debate, is colonialism and its effect on Indigenous populations over time.

The idea that colonisation heavily impacts Māori interaction with the criminal justice system is by no means a new concept. Jackson (1988) argued that colonisation has produced a widening socio-economic disparity between Māori and non-Māori stemming from the dispossession and deprecation of Māori traditional practices and ways of being. He not only points to these processes leaving Māori vulnerable to crime, but also to the systemic racist practices that smooth the route for Māori entrance into the criminal justice system (Jackson, 1988). He describes that:

> *The institutional and structural racism which sustained the process has ensured the Māori people's economic deprivation; the social and personal attitudes which underlay it have ensured their cultural denigration. Together they have constantly reinforced the cycle of confinement" (p. 66)*

In concurrence, Cunneen and Tauri (2017) argue that one cannot begin to understand the over-representation of Indigenous peoples in prison without considering colonialism and the actions of the colonial and neo-colonial State. They highlight these actions as having led to the highly significant over-representation of Indigenous people in every area of the criminal justice system. Ross (2016) also supports this viewpoint and emphasises the processes of colonisation, and the consequential loss of Indigenous sovereignty, as the primary cause of the structural dislocation inherently attached to Indigenous criminality. Quince (2007, p. 335) states quite clearly in her work that:

> *"…colonisation has, in fact, directly shaped the socio-economic position of Māori to such an extent that offending produced by poverty and other related demographics, and the sentences that such offending attracts, are connected to ethnic identity….what is happening to Māori within the justice system is not happening to them because of class, and because of the seriousness and prevalence of their offending; at a deeper level it is happening to them because they are Māori".*

For the denigration and deprivation of Māori to be understood it is essential to grasp the contrived and deliberate processes of colonisation. Ross (1998) points to economic exploitation as the main motive for colonisation. Bulhan (2015) adds that economic domination results from political, cultural and psychological attacks to the structures of Indigenous culture. In effect, cultural suppression is a necessary accompaniment of economic domination. A cocktail of deculturation and indoctrination influences the colonial project (Ross, 1998). The idea of colonialism as a 'project' incorporates ideas of a

systematic and planned assault to dominate and assimilate Indigenous communities. This was legitimised by the western ideal of a 'civilising mission'; one bringing Christianity and Western ways of being to the 'savages' (Cunneen & Tauri, 2017).

Furthermore, Tatum (1994) breaks down the colonial project into four distinct phases: 1) the invasion of one racial group into the homelands of another racial group, with the minority taking control of the majority with the primary purpose of obtaining control over resources of economic value; 2) creating a colonial society utilising "cultural imposition, cultural disintegration, and cultural recreation" (p. 35); 3) the "governing of the natives by representatives of the colonising power", using the police and military as the controlling agents (p. 36); and 4) the creation of a caste system whereby the privileged groups (usually white people) have access to the best resources and those unprivileged (usually the Indigenous) experience socio-economic instability due to a lack of access to resources and the purposeful destruction of their life-world. The experience of the colonial project thus results in a range of negative social outcomes over time. One of these is the disproportionate Indigenous incarceration rates - a direct result of this established racist policy within an environment of societal oppression (Ross, 2016). As Tatum (1994, p. 34) points out:

> *Individuals who are the victims of social, economic and political oppression are likely to perceive that oppression and as a result, develop feelings of alienation in which the commission of crime is an adaptive response. In the colonial model, race or colour is the*

ascriptive criterion for differences in subjection to situations of oppression.

This was, and is, a very real process and experience for Māori. Māori experienced colonisation as an onslaught of cultural homogenisation and a "devaluation of every social, economic, religious, cultural or political institution" that was not aligned with British ideologies (Hill, 2004, p. 20). For example, Cunneen, Rowe and Tauri (2017, p. 65) highlight western knowledge as an "integral part of the colonial project…used to construct a particular view of the racialised inferiority of Indigenous peoples". The outcome of this process is described by MacDonald (2003, pp. 57-58) as having left Māori in a position of possessing "non-culture which existed in a sort of limbo". Through the creation of 'Māori as a non-culture', Māori suffered the loss of land, the outlawing of their language, and the banning of spiritual and cultural practices (Hill, 2004). This, in addition to the implementation of an alien criminal justice system (Pratt, 1992), established Māori firmly in what Cunneen and Tauri (2017, p. 45) describe as the "contemporary phenomenon" of over-representation in incarceration statistics common to British settler colonial societies.

A key tool in New Zealand's colonial appropriation was the Treaty of Waitangi. The Treaty was signed in 1840 by representatives of the British Crown and a number of chiefs, ostensibly ceding the sovereignty of New Zealand to the British. There were two main texts: one in English, and one a supposed Māori translation of the English copy. In the English version, Māori are to hold

“chieftainship” as discussed in Article 2, but it is the “tino rangatiratanga” (absolute sovereignty) in the Māori version that many Māori chiefs signed up for (Jeffries & Stenning, 2014). The significance of the Treaty of Waitangi, and its facilitation of disenfranchisement within the colonial enterprise, are discussed in context below.

Returning to Tatum’s system of colonisation, this section unpacks Tatum’s system using the context of Māori as the case study:

Phase 1 – Invasion

The first phase is that of *the invasion of one racial group into the homelands of another, taking control over resources with economic value*. The diagram below demonstrates the systematic colonial absorption of Māori land from 1860 by the use of force, coercion or legislation. The implementation of the Native Land Court is apparent in the huge losses through confiscation throughout the 1860s (Te Ara, 2019). Other pertinent legislation directly implemented to reduce Māori holdings of land at this time included: The Settlements Act 1858 and 1863 (which resulted in a 1.3 million hectare confiscation from engagement in “rebellion”) (Burt, 2011); and the Native Land Act 1865 (regarding individualising land ownership with titles). Further loss is demonstrated during the periods of 1890-1920 when government land purchases boomed regardless of Māori protest (Te Ara, 2019). There was very little left in Māori hands by 1937. This continued, and by 2009 Māori land

ownership amounted to just five% of New Zealand's total landmass (Miller & Ruru, 2009).

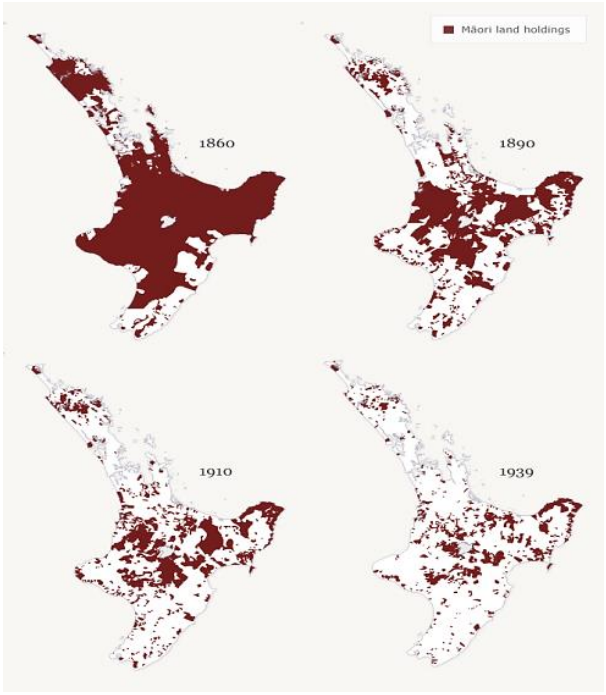

Diagram 1: Loss of Māori Land. Source: (Te Ara, 2019)

Phase 2: Creating a colonial society

After the occupation of land and the claiming of resources of value, Tatum describes the second stage of colonial project as "*establishing a colonial society by way of "cultural imposition, cultural disintegration, and cultural recreation" (p. 35).* The Treaty of Waitangi paved the way for further key legislation which continued this onslaught of disenfranchisement and forced the transfer of economic, social and political power from Māori to the colonisers. Some of this legislation included: the Education Ordinance 1847 (which stipulated that English only must be spoken in schools); the Native Schools Act 1858 (stipulated funding to Native schools only if English was

taught); the Suppression of Rebellion Act 1863 (individuals fighting to defend their land were labelled as a rebellion against the Crown which allowed for punishment of death or prison prior to fair trial); and the Tohunga Suppression Act 1907 (legislation that allowed that anyone practicing traditional healing practices could be liable for conviction).

Phase 3 Governing of the natives

The third stage, according to Tatum is the action of *"governing of the natives by representatives of the colonising power, using the police and military as the controlling agents" (p. 36).* For this to occur, Indigenous ways of justice must be silenced. Pratt (1992, p. 31) asserts that the colonial absorption of land left Māori unable to "…maintain their cultural identity; and without a culture, the various impediments to British intellectual institutional imperialism, such as a power to punish in their own way, would simply fade into the distance of colonial history".

To clarify the connection of land to traditional Māori justice, Jackson (1988, p. 40) explains that "legal duties were manifest and included the ancestrally defined responsibility to maintain order and to protect the land by having a balance between the interlinked animal, plant, spirit and human worlds… shaped by, ancestral thought and precedent". He goes on to define the sanctions that followed as "…part of the holistic inter-relationships defined by that precedent and remembering in ancestral genealogy or whakapapa" (p.

40). Justice was thus tied to the land through oral history which in turn “wove together the inexorable threads of Māori existence” (p. 40).

Another key area of Māori cultural practice impacted by colonialism is social control. Pratt (1992) describes the Māori justice process as inclusive of society, not operating in isolation, and “rooted in the everyday experiences of Māori people” (p. 35). Central to administering justice were the victims’ rights to justice and the redress necessary for that to occur. This redress could, at times, be claimed intergenerationally by next of kin or a tribal claim to recompense where seen appropriate. The most common sanction, according to Pratt, was *utu* (vengeance), most often *muru* (a ritual compensatory process), manifesting in the action of the victim and their whānau plundering the belongings of the offender and their whānau (often to a pre-agreed level). *Tapu* (the forbidden) and other serious offences could result in more severe punishments, possibly death. Redress was important for the restoration of balance (Pratt, 1992).

Pratt makes apparent that the Māori way of justice and the colonial system could not exist side by side due to their differences. The Māori system must, therefore, be “formally silenced” (p. 38), as was the common approach to Indigenous justice systems within British colonial States. While some legislation was passed to incorporate the Māori way (e.g. The Native Exemption Ordinance 1844 allowing *muru* in the form of monetary payment from offender to the victim of theft and the Resident Magistrates Courts

Ordinance 1846 allowing for disputes involving only Māori to be decided upon by Māori chiefs and a magistrate (Ward, 1995)), Māori rights to practice their own forms of justice were systematically removed. Some examples of these incremental encroachments on Māori practices included: the Native District Regulations Act in 1858 - increasing British regulations of what is described as 'the social economy'; the Native District Circuit Courts Acts of 1858 - undermining Māori practices of *taua* (family group retrieving retribution from offender) and *tapu* - taking decision-making from a chief and giving to *runanga* (local council) to uphold and punish within British law; a modification to the Native District Circuit Courts Act which moved authority from the village runanga to a district runanga under the oversight of a British magistrate; and the Residents Magistrates Act 1867 which removed many of the remaining rights to utu nationwide (Pratt, 1992; Ward, 1995). It was the Tohunga Suppression Act of 1907 (as discussed earlier) that nailed the door to Indigenous-led justice firmly shut and in the hands of the colonisers, which relegated specialised Māori social control and religious practices underground, hidden and ultimately extinguished (Pratt, 1992).

The significance of gaining and maintaining control of responses to social harm for the colonial project cannot be overstated. Cunneen and Tauri (2017) point to "criminalisation and punishment" as being "central to the operation of the colonial State…particularly when open warfare was replaced by more regulatory forms of control" (p. 52). They argue that the imposition of a colonial criminal justice system was "an important tool for legitimising the use of force and in imposing a range of cultural, social and institutional values and

process” (p. 46). This aligns with Foucault’s (1977, p. 221) description of the British penal system as being “a subtle, calculated, technology of subjection” and his belief that:

> “*Prison, and no doubt punishment in general, is not intended to eliminate offences, but rather to distinguish them, to distribute them, to use them; that it is not so much that they render docile those who are liable to transgress the law, but that they tend to assimilate the transgression of the laws in a general tactics of subjection*” *(p.272).*

This echoes Foucault’s (1977) view that western penal systems are often devised to maintain and protect the power of the ruling class by utilising laws set by the ruling class and administered by the ruling class. Arguably, this is evident in New Zealand’s history as indicated by the following statistics: Throughout the 19th century, incarceration rates for Māori were between 1.5% and 3% and remained relatively stable until around 1862 when, as settler demand for land increased, so too did Māori resistance to the encroachment (Bull, 2004). Hence, by 1918 the Māori incarceration rate had risen to 4.6% (Workman, 2016). However, Bull (2004) suggests that 328 members of the Pai Maririe movement (a peaceful movement that had evolved from land conflict in the Taranaki), who were shipped off to the Chatham Islands were not included in the official tally (p. 506). This begs the question of what other Māori incarceration data were also omitted? These rates continued with an upward trend to reach 23.3% by 1958 (Workman, 2016).

By 1955, the rates of Māori incarceration had reached a point of societal/State concern, and there was a commission of enquiry initiated which produced the Hunn Report (1961). This report's findings provided socio-economic context to the increases in Māori incarceration rates during that period. It chronicled that: Māori were more likely than non-Māori to be escalated to the Supreme Court for trial; that Māori were more likely to be imprisoned than non-Māori; that 80% of Māori had no legal representation; and that Māori were more likely than non-Māori to plead guilty (80-85% in comparison to 60% non-Māori). This report also proportioned some causal effect to the rate of growth to the significant urban movement of Māori and the associated increase in contact with the criminal justice system (Webb, 2011). However, regardless of this knowledge, between 1950 and 1970 Māori incarceration rates doubled (Workman, 2016).

The massive migration of Māori from tribal homelands into urban areas was viewed by the State as "the means by which the desired goal for Māoridom could be achieved" (Hill, 2009, p. 2). Hill (2009) records the proportion of Māori living in urban areas as high as 80% by the 1980s in contrast to that in 1926 of less than 10%. Hill (2009, p. 2) describes State expectations for Māori once isolated from their cultural bases as having to "…give up their distinctive and collective outlook and 'settle down' to become brown-skinned pakeha. Even their 'brownness' would be modified through intermarriage."

Phase 4 creating the caste system

Tatum depicts the fourth stage as *the creation of a caste system whereby the privileged groups (usually white people) have access to the best resources and those unprivileged (usually the Indigenous) left with instability and lack of access to resource.* In line with this lack of access and in a modern context, 2013 health statistics show that Māori suffer a significantly lower life expectancy that non-Māori, are more likely to suffer a disability, are twice as likely as non-Māori to have cardiovascular disease, are 1.5 times more likely to die from cancer or suffer from anxiety or depression, have twice the chance of respiratory disease or diabetes, and are near double the figures in suicide rates (Ministry of Health, 2013). Importantly, Cunneen and Tauri (2017, p. 5) ascertain that the current socioeconomic condition of Indigenous peoples stems from the "forcible imposition and maintenance of structural conditions of extreme poverty". Moreover, they argue that these conditions have been "actively created and maintained through processes of dispossession and policies of disenfranchisement and social and economic exclusion" (p.5). Current evidence of this remains and is presented comprehensively in the 2018 census results. Two examples, of which there are several, are that Māori endure double the New Zealand rate for unemployment and, in terms of net wealth, the median for "European" New Zealander is five times higher than that for Māori (Stats NZ, 2018, b).

Perhaps Tatum's third and fourth stages of the colonial project would have been unnecessary had Māori died out, as was perceived to be the desired

outcome of the colonisers (Hill, 2004). Māori population numbers certainly declined drastically following the influx of British settlers. At the time of the signing of the Treaty of Waitangi, Māori outnumbered the colonisers by 40 to 1 (Briggs, 2003). 19 years later the colonisers outnumbered Māori (Briggs, 2003). Deaths through war, displacement, urban migration and the disruption to normal economic life and food production, combined with the prevalence of introduced diseases, resulted in the Māori population declining from approximately 150,000 in the early 1800s to 37,500 at the time of 1871 census (Briggs, 2003; Wilson & Haretuku, 2015). However, the Māori population did improve, and by the 1896 census it had increased to 42,000, by the 1901 census to 45,500, and has continued to recover strongly throughout the 20th century (Briggs, 2003). By the 1976 census, the Māori population had grown to 356,574 (Stats NZ, 2013). Māori did not die out, nor did they quietly assimilate. In effect, there was a Māori renaissance.

ii. Māori Renaissance

Māori, as with other Indigenous peoples worldwide, never passively accepted colonisation as their fate. Many continued to fight to maintain their culture and sense of belonging 'as Māori' within the bureaucratic and societal discourses contrived by the colonising process (Simmonds, 2011). Walker (1984) discusses this perpetuated dissent and highlights that, after the Second World War, urban migration produced for Māori a "new generation of leaders more suited to their time" (p. 27). Walker describes the Māori Women's Welfare

League as the “vanguard” in this “…new wave of Māori leadership” (p. 27). The Māori Women’s Welfare League, established in the 1950s, was focussed on improvements to Māori health, pre-school education, childcare and working to effect positive change to government policy for Māori (Walker, 1984). This was followed soon after by the formation of the Māori Council in 1962, which functioned in an advisory capacity to the Government on Māori policy. Walker describes both the Māori Women’s Welfare League and the Māori Council as the “…conservative expressions of Māori activism, pursuing Māori rights within the framework of the parliamentary system” (p. 27). However, Walker also discusses how the urban exposure that migrating Māori experienced “…led to transforming action, resulting in a culture which is freed from alienation” (p.27), and points to the more radical activism that resulted from this new awareness. The impact of the radicalisation of Māori politics is seen quite clearly in the decades that followed.

During the late 1970s and early 1980s Māori collectively resisted government policies of integration and assimilation and publicly demanded a level of self-determination clearly present in the bicultural programme that was included in both Government rhetoric and policy during this period (Workman, 2016). Poata-Smith (1996, p. 97) highlights this “dramatic upsurge” in Māori political activism as having “... a profound effect on New Zealand society” which included State department adoption, or co-option of ‘biculturalism’ (see discussion in Chapter 4) (Tauri, 2011). International movements, such as the women’s liberation movement, the black rights movement and anti-war movements, and the political alignment with New Zealand’s labour movement,

all provided a nest for burgeoning Māori activism (Poata-Smith, 1996). Radical groups emerged, including the Māori Organisation on Human Rights and *Nga Tamatoa;* raising topics of Māori liberation, self-determination, and the need for transformational social action (Walker, 1984). This paved the way for the emergence of the Māori land-rights movement (Matakite o Aotearoa) with their demand for "Not One More Acre of Land", the 1975 Hikoi and the ensuing 1978 stands at both Bastion Point and the Raglan Golf Club (Walker, 1984). These were very public events. They shone a light on colonisation and its barefaced brutality, and publicly highlighted Māori despair clearly juxtaposed with the potential for Māori activism.

Notably, the topic of Māori imprisonment was also forefront at the time. This went hand-in-hand with concerns regarding the numbers of prisoners reoffending and thus the operations of the New Zealand prison system in general from 1977 onwards (Workman, 2016). Publicity aside however, Māori continued to be disproportionately incarcerated. This has been somewhat attributed to the significant increase in gang membership, violence, and a surging crime rate activating a type of moral panic that was inflamed by both the media and the political rhetoric of the time (Workman, 2016). Workman (2016) suggests that this panic fuelled the practices of hard-line policing, repressive legislation and severe sentencing, creating an increase in Māori representation to that of 50% of the prison population by 1980, the effects of which will be discussed in the following chapter.

Chapter 4: State Responses

This chapter highlights key actions of the State that were in direct response to Māori unrest and societal concerns of the justice system's dysfunction. Key reports were ordered by the state, which effected policy and legislation changes. These will be discussed in this section alongside a critique of some of the changes that were initiated.

i) State Reports

> *Demands for change coincided with the reassertion of Māori language and culture and became subsumed in the rhetoric of 'biculturalism' – a policy which operated as a contemporary form of assimilation, incorporating Māori cultural practices and advisory officers into the fringes of existing State agencies. (Kelsey, 1996, p. 185)*

Māori incarceration rates were at crisis point by the early 1980s and Māori discontent became apparent with the worsening situation. The fact that Māori had at that point reached 50% of the prison muster demonstrated the negative impact of rapid urbanisation and signalled a fundamentally flawed criminal justice system (Jackson, 1988). The State's initial response was to instigate several departmental enquiries. These inquiries included (but were not limited to): the *Report of the Penal Policy Review Committee (1981); Puao-Te-Ata-Tu (1986);* and *The Māori and the Criminal Justice System – He Whaipaanga*

Hou: A New Perspective (1988). These reports were instrumental in painting a clear picture of the societal realities for Māori, and of Māori interactions with the criminal justice system. The reports, and a summary of their findings, are discussed in more detail below.

First, the Report of the Penal Policy Review Committee (1981), known as the Casey Report, was undertaken due to concerns in the late 1970s regarding high prisoner reoffending rates. These concerns resulted in an enquiry into correctional 'effectiveness' which was commissioned by the Minister of Justice in 1981. A key finding of the Casey Report was that rehabilitation is unlikely to occur through prisons. This report recommended reducing imprisonment as punishment as much as possible and seeking alternative options to rehabilitation. Recommendations were also made in this report to establish regional prisons administered by regional councils. This was to facilitate the development of community programs and to allow offenders to remain close to their support bases, maintaining and building ties with local community (Williams, 2001). The findings of this report were mostly ignored and between 1982 and 1984 the prison population grew by a further 15% (Workman, 2016).

Secondly, the *Puao-Te-Ata-Tu* Report was commissioned by the Department of Social Welfare in 1986. This report came about during the growing debate of the 1970s and early 1980s when the criminal justice system had come under question and the Department of Social Welfare was publicly criticised as being "racist and incompetent" in its handling of Māori (Williams, 2001, p.

47) . This, in part, led to the 1984 appointment of an advisory group led by John Rangihau. The resulting document *Puao-Te-Ata-Tu* made two significant assertions about the criminal justice system: 1) that the welfare of young people and children was essential in reducing criminality, recognising that social and economic disadvantage was viewed as the root of criminal offending; and 2) that the report itself was a direct proposition for a power share between the government and Māori (Ministerial Advisory Committee on a Māori Perspective for the Department of Social, 1986). Implications and imposition of the State's response to the report is discussed below.

Lastly, and amidst this discontent and critique, Moana Jackson's (1988) *The Māori and the Criminal Justice System – He Whaipaanga Hou: A New Perspective* (1988) Report was released. This study encompassed, for the first time, analyses of interactions and relationships between Māori and the criminal justice system in New Zealand (Tauri, 2005). This report was separated into four parts: 1) the background to offending; 2) offender-based factors that explain offending; 3) systemic factors that drive offending; and 4) imprisonment and suggestions for changes to the system. These findings suggested that Māori believed the justice system itself, along with the police and judiciary, were key protagonists in the outcomes of Māori over-representation in the criminal justice system. Many participants in the study described experiences of institutional racism and biases in their interactions with the police and the judiciary. Jackson's recommendations were underpinned by the philosophy that the "…rightful place of Māori as tangata whenua and partners to the Treaty of Waitangi is the only reality in which

genuine change can happen" (p.25). His recommendations included (but were by no means limited to): strengthening Māori culture and community through education, language and the supporting of vulnerable whānau; bicultural restructuring to reconfigure the monocultural adaption of Māori perspectives within State departments that had been uptaken without the influence of Māori perspective; the implementation of a kaupapa Māori-based criminal justice system that "involves the distinct process to hear, sentence and dispose of charges against Māori Offenders in which the authority to determine the procedure and the law is retained in Māori hands" (p. 37).

ii) Policy changes

The State reaction to the multiple displays of Māori economic and societal discontent, and the resulting reports during the 1970s and 80s, was to introduce a number of policies designed to demonstrate a purposeful 'bi-cultural' response (Tauri, 2011). Policies developed in the early 1970s reflected the State's desire to appear reflexive of cultural diversity. Social equalisation programs escalated in the late 70s and early 80s with a dramatic increase in the display of 'biculturalism' within State departments (Tauri, 1999). Kelsey (1996) highlights that biculturalism became the official State policy after the introduction of Section 56 of the State Sector Act 1988, which required the Chief Executives to recognise and promote Māori involvement in public service. Guidelines with instructions on how to become 'bicultural' were provided to all State departments along with expected targets (Kelsey, 1996).

The initial response from the State was to establish a framework to address ‘Māori over-representation’ in the criminal justice sector by way of reducing their contact with the system (both as offender and as victim), and by increasing the positive participation of Māori with criminal justice (Williams, 2001). From that point on, sector-wide policies were designed and introduced with the stated purposes of: developing Māori programmes from Māori providers; improving and building relationships with Māori communities; establishing interagency cooperation; creating diverse solutions; maintaining an ongoing evaluation of the performance of these (Williams, 2001).

These new policies all tended to incorporate an underpinning ideal of ‘biculturalism’, whereby certain Māori world views or practices were appropriated. Poata-Smith (1997, p. 176) describes these actions of the State, as an attempt “…to appease the rising level of Māori protest…” by implementing policy that contained a “selective incorporation of Māori cultural symbolism” within State departments and institutions. Tauri (1998) provides examples of State implemented ‘bicultural’ policies which included: the creation of Māori advisory roles facilitating the engagement of ‘cultural practice’ but with very little input (if any) into policy development; the establishment of cultural advisory agencies; the adoption of Māori names by departments (and thus their branding/public face); and cultural training courses including Treaty of Waitangi knowledge within the departments.

Several of these ‘bicultural’ policies specifically implemented in the criminal justice system are as follows:

- Increase in Māori police officers to enhance police-Māori relationships and interactions (currently 13% of the Police workforce) (Nash, 2019).
- Increase in Māori officers of the Court (Tauri & Webb, 2012).
- Police iwi liaison role introduced : The stated purpose of this role is to assist in the navigation of cultural aspects in the aim of improving relationships between police and Māori (NZ Police, 2019).
- Māori Focus Units introduced: The concepts behind this policy are derived from the philosophy of cultural identity deficit; being that exclusion from culture can pre-empt offending behaviour, therefore exposure to culture can have an opposing effect. Inmates are provided with cultural training and te reo courses (Byers, 2002).
- Family Group Conferencing (discussed in detail in the case study below).

According to Indigenous scholars, however, these policies were riddled with design errors including (but not limited to) the following: They failed to provide the structural support necessary for their ongoing effectiveness; the use of the cultural concepts co-opted were often completely out of context and therefore potentially harmful to Māori; there was a lack of consultation and expertise from Māori in policy design; and the State failed to comprehensively assess the Māori communities’ capabilities and capacities to respond to their increased responsibilities - potentially setting them up to fail (Durie, 1993; Poata-Smith, 1997; Tauri, 1999, 2005; Williams, 2001). Nor did State

concerns and efforts remain static. Rather, as Kelsey (1996, p. 186) highlights, “political will declined, [and] the rhetoric of biculturalism gave way to the reality of ‘mainstreaming’”.

Meanwhile, critics of State-implemented policies of biculturalism (and the idea of them being culturally responsive) viewed the utilisation of specific cultural symbols and practices as purely tokenistic (O'Reilly & Wood, 1991). They argued superficiality and ascertained the aim of such policies as mere attempts at quashing Māori desires for recognition or as “tokenist distractions from claims for the transfer of real political power” (Smits, 2014, p. 45). Instead of ‘by Māori for Māori’, what occurred in reality was a token gesture allowing a fragment of space for Māori cultural ways to be ‘grafted’ onto a program that was Eurocentric in design, and very much a tactic of co-option set within the larger strategy of ‘indigenisation’ (Tauri, 2005). Tauri (2011) further argues that the ‘bicultural’ adaptations of the State reflect the ‘token nature of the indigenisation process’” He highlights that “indigenisation serves as an inexpensive and politically expedient strategy that allows the Government to be seen to be ‘doing something’ about the Indigenous crime problem, without significantly altering State control of the justice portfolio” (p. 199).

For reasons such as these, and regardless of political climate, scholars suggest that any policy changes or initiatives aligned with the discourse of ‘biculturalism’ have had very little impact on empowering Māori (Sissons,

1990; Tauri, 1999; Williams, 2001). Williams (2001, p. 139) claims that many of these policies "amounted to window dressing rather than Māori involvement in core business". Durie (1993, pp. 23-24) argued that these issues would remain unresolved as long as "Māori policies and programmes are conceptualised on the basis of Māori as a disadvantaged minority…" rather than as "…tangata whenua with constitutional guarantees in terms of some autonomy and residual sovereignty".

In contrast to the purported desire to empower Māori, many view this adoption of a 'bicultural' discourse as a further type of control (Kelsey, 1996; Poata-Smith, 1996; Sissons, 1990; Tauri, 1999; Tauri & Webb, 2011). Sissons (1990, p. 17) suggests that "…while the maintenance and development of bicultural norms and procedures requires the reproduction of a distinctly Māori life-world, bicultural institutions also further the colonisation of this life-world". Furthermore, Sissons adds that this colonising process occurs in two interrelated dimensions: 1) a bureaucratic streamlining of certain Māori ways of being to further State outcomes; and 2) an adaption of Māori values and practices into instruments used for legitimising increased State administration of Māori.

This explains why Williams (2001) points to the departmental co-option of the proposals from reports such as Puao-te-atu-tu as transformed into "something very different from their original concepts" (p. 139). Durie (1998) argues that this form of "cultural capture" was merely a strategy for deflecting Māori

criticism and resistance, and that the adaptation of this bicultural symbolism by the State was symptomatic of the State's need to lubricate the "utility-maximizing individualism" of the neoliberal (discussed further below), deregulated State. Smits (2014, p. 46) adds that such adoption of selective Indigenous ways provided the illusion of "values that are absent from the neoliberal State: belonging to community, relationship to geographical place, celebration of spirituality, and a paradoxically atemporal connection to history and tradition", thus soothing Māori anxieties. This critique can be understood more through the application of Governmentality Theory.

Foucault (2003) theorises the existence of an 'art of governing'. This 'art' involves deliberate and calculated strategies for the maintenance and spread of State control establishing the 'conduct of conduct'. McKee (2009) describes this as a "political project – a way of both problematizing life and seeking to act upon it". (p468). Foucault (2003, p. 307) states that:

> *"If power were never anything but repressive, if it never did anything but say no, do you really think one would be brought to obey it? What makes power hold good, what makes it accepted, is simply the fact that it doesn't only weigh on us a force that says no; it also traverses and produces things, it induces pleasure, forms knowledge, produces discourse. It needs to be considered as a productive network that runs through the whole social body, much more than as a negative instance whose function is repression.*

Foucault also describes the 'governmentalisation of the State' (2003, p. 244). This incorporates the idea that the State does not hold solutions to all

problems, hence it relies upon non-State actors/individuals to deliver solutions whilst still maintaining a public perception of being pivotal in both the conceptualisation of the issue, as well as instrumental in guiding the solution. Many Indigenous critiques of State preservation of societal control by adopting cultural fragments to quell dis-ease, certainly aligns with Governmentality theory. For the purpose of providing a more detailed critique of these 'bicultural' type State policy responses to Māori criticism, and application of Governmentality theory, the case study of Family Group Conferencing is detailed below.

Family Group Conferencing – A Case Study in Appropriation and Biculturalisation

> *"…justice for Māori does not mean the grafting of Māori processes onto a system that retains the authority to determine the extent, applicability and validity of those processes" (Jackson, 1995, p. 34).*

Family Group Conferences (FGCs) were adopted within a youth justice setting following the enactment of the Children, Young Persons and Their Families Act (1989) (Williams, 2001). This Act's development was influenced by the concerns of institutional inappropriateness and racism towards Māori within New Zealand's criminal justice system and by the need for the State to appear proactive in its response to these concerns (Tauri, 2005). Family Group Conferences purportedly provide a forum for restorative justice for youth

offenders and their victims, allowing for face-to-face discussion and potential reconciliation (Cleland & Quince, 2014).

This application of restorative justice (RJ) is considered by many to be based on Māori traditional philosophy and practice; however, this is a highly debated point (Tauri, 2009). Māori scholars question the validity of such claims when the policies and administrative powers surrounding RJ and FGCs are designed by, and occur within, an inherently oppressive colonial framework (Moyle, 2013; Tauri, 2009). An explanation of this critique follows.

Managing the offending of children (10-13 years) and youth (14-16 years) falls under the jurisdiction of the Youth Court in New Zealand (Slater, Lambie, & McDowell, 2015). Family group conferences are central to this process and are a legally mandated process under the Children, Young Persons and Families Act 1989 (Cleland & Quince, 2014). It is legislated within this Act that legal proceedings will not be started against the child/youth unless there has been consultation with a Youth Justice Co-ordinator and an FGC has been undertaken (Slater et al., 2015). This was managed by the Department of Child, Youth and Family (now known as Oranga Tamariki), the service component to the Ministry of Social Development (Slater et al., 2015). Those present at a FGC are the young person offender, members of their whānau/family, anyone by invitation of the offender or their whānau, the victim or victims (or their representative), a support person for the victim (if required),

the police, the offender's lawyer (if required), and sometimes a social worker (Morris, 2004).

Although some Māori believed the establishment of the FGC to be a step forward towards establishing some semblance of power share with the State, many Māori scholars argue the opposite to be true. For example, Love (2000) highlights the appropriation and transformation, and, therefore, removal of key elements such as whānau rangatiratanga that are crucial to the processes' success. Often the outcomes result in whānau, hapū, or iwi being held accountable for resolution yet have none of required resources to do so provided (Love, 2000). Structural impediments for the development of "Iwi Social Services", as allowed for in the Act, clearly state the need for approval from the Director General of Social Welfare to function (an arm of the State) (Love, 2002).

In a recent study researching the experiences of Māori social workers participating in FGCs, it was found that several of the practitioners reported the experience of inappropriate cultural conduct during FGCs stemming from the Eurocentric, one size fits all, approach to youth justice (Moyle, 2013). These practitioners highlight the use of imported risk assessment tools as a particularly problematic area, in that these do not address historical factors such as colonisation or dispossession nor the contemporary issues of structural racism that are a lived reality for Māori. Many of the practitioners also identified a lack of working knowledge of a Māori cultural perspective

amongst those working within the classification of bi-cultural practitioners. As a result, both whānau participation and the potential positive outcomes for those involved are often diluted or depleted. While some practitioners reported some positive experiences with FGC practice, for the most part experiences were reported as largely negative. Love (2017) describes several concerns relating to the stability and success of FGCs including:

- Under-resourcing: can result in key people unable to attend FGCs due to a lack of affordability to travel; difficulty in ongoing assessment; and an inability to access resources and services; and
- Professional involvement: can intimidate whānau therefore inhibiting participation; disempower whānau; power and control dynamics impede successful outcomes; the creation of expert knowledge of processes and outcomes potentially undermine whānau decision making; reinforcing colonial oppression and powerlessness, feeling revictimised; the perception of the appropriation of cultural elements used as a tool for control.

Tauri (2009, p. 4) argues that outcomes, such as those described above, are precisely in line with the policy sector standardising RJ practice through a "policy focused process of legitimation". This process begins with community action for the implementation of RJ processes, followed by clarity of function by State officials, and, lastly, the provision of State policy direction which creates the rubric for formal use. The result is a top-down management system that ensures State control through "design, delivery and funding"

(Tauri, 2009, p. 7). Cunneen (2003) argues that concepts such as FGC are deliberately designed to allow the State to create a space whereby low-level offenders are dealt with by community leaving the State with excess resources for implementing policies of penal populism and punishment.

Complex variables mean the effectiveness of FGCs is difficult to ascertain. Cleland and Quince (2014) do highlight a lack of ongoing evaluation and assessment of the effectiveness of FGCs meeting their primary goals of "diversion; accountability; victim involvement; family involvement; consensus decision making; cultural appropriateness; and due process" (p. 144). They suggest, while there was an early "flurry" of research done around the time of implementation (see Maxwell and Morris, 1992), interest has since dwindled and demographics have significantly changed. Cleland and Quince (2014) argue that, for the FGCs to remain effective, ongoing and consistent research and evaluation is necessary. Remarkably (but perhaps not unpredictably) there has been very little research into FGCs being a "culturally appropriate and empowering justice mechanism" for Māori (Moyle & Tauri, 2016, p. 88).

Despite criticism of FGC's functional and elemental shortcomings, Moyle (2013, p. 7) succinctly expresses that "[i]t is as though nothing has progressed in terms of FGC practice development and families are being asked to ride round in the same old Cadillac without it being maintained". One can easily argue that the State's lack of responsiveness to criticism, and its inability to

follow through on evaluating and/or improving the capability of FGCs to meet their stated goals, is itself indicative of a lack of intent to meet Māori needs.

iii) Neoliberal intent contradicts penal expansion

Throughout the 1980s and 1990s New Zealand became a glowing example of neoliberalism in action. A near instantaneous roll-out of neoliberal policy took the country from what was one of the most regulated economies to one that was leading the way in free market reforms (Roper, 2015). Welfare was shrunk alongside the mass corporatisation of State operated assets and staff culled from government departments. This resulted in heavy job losses from what had previously been very secure employment, with a slowly diminishing welfare system to fall back on (Cunneen et al., 2013).

Many policies relevant to the criminal justice system were introduced in alignment with neoliberalism at a time when the State was attempting to induct a bicultural sensitivity in its processes. Family group conferences, for example, are theoretically demonstrative of the State removing itself from the process of dealing with youth offending, and placing responsibility in the hands of community and family (although control was handed back to State officials as discussed in the FGC case study above). Restorative justice itself can be considered neoliberal in content in that it holds the potential to reduce court and prison costs, and for the focus on ‘responsibilising the individual’

(see discussion below). Tauri (2009, p. 3) argues that many of the State-led policies implemented as alternatives to incarceration were introduced to cut costs, thus fitting nice and tidily within neoliberal policy boundaries. However, lived realities proved the reverse.

Of significant note, and pertinent to the era, is the understanding that the world's highest imprisonment rates lie with those Western style democracies that have implemented neoliberal polices most stringently, and New Zealand certainly sits squarely in this category. These punitive outcomes resulted in part from the rise of neoliberalism and the subsequent decline of the welfare State. The focus had shifted from a welfare-based system into that of individual accountability (individualisation) and responsibility by means of deterrence and punishment (Cunneen et al., 2013). This promotion of individualisation, combined with the social insecurity of the time, altered social relationships and damaged society's view of the State (Pratt, 2017). As the State retreated from its 'nannying' of society, Māori imprisonment numbers continued to climb.

On one hand we have State minimalisation of presence by supposedly 'handing over' responsibility to community, as expressed by Governmentality Theory, yet, on the other hand, prison spending increased. Pratt (2017) discusses this as a clear juxtaposition of penal policy spending with other areas of public spending, particularly within the neoliberal context. Between 2002 and 2008 for example, four public prisons were built at the cost of one

billion dollars to the New Zealand taxpayer. Pratt describes this as indicative of a movement towards a prison-industrial complex. He further argues that the construction of two more prisons under the private ownership and management of the multi-national corporation, Serco, - a move from exclusively State-run/owned prisons - also signifies this shift. Whilst private prisons fit with neoliberal philosophies, the building of more prisons is in clear contrast to the State's projected public desire to reduce custodial sentences in New Zealand. Pratt (2017) also highlights that the penal policy views of the State since the Casey Report's release in 1981 has reversed and that the State has in fact implemented "…a series of measures deliberately intended to increase the use of prison" (p. 350). His examples of these measures include an increase in the use of preventative detention; longer finite sentences; the Third Strike Law; the Sentencing and Parole Reform Act 2010; and restrictive laws on bail. Furthermore, Pratt (2017) posits that, rather than the States justifications of punitive penal policies being necessary for keeping its citizens safe, the opposite is true, and that these policies have "…damaged the country's health and well-being" (p. 349).

There was, however, a piece of legislation passed (and a subsequent re-interpretation of that Section), which appeared to be angled towards reducing Māori criminality and incarceration, the Criminal Justice Act 1985.

iv) The Criminal Justice Act 1985

The Criminal Justice Act (CJA) came into force on 1 October 1985. This new legislation was guided by societal concerns regarding biculturalism, increasing rates of violent crime, and the lack of community involvement in the criminal justice system (Chetwin, Waldegrave, & Simonsen, 2000).

A submission to the Statutes Revision Committee on the Criminal Justice Bill 1985 by the Department of Justice discussed the high rates of Māori imprisonment in comparison to non-Māori. The submission highlighted that the disparity remained when race as a variable was eliminated and socio-economic status used instead (as cited in Chetwin et al., 2000). The submission advocated for community alternatives to imprisonment for Māori and the need for a clear provision of court access to the cultural background and personal circumstances of the offender through a community representative (as cited in Chetwin et al., 2000).

On the basis of this advice, clause 14A (which later became Section 16 of the CJA) was included in the Bill (Jeffries & Stenning, 2014). During the second reading in Parliament, the then Minister of Justice, Geoffrey Palmer, discussed the purpose of clause 14's inclusion in the Bill:

> *Clause 14A is an important new provision that allows offenders appearing before a court for sentence to call a person to speak to the court about the offender's ethnic or cultural background, and on the*

way in which that background relates to the offence or may assist in the prevention of reoffending by the offender. The court is obliged to hear any person called by the offender unless it is satisfied that for some special reason it would not be of assistance to hear that person. The purpose of the new provision is to secure the co-operation of ethnic minorities that at present experience high rates of imprisonment in seeking ways of finding alternatives to imprisonment. Clause 14A has been framed to apply generally to persons of all races to avoid any argument that it favours some racial groups at the expense of others" (464 New Zealand Parliamentary Debates 5834).

Section 16 of the Act was essentially designed with Māori as the focal point but was worded to be inclusive of other minorities to avoid appearing to favour one group over another (Chetwin et al., 2000). The aim of this Section was to involve the community in proposals of community-based sentences as an alternative to imprisonment (Chetwin et al., 2000). This Section allowed for a layperson to speak on the “cultural” and “ethnic” circumstances of the offender, and on how these may relate to the offending or contribute to the reduction of future offending, whilst offering options for community-based sentencing (Chetwin et al., 2000; Webb, 2011). It is worded as follows.

Section 16 Offender may call witness as to cultural and family background

(1) Where any offender appears before any Court for sentence, the offender may request the Court to hear any person called by the offender to speak to any of the matters specified in subSection (2) of this Section; and the Court shall hear that person unless it is satisfied that, because the penalty is fixed by law or for any other special reason, it would not be of assistance to hear that person.

> *(2) The matters to which a person may be called to speak under subSection (1) of this Section are, broadly, the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.*

Community rehabilitation programs under the Act could not exceed 6 months in length if they were residential, or 12 months if non-residential, and allowed for placements in the care of the offender's Kaumatua, whānau, iwi, hapū or marae (Webb, 2011).

An example of Section 16 in action was seen in the case Wells v Police (1987). This case involved a 20 year-old Māori female, who pleaded guilty in the District Court to charges of breaching periodic detention and for the receiving of stolen goods. She received two sentences, one of two-months and another one of ten-month's imprisonment to be served concurrently. An appeal was lodged based on a misinterpretation of Section 16 by the presiding judge for disallowing a Section 16 report. The appeal argued this resulted in an excessive sentence. Upon appeal and consideration of background information that would have been included in the Section 16 report, the appellant judge allowed the appeal and ruled for a community-based sentence, suggesting that rehabilitation for the offender was more likely in the care of her own people.

This was, however, one of only a few examples of the potential of Section 16 being actualised. During an investigative exercise, which took place over a six-month period in 1986/87, eight District Courts were monitored. This investigation revealed that only two of the Courts had recorded the use of Section 16 for a total of 19 cases (Chetwin et al., 2000). This represented 0.25% of instances in which a Māori or Pacific Island offender was convicted of a crime during this period (Chetwin et al., 2000). Section 16 continued to be rarely used throughout the 1990s due to a general lack of awareness of its very existence, and the resistance of those working within the system to use it at all (Chetwin et al., 2000; Jeffries & Stenning, 2014). This fuelled the need for an investigation into the purpose, use, effects and the possible reasons for the lack of use of Section 16, which was undertaken by the Ministry of Justice in 1999 and 2000. The report, *"Speaking about cultural background at sentencing: Section 16 of the Criminal Justice Act 1985"*, was published in 2000.

The findings of the report demonstrated a continued low utilisation of Section 16 and a lack of awareness of its part in the court system. However, this report also found that when Section 16 was used it could effectively improve both the process and outcomes of sentencing. A lack of clarity in the wording of the Section was highlighted as problematic and suggestions were made about clearly defining allowable content, the inclusion of restorative processes undertaken, and the need to clearly State the allowance of multiple spokespersons.

However, societal circumstances changed with a sharp rise in serious violent crime in the mid-1980s (Newbold, 2008). This rise created a sustained pressure on the government from the media, lobby groups and parliamentary opposition to increase sentences and tighten parole and bail laws (Newbold, 2008). Workman (2016) describes the 1985 Act as being "overtaken by retributive public opinion and political rhetoric by the time it was passed" and heavily amended to reflect these punitive attitudes in 1987, 1993, and 2002 (p.96). This effected a 60% increase in prison numbers between 1985 and 2002 (Newbold, 2008), and the implementation of new penal legislation by way of the Sentencing Act 2002.

v) The Sentencing Act 2002

The focus on community-based alternatives to prison during the 1980s and early 1990s was overtaken by the political shift towards more punitive responses despite declining crime rates (Webb, 2011). The Sentencing Act (2002) (SA) was introduced during this time of penal populism and a discursive demand for punitive legislation and intervention shaped the sentencing policy by emphasising the offender's accountability for harm to both victim and community (Burt, 2011). This shift in policy focus is reflected in the increase of prison numbers by 40% in the 5 years following the Act's implementation from 2002 to 2007 (Newbold, 2008).

One factor contributing to this increased prison population was that the SA removed the judge's discretionary rights to impose suspended sentences which were often imposed on those with a low risk of reoffending (Burt, 2011). This resulted in many women with children, for example, receiving custodial rather than suspended sentences although they potentially had a lower risk of reoffending (Burt, 2011). Statistics show that between 2001 and 2012 the female prison population grew by 70% and has continued to rise until recently (Jeffries & Newbold, 2015; Workman & Mcintosh, 2013). Proportionately, this heavily impacts Māori women: 87% of imprisoned females are mothers, and 58% of those are Māori women (SUPERU, 2015; Toki, 2018).

There were, however, certain Sections within the SA which still focused on community-based actions or a philosophy of setting the least possible time of imprisonment. While this thesis focuses on a critique of Section 27 of the SA, the Section does not stand alone. Section 27 is supported by a legislative framework designed to allow it to function and achieve its stated aims. These sections are: 7, 8, 9, 10, 16, 25, 50 and 51. They create a framework or set of guiding principles for sentencing decisions, in general, while also supporting Section 27.

Section 7(1)(h) states one of the purposes of sentencing as the need to consider the rehabilitation and reintegration of the offender.

Section 7 Purposes of sentencing or otherwise dealing with offenders

(1) The purposes for which a court may sentence or otherwise deal with an offender are—

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or

(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or

(c) to provide for the interests of the victim of the offence; or

(d) to provide reparation for harm done by the offending; or

(e) to denounce the conduct in which the offender was involved; or

(f) to deter the offender or other persons from committing the same or a similar offence; or

(g) to protect the community from the offender; or

(h) to assist in the offender's rehabilitation and reintegration; or

(i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

(2) To avoid doubt, nothing about the order in which the purposes appear in this Section implies that any purpose referred to must be given greater weight than any other purpose referred to.

Section 8 (a), (g), (h), (i), and (j) are particularly relevant to Section 27 in that they demand attention be paid to the degree of culpability of the offender; less restrictive sentencing where applicable; a need to account for any circumstances which may make any particular sentence disproportionately severe; a regard of whānau and cultural aspects ensuring sentence fairness and suitability, and consideration of any outcomes from restorative justice processes.

Section 8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

(a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and

(b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and

(c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and

(e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and

(f) must take into account any information provided to the court concerning the effect of the offending on the victim; and

(g) must impose the least restrictive outcome that is appropriate in the circumstances, in accordance with the hierarchy of sentences and orders set out in section 10A; and

(h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and

(i) must take into account the offender's personal, family, whānau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and

(j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

Section 9 (below is an abbreviated version, for full version see Appendix 1) addresses aggravating and mitigating factors. Sections 3a (d), 4 (a), and 4 (b) allow judges flexibility in sentencing, discussing the right of inclusion of any other relevant or perceived pertinent mitigating factors that may influence sentencing outcomes.

Section 9 Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case (abbreviated)

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) whether and when the offender pleaded guilty:

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity/understanding:

(f) any remorse shown by the offender, or anything as described in Section 10:

(fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:

(fb) any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement:

(g)any evidence of the offender's previous good character:

(h) that the offender spent time on bail with an EM condition as defined in Section 3 of the Bail Act 2000.

(3) Despite subSection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(3A) In taking into account that the offender spent time on bail with an EM condition under subSection (2)(h), the court must consider—

(a) the period of time that the offender spent on bail with an EM condition; and

(b) the relative restrictiveness of the EM condition, particularly the frequency and duration of the offender's authorised absences from the electronic monitoring address; and

(c) the offender's compliance with the bail conditions during the period of bail with an EM condition; and

(d) any other relevant matter.

(4) Nothing in subSection (1) or subSection (2)—(abbreviated)

(5) In this Section, procedural requirement means a requirement imposed by or under—(abbreviated)

Section 10 supports the acknowledgement of any amends or reparation made (or attempted to be made) by the offender to the victim or their whānau.

Section 10 Court must take into account offer, agreement, response, or measure to make amends

(1) In sentencing or otherwise dealing with an offender the court must take into account—

(a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim:

(b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur:

(c) the response of the offender or the offender's family, whānau, or family group to the offending:

(d) any measures taken or proposed to be taken by the offender or the family, whānau, or family group of the offender to—

(i) make compensation to any victim of the offending or family, whānau, or family group of the victim; or

(ii) apologise to any victim of the offending or family, whānau, or family group of the victim; or

(iii) otherwise make good the harm that has occurred:

(e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

(2) In deciding whether and to what extent any matter referred to in subSection (1) should be taken into account, the court must take into account—

(a) whether or not it was genuine and capable of fulfilment; and

(b) whether or not it has been accepted by the victim as expiating or mitigating the wrong.

(3) If a court determines that, despite an offer, agreement, response, measure, or action referred to in subSection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

(4) Without limiting any other powers of a court to adjourn, in any case contemplated by this Section a court may adjourn the proceedings until—

(a) compensation has been paid; or

(b) the performance of any work or service has been completed; or

(c) any agreement between the victim and the offender has been fulfilled; or

(d) any measure proposed under subSection (1)(d) has been completed; or

(e) any remedial action referred to in subSection (1)(e) has been completed.

Section 16 of the Act suggests a community sentence whenever practicable, with the principle of community safety first and foremost.

Section 16 Sentence of imprisonment

(1) When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.

(2) The court must not impose a sentence of imprisonment unless it is satisfied that,—

(a) a sentence is being imposed for all or any of the purposes in Section 7(1)(a) to (c), (e), (f), or (g); and

(b) those purposes cannot be achieved by a sentence other than imprisonment; and

(c) no other sentence would be consistent with the application of the principles in Section 8 to the particular case.

(3) This Section is subject to any provision in this or any other enactment that—

(a) provides a presumption in favour of or against imposing a sentence of imprisonment in relation to a particular offence; or

(b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

Section 25 provides the right for the judge to adjourn court to allow for the completion of restorative measures to be undertaken, rehabilitation programmes to be completed (as can be suggested as possible benefits in a Section 27 report), and for the court to determine the offender's responses to these processes.

Section 25 Power of adjournment for inquiries as to suitable punishment

(1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:

(a) to enable inquiries to be made or to determine the most suitable method of dealing with the case:

(b) to enable a restorative justice process to [occur, or to be completed]:

(c) to enable a restorative justice agreement to be fulfilled:

(d) to enable a rehabilitation programme or course of action to be undertaken:

[(da) to determine whether to impose an instrument forfeiture order and, if so, the terms of that order:]

(e) to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

(2) If proceedings are adjourned under this Section or under [Section 10(4) or 24A], a Judge or Justice or Community Magistrate having

jurisdiction to deal with offences of the same kind (whether or not the same Judge or Justice or Community Magistrate before whom the case was heard) may, after inquiry into the circumstances of the case, sentence or otherwise deal with the offender for the offence to which the adjournment relates.

Sections 50 and 51 relate to specific sentencing allowances for community-based or alternative programmes perceived as relevant to the offender.

Section 50 Special conditions related to programme

A court may impose any special condition or conditions related to a programme if the court is satisfied that—
(a) there is a significant risk of further offending by the offender; and
(b) standard conditions alone would not adequately reduce that risk; and
(c) the offender requires a programme to reduce the likelihood of further offending by the offender through the rehabilitation and reintegration of the offender.

Section 51 Programmes

For the purposes of Section 50, programme means any of the following that is not residential in nature:
(a) any psychiatric or other counselling or assessment:
(b) attendance at any medical, psychological, social, therapeutic, cultural, educational, employment-related, rehabilitative, or reintegrative programme:
(c) placement in the care of any appropriate person, persons, or agency, approved by the chief executive of the Department of Corrections, such as, without limitation,—
(i) an iwi, hapū, or whānau:
(ii) a marae:
(iii) an ethnic or cultural group:
(iv) a religious group, such as a church or religious order:
(v) members or particular members of any of the above

In theory, all of the Sections listed above should enable Section 27 to function in an effective way.

a) Section 27 of the Sentencing Act 2002

Section 27 of the SA is an expansion of Section 16 of the CJA discussed earlier, and represents a more specific and clear identification of the Section's purpose and function (Roberts, 2003). The revised wording is perceived as a considerable improvement to the earlier Section 16 of the CJA 1985, acknowledging the offender's background and clarifying the function and purpose of the provision (Roberts, 2003). The revision also clarifies that an offender is entitled to multiple witnesses appearing on their behalf when enacting Section 27, whereas the earlier Section 16 only allowed for one such person (Roberts, 2003). The new Section 27 was also strengthened by clearly stating the obligation of the court to hear the witnesses, and for the judge, when appropriate, to suggest the benefit of invoking it to the offender if not invoked (Roberts, 2003).

Section 27 reads as follows:

> ***Section 27 Offender may request court to hear person on personal, family, whānau, community, and cultural background of offender***
> *1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—*

(a) the personal, family, whānau, community, and cultural background of the offender:
(b) the way in which that background may have related to the commission of the offence:
(c) any processes that have been tried to resolve, or that are available
to resolve, issues relating to the offence, involving the offender and his or her family, whānau, or community and the victim or victims of the offence:
(d) how support from the family, whānau, or community may be available to help prevent further offending by the offender:
(e) how the offender's background, or family, whānau, or community support may be relevant in respect of possible sentences.

(2) The court must hear a person or persons called by the offender under this Section on any of the matters specified in subSection (1) unless the court is satisfied t there is some special reason that makes this unnecessary or inappropriate.
(3) If the court declines to hear a person called by the offender under this Section, the court must give reasons for doing so.
(4) Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this Section.
(5) If an offender does not make a request under this Section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subSection (1).

Many critics suggest that cultural background methodology in sentencing is inappropriate for tackling the complex socio-cultural causes of criminality (Clark, 2014). From a perspective of everything being equal, it may seem unfair to impose a seemingly lesser penalty on two different individuals for the same offence. But contexts are by no means equal - as the incarceration statistics suggest (and as some of the research participants related in their comments discussed later in this thesis). By addressing unique systemic

factors, and imposing specific and personalised sentencing, effective rehabilitation of an individual can occur (Clark, 2014).

Section 27 of the SA allows New Zealand judges this flexibility. The requirement for courts to consider the cultural background of an offender acknowledges historical injustices and the impact this has on offending by Māori today. It thus has the potential to preclude systemic bias at sentencing (Clark, 2014).

However, there have only been three statistical investigations comparing the sentencing outcomes of Māori to non-Māori since the introduction of Section 16 of the CJA (see Deane, 1995; Goodall & Durrant, 2013; Triggs, 1999). All three investigations show no discernible correlation between the introduction of either Section 16 of the CJA, or Section 27 of the SA and overall trends of sentencing or incarceration of Māori over that time (Jeffries & Stenning, 2014, p. 478). This may well be due to the lack of use of both Sections. This underuse is emphasised and explained by O'Driscoll (2012, p. 358), who claims Section 27 is a "potentially powerful tool in a defence counsel's arsenal", while also pointing to it being one of the most unknown and under-utilised components of the SA. Toki (2018) highlights that six years later, Section 27 is still being underutilised.

More recently, Section 27 has been brought to the forefront with several Section 27 reports informing sentencing decisions (some are listed in the next section). There also appears to be a bureaucratic push to implement the Section, as highlighted in the New Zealand District Courts Annual Report 2018 in which Chief District Court Judge Jan-Marie Doogue urges Courts to take "…a more comprehensive approach to inform sentencing decisions using cultural reports under s27 of the Sentencing Act 2002" (District Court of New Zealand, 2018, p. 8).

Public awareness of the benefits of Section 27 has also increased recently. Mainstream media has exposed the regular occurrence of judges ordering Ministry of Justice funded Section 27 reports without legal provision for this. Funding was halted in June 2018. There is no automatic provision for this within legal aid, and a legal aid extension must be applied for to fund the report, even though many are ineligible for legal aid (Smith, 2019). Chief District Court Judge Doogue has also recently sent a request to the Ministry of Justice for a law change, enabling judges the right to request a fully funded Section 27 report (Smith, 2019).

b) Recent Cases

The following recent cases are examples of the current understandings and potential of Section 27 in the lives of Māori offenders. This by no means

encompasses all that is possible; rather it is a handpicked illustration of what has occurred since around mid-2018.

Solicitor-General v Heta (2018)

A significant appeal decision by Judge Whata in the Solicitor-General v Heta (2018) case became publicly known by way of the media. Heta had pleaded guilty to a grievous bodily harm and a common assault charge. The judge presiding over the original case had sentenced the offender to a three-year and a two-month imprisonment after discounts had been applied. 30% of this discount was attributed to the offender's personal circumstances as explained in the presented Section 27 report. The appeal addressed two points: 1) did an earlier case preclude the discount; and/or 2) was the end sentence manifestly inadequate? Judge Whata upheld the earlier discount and explained that the deprivation that affects Māori is a generally traceable link between said deprivation, the offender and the offence. He observed that:

> *[41] There is no express requirement to have regard to systemic Māori deprivation in sentencing. However, the Court when fixing sentence may consider 'any aggravating or mitigating factor the court thinks fits. Section 27 then mandates consideration of the full social and cultural matrix of the offender and the offending. There is no obvious reason why this should exclude evidence of systemic Māori deprivation and how (if at all) this may have contributed to the offending. On the contrary, inclusion of all material background factors in the assessment aligns with the underlying premise of s 27 just mentioned and it better serves the purposes and principles of sentencing to identify and respond to all potential causes of offending, including where relevant, systemic Māori deprivation. It may inform, among other things, the*

actual and relative moral culpability of the offender and the capacity for rehabilitation.

Because every individual's circumstances are different, Whata ascertained that it cannot be assumed deprivation is present in the life of all Māori, thus highlighting the importance and relevance of a Section 27 report. Whata also discussed how deprivation and crime may be unrelated and therefore connections must be made within the report to show these linkages. He explained:

[49] … the evident legislative policy of s 27 is that background factors, such as the presence of systemic deprivation, may be relevant to individualised justice. I agree however that the presence of deprivation, systemic or otherwise, in the lives of all Māori offenders cannot be assumed. This brings back into focus the significance of s 27. It mandates and enables Māori (and other) offenders to bring to the Court's attention information about, among other things, the presence of systemic deprivation and how this may relate (if at all) to the offending, moral culpability and rehabilitation. Thus, the cogency of any s 27 information, and the likely presence of systemic deprivation and strength of the linkages between (among other things) that deprivation, the offender and the offending, together with the availability of rehabilitative measures to specifically address the effects of systemic deprivation, will be critical to the assessment.

Judge Whata went on to explain how and where these connections are present:

[50] The evidence of the presence of systemic deprivation (or social disadvantage more generally) on an offender need not be elaborate.

> *The symptoms of systemic Māori deprivation are reasonably self-evident, including (among other things) intergenerational social and cultural dislocation of the whānau, poverty, alcohol and or drug abuse by whānau members and by the offender from an early age, whānau unemployment and educational underachievement, and violence in the home.*

R v Hurrell (2018)

This case provides an example of the discretionary capabilities possible with a wider understanding of the offender's background. The offender in this case had a history of state care. The Section 27 report discussed that the "link between early life and environmental influences and representation in criminal statistics is clear" and that "the removal from whānau and whakapapa, has an ongoing detrimental effect on the offenders "understanding of a place within Te Ao Māori and society" [41]. The presiding judge acknowledged that "addressing your [the offenders] compromised Māori cultural identity is crucial to unlocking your [the offenders] rehabilitation potential" [52]. The judge awarded a 50% discount to the starting point sentence, which included the acknowledgement of a guilty plea, cooperation, youth, and the expression of remorse. Although the Section 27 report was not directly awarded any sentencing discounts, the judge stated that the "psychological and cultural reports most assist me [the judge] by pointing the way to you [the offender] turning your life around with the help which you must receive" [101]. It is also significant to highlight, that in this decision the judge declined to impose a minimum period of imprisonment. This permits the parole board to assess the

risk of releasing the offender, and in doing so, allows the offender the incentive of a possible early release.

HM v R (2019)

The case HM v R (2019) provides an example of a reduction in sentencing affecting a non-custodial sentence. This case was appealed partly due to claims of an insufficient discount applied to a sentence on matters addressed in a Section 27 report (originally a 10% discount). The presiding appeal judge discussed the “pervasive and persistent social disadvantage affecting Māori” [31] as being indisputable, and referenced Judge Whata’s ruling in the above case with regard to deprivation needing a demonstrable connection to the offence. He observed that the intergenerational effects of colonisation as described in the offender’s cultural report could not be considered linked to the offence, however the judge did suggest that the link is present to “some degree and…should have been acknowledged” [38]. This resulted in an increase in discount from 10 to 15%, quashing the original imprisonment sentence and invoking a lesser sentence of home detention.

R v Sanders (2019)

Another case of significance is R v Sanders (2019) - an example of a third strike offence. This case is important as it represents the scope of Section 27 report capabilities. Again, within the context of the offender’s life the report acknowledges the experience of State care. The Section 27 report also

discusses the offender as having a “strong sense of taha Māori, being well versed in…whakapapa” and as having “lifelong interactions” [14] with their Marae communities. However, it is also acknowledged that the ongoing “isolation from the pro-social influences of whānau, hapū and iwi” [15] has enabled the offenders “…inadequate development…and…damaging behaviour” [15]. The judge highlights that the offender sees the trajectory of their life “from welfare intervention, to youth offending, and adult offending, all in a gang context – as normal, natural and inevitable” [14]. Whilst the report writer is quoted by the judge as describing the offender as “the worst kind of offender in many ways” [17] it is also expressed in the report that (in the judge’s words) “a finite and proportionate sentence, served in a facility providing for rehabilitation, will enable you [the offender] to make the changes you [the offender] need” [17]. A maximum sentence of 14 years with a minimum period of seven years imprisonment was bestowed on the offender.

The literature review undertaken in this study has highlighted the need to comprehend the usability and feasibility of Section 27 in its lived application within the criminal justice system. For this purpose the intent of the following research is to delve, in depth, into Section 27’s application through the lived experience of eight defence lawyers alongside four cultural consultants employed to pen said reports.

Chapter 5: Methodology

i. Overview

A critical approach to research has been chosen as an appropriate method for this study. This approach is underpinned by the idea that "…individual and group behaviour and meaning…" is crafted by both the "…structures and the processes of dominance" (Schensul, 2008, p. 518). The critical method can potentially expose these as patterns of dominance and control and bring to the forefront the means by which these are both sustained and repeated (Schensul, 2008). A critical approach can also uncover and potentially address power imbalances and injustices, and the responses, resistances and voices of agency proximal to the issues (Schensul, 2008). Breitkreuz and Swallow (2019) suggest that the aim of this approach is to explain a particular phenomenon and to investigate the differing impacts of that phenomenon when accounting for concepts such as gender, class and race. They emphasise that, by uncovering and exposing any existing injustices, this method allows for changes and solutions to be proposed.

To gain a deeper understanding than quantitative statistics provide, the information required to understand Section 27's usage, and the potential barriers to its effectiveness, comes best from those professionals with a lived experience of it in action. The questions to be answered encompass human values and opinions. Thus, it is through qualitative interviews that the in-depth qualitative data necessary for the purposes of this research is obtained.

Qualitative interviewing is one of the most common research methods used for data retrieval when seeking to understand social phenomena within a social science research context (Travers, 2013). This method can allow a view into the lived experience of the world that is often overlooked or remains unseen (Rubin & Rubin, 2005). Qualitative interviews are also held to be highly effective in scoping rich data from smaller data sets. The nature of the information required for this specific research, coupled with the specialised knowledge of those holding this information, necessitated interviews guided by open ended questions (Starks & Brown Trinidad, 2007). This type of interview method is a non-neutral process held between two or more people, involving the interaction between these people, which produces “negotiated, contextually based results” (Fontana & Frey, 2000, p. 646).

Both subjectivity and meaning are principles underpinning the theoretical framework of qualitative interviews (Travers, 2013). Such interviews can be conducted in the format of a face-to-face interchange, or through questionnaires, or surveys (Fontana & Frey, 2000). Depending on delivery, these can be structured, semi-structured, or unstructured (Fontana & Frey, 2000).

The face-to-face interviews conducted in this study were semi-structured. A list of loose questions was available to guide discussion, but questions asked in the interviews were mainly determined by the information presented in the answers to the question beforehand, and dependent upon the conversational

journey. However, as discussed in the next section, one-on-one interviewing was not always possible. Thus two online questionnaires (similar but adapted for both professions) were designed from the question/answer patterns of the previous face-to-face interviews, establishing a set of questions that aligned with the face-to-face experience as closely as possible. To reproduce the opportunity for rich data retrieval, the questionnaires provided open ended questions and allowed plenty of response room for elaboration in all answers. In both questionnaires, the last question provided opportunity and space for all who participated to voice any further information that they felt was necessary and relevant to the study that may have been missed in the questions themselves.

ii. Research Sample and Data Collection

The original sample of lawyers in Location 1 was primarily obtained through purposeful sampling whereupon it was found that participants who agreed to be interviewed generally lacked experience in using Section 27. This lack of experience in using Section 27 provided its own set of data and highlighted several barriers to the Section's potential efficacy (discussed later within the findings). At this stage of the study, three lawyers had agreed to participate, and all three one-on-one interviews were recorded on an audio device and transcribed at a later date.

It became apparent at this point that the scope of the study required broadening in order to collect more comprehensive information. An internet search was undertaken concentrating on legal firms providing criminal defence in Location 1, and ten random legal firms were chosen. An email was sent to all ten firms with an invitation to participate in the study. There was limited response to those emails, and any responses were again somewhat limited due to the lack of experience with Section 27. One lawyer volunteered to participate in a one-on-one interview. It was suggested by three of the lawyers in Location 1 that it would be advantageous to the study to seek participants from another city (which they named) where Section 27 was known to be actively used.

It was at this time that the breadth of location was increased to include the suggested city (Location 2). This broadening of locale also enabled a comparative approach and highlighted several of the issues discussed in the findings Section of this thesis. An online search of legal firms in Location 2 that provide criminal defence services was completed and ten firms were again randomly selected. An email was sent out to these ten legal firms with an invitation to participate in the study. The response was positive, and nine lawyers agreed to participate. Unfortunately, due to the geographic distance of Location 2 and time constraints, one-on-one interviews proved too difficult and some of the potential participants requested the ability to respond to questions in writing. An online questionnaire was therefore designed (see Appendix 6), reflecting the nature of the qualitative interviews as much as possible (see Appendix 5). This was then offered to responding lawyers in

Location 2 and thus became the alternative investigation for comparing and contrasting with data from Location 1. Four of the nine lawyers completed the questionnaire (five of the initial volunteers did not participate). Unfortunately, the questionnaire was unable to provide the same richness of data as that obtained through one-on-one interviews. The benefit of the wider reach across two city locations, however, far outweighed any shortcomings.

A database of cultural consultants writing Section 27 reports proved difficult to find online. There appears to be very few organisations advertising Section 27 report-writing services online. The online search revealed three organisations offering these services. An email was sent out to all three of these organisations offering an invitation to participate in the study. None responded. Through personal networks, three individual cultural consultants were identified and contacted, and all three agreed to participate in the study. A further consultant was recruited to participate through a snowball effect, resulting in a total of four cultural consultants participating in the research. Two of the consultants practice primarily in Location 2; the other two operate nationwide, including in Location 1. One-on-one interviews proved impossible with this group so an adapted version of the questionnaire (designed for the lawyers) was offered to the cultural consultants as a convenient way for them to participate (see Appendix 7).

iii. Limitations and Delimitations

The study is informed by a small data set from two different areas across the country. It by no means represents the entirety of the potential benefits/shortcomings or effectiveness of Section 27. However, the data are indicative - providing a window into current usage of Section 27 and the potential for more effective use of it. There are many other viable and pertinent sources of data, including the prisoners themselves, judicial professionals and the police. The scope and time constraints of a Master's thesis, along with the bureaucratic difficulties inherent when engaging with such bodies, dictated a focus on the boots-on-the-ground operational reality experienced by lawyers and consultants.

There are also issues pertinent to research when using 'elite' or professional participants. This requires consideration of the power dynamics or a potential power shift that can occur within the elite interview setting and how this can manifest within a reliability context (Lancaster, 2017; Woliver, 2002). Lancaster (2017) determined that this possible shift in power can manifest in an exertion of control by the participants and possible manipulations of the data and thus the research process. Examples of these manipulations can manifest as displacement of pattern interpretation or neglecting to provide certain pertinent pieces of information whilst emphasising others (Lancaster, 2017; Morris, 2009). Such conduct can potentially harm the legitimacy of the research and may result from the pressures of position (Morris, 2009). Those

in elite positions are often high profile and subject to public scrutiny. This can leave them vulnerable to fears of providing information that may have a negative impact on their public personas/reputations (Nir, 2018).

Another factor to consider is that those who have volunteered could well have a vested interest in the outcome of the research. As a result, the data can include some bias (Nir, 2018).

iv. Ethical Considerations

This research was undertaken as part of a Master's degree through the University of Waikato and thus needs follow the universities strict protocols required when conducting research. Ethics approval was sought and given by the Human Research Ethics Committee of the Faculty of Arts and Social Sciences.

Tolich and Davidson (2011) describe five key principles critical to ensuring ethical research practices: voluntary participation; informed consent; confidentiality; absence of deceit; and non-maleficence. This section details the ethical factors considered/enacted in this research with regard to these principles.

Notwithstanding potential issues regarding researching ethically, however, research is not conducted within an isolated period in a perfectly planned way. Ethical research must be practiced with an ongoing and reflective awareness of effect, both during and beyond the entirety of the study (Hugman, 2010). The first stage is procedural, adhering to the ethical policy of the organisation that the research is connected to; the second part is ethics as praxis (Guillemin & Gillam, 2004).

a) Informed Consent and Voluntary Participation

Voluntary participation was gained through emailed invitations for participation in the study. Those who responded received, by email, a document describing the nature of the study (see Appendices 2 & 3); what participation would entail; information regarding the right to refuse to answer any question they wished. The document also discussed the right to withdraw from the study at any time up until 4 weeks past the individual's interview date. Participants in the face-to-face interviews were also asked if an audio recording could be made during the interview. All who participated in the face-to-face interviews agreed to be recorded. A consent form was also attached to the email (see Appendix 4), which the participants either signed and returned on the day of the interview, or checked a tick box on the electronic questionnaire that they had received all the information and were happy to participate within the bounds Stated within those form. No requests were made to withdraw from the study.

b) Cultural Considerations

It was anticipated that participants would benefit from their involvement in the research by imparting knowledge about the use of Section 27 that could potentially lead to enhanced policy and courtroom practice. The intention of Section 27 is, in part, to make court processes - especially sentencing - more 'culturally' informed with regard to Māori. Therefore, consultation on the potential impact on Māori, especially Māori professionals who might participate in the research, was carried out with the principal investigator's supervisor, Dr Juan Tauri (Ngati Porou). Dr Tauri has ten years' experience working in the criminal justice policy sector, and 16 years' experience researching with Indigenous peoples on criminal justice-related issues.

c) Potential risks to participants

The participants in the study were not deemed as vulnerable population groups so no personal training regarding competency in this area was required. Those professionals participating in the study, however, can be construed as "elite" (holding a perceived closer proximity to power than most) and therefore potentially hold their own set of vulnerabilities and circumstances that necessitate consideration. This issue was dealt with via processes utilised for ensuring confidentiality, as discussed below.

d) Confidentiality and Privacy

The ethical provision of confidentially within an elite interviewing context can be quite complex. Anonymity and confidentiality when carrying out research with elite participants must be comprehensively thought-out, as those in high profile positions are often subjected to close public scrutiny and work within areas where the public have access to information (Nir, 2018). Whilst anonymity can be provided as a procedure of operationalised confidentiality, it is ill-conceived to assume that the action of anonymising data necessarily ensures the protection of identity (Lancaster, 2017). Thus, for the purposes of this research any specifics of cases discussed by the lawyers or cultural consultants were heavily scrutinised for potential identifiability before being used in this thesis. This, however, did bring another issue to the forefront that Lancaster (2017) highlights: that by protecting the anonymity of the data and thus the anonymity of the participant, the accuracy and legitimacy of the data reporting could be affected, and the researcher must be mindful of this. For this reason, when using the data from participants, they are not identified as (for example) “Lawyer 1”. To avoid the identifying potential of grouping data together, they are identified for example as LL1 which refers to “a lawyer from Location 1”. Similarly, the Cultural Consultants are not identified by number or region of practice due to the risks of identification through the limited numbers of individuals providing services in this field.

All information retrieved from the interviews and questionnaires is stored in digital format in a locked box at the residence of the Principal Researcher. Only the Principle Researcher has or will have access to this data.

v. Data Analysis and Synthesis

The initial step in analysing the data lay in the underlying questions of the study itself. A thematical analysis approach was taken, and the core questions of: benefits, barriers and the potential changes that could improve the functionality of Section 27, became the headings under which the data was to be categorised for analysis. Thematical analysis allows an exploration of the data involving individual perspectives and lived experiences that shape the behaviour and particular social aspects, that in turn, shape certain phenomena (Braun & Clarke, 2006). It is a method of analysis commonly used in qualitative research that allows a focus on the pattern of meaning within the data gathered (Braun, 2013).

In line with thematical analysis, the responses from both the interview transcriptions and the questionnaire data were then reviewed multiple times to ensure that the full meaning was understood. The data were also examined to assess shared perspectives or meaning. From this process, the responses (both from direct quotation and the interpretation of meaning from more subtle expression) were then grouped together under one of the three main

headings. Themes emerged and several subheadings were established under each main heading. Arranging the data in this way provided a comprehensive display for ease of analysis. The subthemes are as follows:

Table 1: List of headings and themes

HEADINGS	THEMES
Benefits:	• Better sentencing outcomes • Enlightening the offender and Reconnection with culture/community/ whānau • Reducing recidivism • Educating judiciary and practitioners
Barriers:	• Limited knowledge of Section 27 within the legal fraternity • Ambiguity • Lack of consistency/cultural competency or racism within the Court system • Funding/cost of reports • Lack of report writers
Suggested Improvements:	• Mandatory/fully funded reports and possible accreditation process • Address cultural ignorance within the court allowing the Act to function • By Māori for Māori/System overhaul

Chapter 6: Results and Discussion

This chapter presents the qualitative data retrieved from interviewing participants and discusses the findings. While the discussion relates to the use of Section 27 as intended by legislation, the underlying rationale is for its usage, the underlying rationale for it not being utilised, and the potential changes that could be made to the legislation, policy or institutional practice to enhance its use. The first two sections below provide a platform from which participant responses are analysed and assessed. Because it is important to understand Section 27 from the perspective of those using it, it is therefore (for the purpose of this research) defined through the participants' understanding of that purpose and punctuated with participants' concerns about the surrounding framework/system.

i. General comments and associated concerns

To begin to understand Section 27, it is important to comprehend the opinions of the participants' views and experiences of the criminal justice system in general. This material provides a context for the broader issues surrounding the potential for Section 27 to have any real impact on reducing Māori incarceration. These comments have been separated into four different topics. Although many of them interrelate, the four topics are: a) general views of Māori interaction with the criminal justice system, b) Section 27 is too little too

late, c) the problems with the bail and remand laws, and d) the negative impact of custodial sentences and prison exposure.

a) General views of Māori interaction with the criminal justice system

Amongst most participants there was a general sense of frustration and despair, not only regarding the over-representation of Māori within the criminal justice system, but also of the criminal justice system itself, as related in the following comments:

> *75 to 85% of our clients in this area are Māori, and disadvantaged and poor…it's just so awful (LL1)*
>
> *It's really disappointing to see very clearly predominantly Māori in (Location 1) appearing in front of court. I'm up there every day to see it! I'm Māori and I see some of my whānau appearing…and I can't figure out why I have got to lead a different life…I've got a very privileged life in comparison to quite a lot of my whānau (LL1)*
>
> *The problem with a lot of our Māori clients is that they don't sort their shit out in their 18 to 22 years…which means that they get different sentences later on…compliance on community work is 50%... prison is an over-representation of that youth non-compliance at a basic level… those youth who are non-compliant often have no family or support pushing them to comply … no access to family members where they don't have anything or anybody and so they get bumped up to a sentence…or it becomes socio-economic (LL1)*
>
> *The majority of people I work with in prison are culturally disconnected…The criminal justice system is just another pakeha construct imposed on Māori by yet another Crown Agency that continues to perpetuate the injustices that have plagued our people since the signing of the Treaty in 1840. The Department of Corrections is the Oranga Tamariki of the justice sector and we need to start espousing "not one more Māori in prison" (CC)*

These views align strongly with the earlier review and opinions provided in Chapter 2 regarding the failure of the criminal justice system to be culturally sensitive. They also highlight the complex intersectional nature of Māori offending and the over-representation within that system that was discussed in that chapter.

b) Section 27 is too little too late

Many of the participants felt the Section 27 was “too little too late” in the process considering the negative effects on the offenders that had already occurred within the criminal justice system, and their socio-economic environment prior to sentencing. For example:

> *The 27 thing is the arse end of it...the ambulance at that stage (LL1)*
>
> *One little Section at sentencing stage is not going to address systemic issues (CC)*
>
> *[The Section 27 report] does not punish the racist actors who had influence over the individual's life and it does not force upon the system a change in thought or behaviours moving forward (LL2)*
>
> *Institutional racism is not something to be corrected from within an individual's sentencing regime. If there was evidenced institutional racism like Police decision-making leading to their arrest or detection that had operated on the offender's arrest, the remedy for that is not a cultural report (LL2)*
>
> *…where an individual has faced overlays of racism which have led to increased criminogenic factors that have gone into the melting pot of causing the fertile breeding ground for their later offending, a cultural report does nothing to correct for that, in reality, for their lives in practice. All it does is give a judge a basis upon which to acknowledge how those factors went into that decision-making and grant a credit at sentencing (LL2)*

There are also a whole lot of social issues that need to be addressed, where we enable and empower people in way that enhances their mana rather than diminishing it. For example, employment is impeded for many offenders because of criminal history. They live a silent sentence which deprives them of their ability to earn a living and provide for their families. For many, criminal enterprise is all they know or what they will always fall back on simply to survive in a world driven by capitalism and free-market ideologies that widen the gap between the "haves" and the "have-nots" (CC)

c) The problem with the bail and remand laws

Although this thesis pertains to the SA, and in particular Section 27, of note and in need of reporting is the thread of frustration voiced regarding bail and remand laws/processes in New Zealand. Bail and remand decisions occur before trial and regardless of cultural context, so this information is relevant to the systemic dysfunction present prior to sentencing:

[In remand] almost everyone who gets a short prison term is throwing their hands up and saying they're guilty… because they're in custody on remand and by the time they get to sentencing they've already done their time… so we are doing a convenient deal to get them out again. They're all deemed to be high security default by security classification because their charges are undetermined and they are all in together. You've got all these people that are too drug addicted and don't have anyone...those who live too close to the complainant ...don't have a home…parents don't want a bar of them…home deemed unsuitable for bail…small towns… and everyone is being housed together in remand...all the most dangerous with the most naive and inexperienced...all supposedly presumed innocent (LL1)

The courts aren't looking at these bail laws properly… the bail laws are essentially there to ensure offenders do not reoffend while on bail, that they don't interfere with the evidence or witnesses and they turn up to court… now those are the three things that bail conditions are essentially required to address…now just because you can't find a house to live in and the police are opposing your bail because of it does not show a direct nexus between the offence and what the bail act is there to try and prevent or ensure…meaning there is no direct

nexus between the alleged offending and the bail conditions… the courts are not scrutinizing that enough… so they're just sending people away rather than actually looking at the conditions…you don't get a second bite of the cherry either…you apply for bail, if you don't get it you can apply for electronically monitored bail, and if you miss out on both of those you don't get to apply for bail again unless you appeal those decisions to higher Court …so while you're awaiting trial, which could be a year away, you're inside (LL1)

The discussion around remand and bail laws is particularly pertinent considering that Māori are 11 times more likely than non-Māori to be remanded in custody whilst awaiting trial (Fernando, 2018).

d) The negative impact of custodial sentences and prison exposure

There were also many statements concerning the perceived futility of what occurs once an individual has been exposed to prison; for example:

I mean I hate it…I hate getting some 19 year-old boy on an ag-robbery…there's just nothing to be done right? The law says that you go to jail and you go to jail, and 3 years later you come out very hard and probably a patched-up gang member. (LL1)

But sending them to prison - even our hardest clients will come out harder after a lag no matter how hard we thought they were. It's just appalling…and then they come out into society even harder. (LL1)

The judges need to understand the way prison works and the way gangs work in order to understand the "choices" that the men face- it is not a case of choosing to be violent, but of kill or be killed in prison- it's impossible (LL2)

We all know that prison is a fucken shithole and that in order to survive if you are a young Māori guy you kind of have to patch up, and that's how it is. It is, frankly, pretty heart-breaking and I hate it. I hate seeing young people go to jail because it's just so shit. Especially when they

want to because they are G'd up and you're like "bro you don't know what you're are signing on for" and "you don't get to revoke your membership with the shit heads club because you don't like it anymore" (LL1)

ii. Context and delivery

The manifestation of the professionally written Section 27 reports is a recent phenomenon. This Section provides detail of a) the perceived purpose of Section 27, b) participants' views on oral vs. written delivery of Section 27 related Statements, and c) what different types of conveyances of Section 27 have been utilised by the participants.

a) The Purpose of Section 27

The underlying goal of this research was to understand the lived day-to-day experience of Section 27 as it exists within current legal practice. It is therefore important to comprehend how those who are involved in the Section's application perceive the purpose of Section 27. Some of the participants were asked for their perception of the purpose of Section 27. The following are some of those responses:

Section 27 reports provide the Court with information that helps establish causal nexus between the life experience and cultural milieu of a specific individual, and their offending behaviour, and to identify potential habilitative or rehabilitative solutions to the offender's dilemma (CC)

In my view it is always relevant to tell the story of how an offender came to be where they are now, whether it has an impact on sentence or not. Qualitative experience of justice is an under-estimated outcome

- as it increases confidence and trust in the system and the rule of law - those are important factors in evaluating the legitimacy of a justice system (CC)

The question is whether a person's background of hardship can be said to have influenced their positioning in society to the point where they were more likely to engage in crime; or, whether their choices in their offending were less rational and more a product of their personal circumstance. Any right-thinking person knows that there are some cases where a person's background deserves a discount for the horrors of how they grew up. That corrects for the people who offend not from desperation but due to a cynical desire to do harm, receiving the same sentence for similar offending. By discounting from what a cynical offender would receive, the correction is made for the individual, in the form of a discount. That is just and right… (LL2)

[So] that they know that they've had a fair hearing and they know that we've done our best for them and that they've got an outcome that is fair (LL1)

b) From oral beginnings to the written submission

Section 27 States that "If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on - …the personal, family, whānau, community, and cultural background of the offender etc..." so it is readily assumed that Statements will be delivered orally. However, it has come to pass that written cultural reports appear to be the preferred and most common form of conveyance of Section 27 information. The participants were asked to reflect on why that may have happened and also for their views on the effectiveness of either form. The responses were as follows:

Judges are super leery of just accepting oral submissions on the day because they really don't like uncontrolled processes and their

expectation would be that they will get a nutter shrieking at them. So what they want is a written report in advance and they are more than happy for that person to speak to that report in court, but I myself would be really uncomfortable getting an oral report to the court anyway because how do you know what the fuck they are going to say (LL1)

I mean I know that it talks about personal family/whānau potentially as being those sorts of people but legitimacy comes from someone who is not necessarily emotionally involved in the preceding but is able to give an insight into the things that Section 27 talks about (LL1)

You know it's just meant to be a verbal thing…and then Judge X said we need this in a written report…we need things in advance so we can factor them in …. A memorandum is meant to be a framework for our oral play…sentencing practice notes reminds us that the written memorandums are not a replacement for our oral submissions (LL1)

Written reports are harder to ignore…in my experience the ignorance and cultural incompetence that is pervasive in the [location 2] District Court means that whānau voices are usually not heard (LL2)

c) Different techniques of delivery

Several of the lawyers interviewed had used a mixture of different techniques in the implementation of Section 27 in the sentencing process. These included affidavits by lawyer/whānau members, oral submissions by the lawyer, oral or written reports by whānau/hapū/iwi or associated community representative, supporting the offenders self-represented oral delivery, as well as the professionally produced reports. In contrast to the above data, responses from some of these participants highlight that oral submissions from the either the offender themselves or a representative from the offender's family/whānau/community can be just as effective given the right circumstances:

It depends on the Judge and I am inclined to think that Māori Judges would be more receptive to whānau reports than non-Māori Judges (CC)

…it's empowering for them…one of my offenders spoke in regards to his own cultural background... he was self-represented but working within the framework of the system… I helped give him the tools to represent himself and speak for himself… I thought that was really important because he got to fully participate … that was really awesome (LL1)

Whānau, hapū and iwi are the experts in their whakapapa and, most likely, know the person's background related to the offending, as well as how they can help and support them to recover from the situation that they find themselves in (LL2)

I did a sentencing recently…my client talked to me about a Section 27 report but couldn't identify someone who would be able to prepare that report…so then I just chatted to him about his life and his upbringing, and bullet pointed some things which I called Section 27 factors which I put in my submissions. I made my oral submission to address my Section 27 factors orally and I felt that got really good traction (LL1)

iii. Results

This section presents the key findings of the study as they pertain to the principle research questions and the data provided by the participants. These findings have been separated into three themes: a) benefits, b) barriers, and c) suggested improvements. These findings are discussed in-depth within each thematical breakdown. As with much of the results above, many of the findings interrelate.

a) Benefits

One of the key purposes of undertaking this research was to understand the lived experience of Section 27 on the 'ground floor'. Ascertaining the benefits of the Section through the eyes of the practitioners that are utilising the Section is key to understanding this. The participants were asked for their perceptions of the benefits that accrued from utilising Section 27. Their answers have been grouped together into associated themes. They are: 'better sentencing outcomes'; 'enlightening the offender and reconnection with whānau/family/community'; 'educating the judiciary and court practitioners'; and 'reducing recidivism'. These associated themes are discussed below.

1) Better sentencing outcomes

One question asked of the participants was what outcomes/benefits they saw in utilising Section 27, and what sets of circumstances contributed to achieving those outcomes/benefits. Several of the answers pertained simply to obtaining a reduced sentence for their client(s). However, other participants took time to explain these outcomes, for example:

> *Working with whānau to get better sentencing outcomes – ideally keeping our people out of prison or if prison is inevitable, spending less time in prison (CC)*
>
> *Improved outcomes - qualitatively different sentences, quantitatively shorter sentences. (CC)*

The Judge treats the probation report as scripture… 27 if it's done right could bring some balance to it and I think that the other massive benefit that Section 27 can have sort of moving forward away from a process that has become very victim-centric (LL1)

Several sentencing benefits were highlighted by the participants in this study. Any reduction in sentencing was generally viewed as a positive outcome. Most participants discussed the important role of Section 27 and its potential to gain sentencing discounts that result in community or home detention type sentences rather than a custodial one. This is particularly significant for those facing a sentence of first-time imprisonment. Second and third strike offences were also highlighted as particular points for potential positive impact derived from the introduction of a Section 27 report.

2) Enlightening offender and reconnecting with culture/community/whānau

The reconnection with whānau and community was perceived by the participants as crucial in the rehabilitation of Māori offenders. All participants viewed this as a key benefit from the effective implementation of Section 27. The process of developing a report was also viewed as having the capability to deliver a clear picture to the offender of the patterns and processes involved in their offending:

It's when they're self-centred and they don't think they've got anything to lose and they can't see the impact their offending has on their family… in the loss that their family has because Dad's not there all this

time is bad or whatever… there's still that desire for them to be home…so if the client can see more one-on-one the impact better that their behaviour is having…It would be nice to see that could have social change and going to jail they just don't seem to give a shit if they go to jail…(LL1)

Cultural report writers have an opportunity to play the role of advocating for change and connecting whānau with the relevant wrap-around support that is more often than not needed in the community (CC)

It's forcing the engagement of a wider group and for a lot of our clients that's not how long they will be in prison, but it's how they cope with it when they out - to the isolation when they get back out… because they haven't got anywhere to go… because their family got sick of them - you know… and it's whether or not there can be better expectations (LL1)

3) Educating the judiciary and court practitioners

The cultural education of the judiciary and other associated court practitioners may have been unintended in the original design of the Section, but has been highlighted by several of the participants as a significant benefit as expressed in the following comments:

Educating the bench. Filling in for the lack of competency and understanding of Te Ao Māori on the bench (LL2)

I do think it's a good time to be more culturally aware. We have been told for a long time now about institutional bias and racism and we have been resisting it...so it's a good time to look at how we are contributing to it (LL1)

It is a tool through which we might achieve better individual outcomes and hopefully knowledge of and response to matters of tikanga Māori and inequality (CC)

4) Reducing recidivism

There has been very little research undertaken to understand the connections between a reduction in sentencing and the effect of that on recidivism rates. Therefore, the participants were asked what their personal opinions were on sentence reductions impacting on the long-term behaviour of their clients:

> *I think for young offenders a reduction that would see them not get a custodial sentence would have an impact on recidivism… prison is crime school there's no doubt about that… and young offenders if they are to avoid a life of crime the last thing you want to be doing it's sending an 18-year-old to prison. I do see there being some benefit in terms of recidivism if the difference being keeping young offenders out of jail that's where I can see it working… anything after that I don't know…you still see some really immature 25/26 year old men doing just stupid things ending them in jail (LL1)*

> *In some circumstances it could. For example, where mothers return to their whānau sooner and are able to be present for their children, it wouldn't just help them but their children in reducing drivers of crime… However I think overall it will not make a large scale difference for re-offending rate (LL2)*

> *The recidivism rate for first offenders that get prison and first offenders that get home detention are wildly divergent just because people that go to prison tend to go back to prison – that's the nature of the beast. The real key driver is that we keep these people out of prison (LL1)*

However, other participants opposed the supposition that reduced sentencing could positively affect recidivism, for example:

> *For the same reason as longer sentences do not reduce reoffending, shorter sentences are still sentences of imprisonment and imprisonment is still a factor which is one of the greater predictors of recidivism (LL2)*

Not (sentencing reductions) alone- also need cultural rehab/ courses for the men (LL2)

While several benefits resulting from the utilisation of Section 27 during sentencing decisions have been presented above, there also appears to be particular circumstances in which the reports have a greater scope for impact. For example:

Where the client has the ability to engage or re-engage in cultural safeguards and where the matter is adjourned to allow for some or all of a safety plan to be completed. This gains real credit and recognition for the work done at sentencing. Also, where there is historical trauma some distance from the offending, but has played a part in the offender's drivers of crime (poverty, homelessness, sexual offending) (LL2)

Also, when sentences can be sufficiently reduced to the arrive at the home detention threshold and result in a non-custodial sentence (i.e. sentence starting point could be 3-5 years and combined with other discounts such as early guilty plea, restorative justice, youth, remorse) (CC)

Of note, however, is the following view offered by one participant regarding the complexity of attributing circumstances that lead an individual to offending, and the corresponding impotence of a Section 27 report on affecting positive outcomes for offenders*:*

How could 10-12 pages of written material - something which the individual themselves might not be able to read without assistance - prepared by a cultural report writer revisit the myriad of factors that brought them to that place, and help them to make a better choice next time....? (LL2)

b) Barriers

Whilst many benefits were highlighted by the participants when Section 27 is used effectively, what is also apparent is that the historic low utilisation is likely linked to significant barriers, as demonstrated below. Although it appears that the up-take of Section 27 has increased in the last few years, and that this appears to be on an upward trend, it also appears that this increase has not been evenly distributed when taking into account the differences in usage and knowledge between the two locations within this small study. This varied level of utilisation, however, has provided this research with insight into the barriers that practitioners face when considering or delivering a Section 27 report as part of their litigation strategy. The responses are separated into five specific themes: 'the limited knowledge of Section 27 within the legal fraternity'; 'the ambiguous nature of Section 27'; 'a lack of consistency/cultural competency or racism within the Court system'; 'the funding/cost of reports'; and 'a shortage of report writers'. These themes are discussed below.

1) The limited knowledge of Section 27 within the legal fraternity

One predominant barrier that was highlighted during the study (and in the literature review) was the limited knowledge/understanding/experience of Section 27 amongst legal practitioners. The following statements on this issue

were offered by participants (please note that none of these comments came from lawyers in Location 2):

> *I've never really even been aware of 27 reports until the last couple of years. I mean I was kind of vaguely aware that they existed. They never even really got used until mid-last (LL1)*
>
> *I have no experience [with s27] in part because [of my time] with the Crown…where the Crown defence lawyers just never asked for them… and I suppose my answer is as a defence lawyer for the past [number omitted] years there is that there is really no one that's qualified on its face to even give them, although the Act suggests in can just be anyone (LL1)*
>
> *One of the barriers is the lack of awareness amongst legal fraternity of s27 (CC)*
>
> *There are also issues with practitioner knowledge of the Section - i.e. knowing that it exists and what it means and how you go about getting s27 information (CC)*

Lawyers from Location 1 provided clear discussion concerning the lack of experience and/or negligible/nil exposure to Section 27 in action in any case that they had been a part of or witness to. They discussed the very recent uptake of Section 27 in courtroom practice and alluded to a judicial 'nudge' to undertake more regular usage of the Section. What was highlighted, particularly within Location 1, was an uncertainty about the structure/content/delivery of Section 27 which is discussed more thoroughly in the next section.

2) The ambiguous nature of Section 27

Another barrier that has emerged from the data, and signified by reluctance to incorporate Section 27 into practice, is the lack of clear instruction and framework around the Section. Again, of note here, is that none of the comments below came from Lawyers in Location 2:

> *The Sentencing Act…it's not clear at all how the reports will be taken into account and there's all sorts of fuckery in sentencing because you can… you know in theory there's no reason at all that the judge couldn't say "look I've had this cultural report that's gives me good insight and I'm electing to view this person as having an increased culpability"…I don't think it would happen but there's no reason why it couldn't. (LL1)*
>
> *There's no clear statutory basis about how it fits into the sentencing process at all and that's something that just makes us anxious you know? In 90% of cases I couldn't see it having any real value - you get substantial discounts for guilty pleas anyway, and it's difficult to see how it fits into the other. (LL1)*
>
> *And I mean, let's again be real, the actual hard demonstrable sort of science aspect of it is really lacking. I mean like what is your cultural background? How is that related to your criminal offending? I mean…I don't know. I mean it obviously is… but to what extent and how much of it is actually meaningful or… umm well I mean so you've got a shit existence and you've committed a horrible crime… well OK…I'm uncomfortable with this because it just kind of muddy (LL1)*
>
> *It's valid but woolly and you can easily see an unintended consequence - your well-funded defendant get silver service cultural reports from Dame Malvina Major or whomever who comes to court and sings an aria for them (LL1)*

The lack of specific instruction and framework surrounding Section 27's wording and inclusion in the SA appears to create uncertainty and an ensuing lack of confidence to utilise the Section during sentencing. Words like "woolly"

and “muddy” were used to describe the both construction and the interpretation of judicial determination of relevance held in a report.

3) A Lack of consistency/cultural competency or racism within the courts

Several of the participants voiced frustration with the cultural incompetence present at the judicial level. Many comments referred to the impossibility of Section 27 having impact when those receiving them are ill-equipped to take reports comprehensively into account considering their lack of the cultural knowledge and understanding. These attitudinal/knowledge inconsistencies within the judicial are not only effecting inconsistent outcomes during sentencing, but also appear to leave some practitioners reluctant to utilise Section 27 at all as the following responses highlight:

> *I can tell you with total confidence that the exact same report could have a massive impact on one judge and zero with another and that is the definition of a bad policy because the one thing that we want is some degree of consistency…we want to be able to say to our clients that if we do x then y will happen and that doesn’t have to be a good outcome just a reliable outcome (LL1)*
>
> *It's just a matter of how the court is going to take that into account which will be largely dependent on the judge who is ultimately making the determination of the credibility of what is being said in the judge's courtroom so you can get 100 people get up there and say something but if the judge is not going to take any of it into account well what's the point (LL1))*
>
> *There are still some decision-makers who remain unconvinced by cultural reports and uphold their prejudiced views (CC)*

The reports are still only as effective as the Judges ability to understand them. The shameful proliferation of white male judges on the [location 2] District Court C bench who lack cultural competency is an insurmountable barrier to effecting a reduction in Māori incarceration rates that s27 alone cannot overcome (LL2)

All participants commented on the potential, or occurring, judicial inconsistencies in the weight given Section 27 information within sentencing decisions. Some comments suggested blatant racism whilst others argued cultural incompetence.

4) The funding/cost of reports

Funding for, and/or the cost of, professionally produced reports was a common thread amongst the participant responses to significant barriers to Section 27's ability to function as litigation tool. The comments were as follows:

The cost is unbelievable…I mean it costs more than a psychiatrist's report from highly trained folk who have had years and years and years of specific training to be able to write a specialist report. Legal aid will finance them apparently but the criteria for that is dimorphous and is sort of a perfect chicken and egg…it's like "I need a Section 27 report" "why" "because of his cultural background" "how do you demonstrate that"…by getting a Section 27 report (LL1)

I'd be pretty sceptical of someone claiming a big bill for doing it because I would see this as exploitative and I'm simply not interested in paying someone thousands of dollars to produce one of these reports. The figures that Judge [name deleted] said were paid for a couple of reports that he talked about recently just horrified me…it's just horrifying that someone would be paid more for that report than an

entire lawyer will get, you know two or three times more than the lawyer will get for fully representing that client so I'm simply no interested in paying that to someone. However if we prepare a report we get a flat fee of 120 or 200 dollars or something (LL1)

Access to legal aid funding for Section 27 reports was highlighted as an issue by many of the participants. This appears problematic at both the base level funding for the reports and when attempting to obtain any further funding deemed necessary during the preparation of the reports.

Legal aid or court's refusal to fund s27 cultural reports [is a barrier] (CC)

We end up subsidising or doing work pro bono due to slow processing or refusal to fund travel (CC)

Legal aid actually fully funds reports through disbursements now, which is an additional hoop to jump through but given the Public Defence Service now has an unofficial policy which is not to fund reports for anyone who is going to prison, which is not the test and is also ridiculous (LL2)

For paid reports, the lack of clear and transparent criteria relating to accreditation of report writers, relevant material and what is or is not funded is problematic. The Family Court has a basic set of criteria, which the criminal courts do not have (CC)

[Legal Aid] seems to be random and sometimes self-defeating as costs incur at other points in the criminal justice system. Our reports on average are equivalent to the cost of 12 days incarceration so, duh! Discounts for a report are generally around 13% reduction sentence duration (CC)

However, this is only in relation to the professionally produced reports as mentioned below:

[Funding is a significant barrier] … at least for a model of s27 information predicated on using paid independent report writers. If the information is given directly from whānau and community members, then of course there is no need for legal aid support.

There also appears to be some contradictions in opinions and experiences of Legal Aid as signalled in the following responses:

Counsel who do not know how to use the legal aid administration to get funding for what their clients need are likely to be somewhere on the scale between inefficient at best and negligent at worst. The job of defence counsel is to make arguments for their clients. If Legal Aid decline funding it is my experience that a poorly worded application for funding is the culprit. Where counsel do not understand their client's background they are likely to be unable to effectively argue for their client to receive the funding to present evidence about it at sentencing (LL2)

Legal Aid fund reports- it's great (LL2)

5) A shortage of report writers

A lack of report writers was highlighted as a significant barrier in Location 1 with the following comments (again this is only relative to professionally provided written reports):

Well it's impossible to find someone to write the bloody things (LL1)

I can tell talking to some of my [location 2] colleagues they are only really being presented in [location 2] because of the access to report writers (LL1)

Apparently there is only one person doing the cultural reports in [Location 1]… So if there is only one person there is therefore only ever going to be able to do so many (LL1)

It would help having people who can actually provide a decent report (LL1)

However, it appears that this shortage is not unique to Location 1 but is possibly an issue nationwide. Responses from three of the four cultural consultants interviewed concur with the lawyers in Location 1:

We are swamped (CC)

Definitely - I cannot keep up with demand, and I turn down requests almost daily (CC)

There is a huge shortage of report writers nationally. I purposefully did not market in [location 1] because I struggle to meet the demands of the [location 2] Courts. So the demand is hard to meet because there is a shortage of people doing this work and increasingly people are becoming aware of s27. (CC)

c) Suggested improvements

A further key investigation in this research is the gathering of data pertaining to court practitioners' perspectives on further developing the Section 27, or the surrounding framework that supports it. Emphasising the value of researching the lived experience of policy was this response:

I just don't understand how you have a bunch of criminal justice policy people who have never stepped foot into a criminal court in their life, and have no idea about the realities of it and constantly come up with these brilliant ideas (sarcasm intended) (LL1)

The participants were asked to give their opinions on what these changes could be. The responses aligned with three key themes: Mandatory/fully funded Section 27 reports; the need to address cultural incompetence within the court system, allowing the SA to function as intended; and the need (as voiced for decades) for 'by Māori for Māori'.

1) Mandatory/fully funded Section 27 reports

Fully funded mandatory reports were a key suggestion of a number of participants. This action in itself might not directly alleviate several of the other issues discussed above, such as a lack of report writers, judicial ignorance etc.… but could aid to educate the bench and the legal fraternity, and create a demand which potentially increases the supply of report writers. The responses were as follows:

> *One suggestion to start is that s 27 reports become mandatory and fully funded for every offender - and not done by Corrections because clearly they can't be trusted with writing them (LL2)*
>
> *It might be that rather than going through legal aid that the court can direct the court…can direct the onus so that defence council doesn't have the extra burden of jumping through legal aid hoops (LL1)*
>
> *It would be better if it was a compulsorily court-mandated and funded report like the PAC report. (LL2)*

However, some respondents saw risk in making Section 27 reports mandatory, institutionalised, or fully funded:

There's an immense problem in its mandatory language in that the statute says "must", that if there's "an identifiable victim... must refer". Which has then led to this fucking comedy where every supermarket, service station chain in NZ has to put themselves on this list of "we will not participate in RJ" otherwise you get people arrested for shop lifting, plead guilty for stealing a packet of chips from Pak and Save and get remanded for a restorative justice inquiry…and that can quite easily be someone with no address, or a hopeless alcoholic on the street, so they are spending a month and half in prison for something that is worth a $100 fine and you know… I digress…because I don't think that they should ever be mandatory because a vast majority of the time they would not be useful (LL1)

Let's say for instance, you get a report and its fucken terrible and I don't want to put it in front of the court…what are your obligations if it's a mandatory process in place… where you just get the audit and they're in and they're not very good, and some of them won't be - some of these people are not misunderstood; they're just really bad people you know (LL1)

The defence has the right to go and get independent reports by psychology and psychiatry that is paid for through legal aid as opposed to the court ordered process… if the court orders those reports you're left with whatever the report comes back with…. so tends to be a degree of privilege that's lost…and privacy that's lost because those reports people reveal things to the courts before it comes to the lawyer and the offender to scrutinize that report or redact parts of that report…so there are times when as a defence lawyer you're not asking the court to direct the report…you will go and get one yourself independently because you can control it in that way…so I wonder if the process became mandatory, would the same risks would apply? (LL1)

2) Addressing cultural ignorance within the court system

Cultural incompetence was highlighted as a large barrier to both Section 27 and to the SA itself functioning to the capacity that it has the potential to. The following comments offer potential remedy to alleviating this issue somewhat:

Get rid of the proliferation of old white men on the bench. (LL2)

Stop appointing white men to the bench until the issues are resolved. Only appoint genuinely culturally competent individuals to the bench. Whatever their race gender (LL2)

[S27 reports are] a small instrument but cannot address racism on the bench fully. The majority of White judges in the [Location 1] DC are still limited in their ability to understand the issues. Even the ones who have had training and believe themselves to be enlightened do a poor job. I see gender as a key issue in failing Māori. In my experience female judges are more attuned to the institutional bias and racism at play (LL2)

The judge's need to understand the way prison works and the way gangs work in order to understand the "choices" that the men face- it is not a case of choosing to be violent, but of kill or be killed in prison- it's impossible (LL2)

3) By Māori for Māori/System overhaul

Many participants expressed support for a 'by Māori for Māori' in criminal justice as advocated by Jackson in his 1988 report:

I suggest a cultural report can only be used in a meaningful way to reduce re-imprisonment where it is used in the Matariki Court model - for continued adjournments while the defendant is monitored through re-engagement safety plans in their own community. The policy already exists (LL2)

My simple answer is that the management of our people in the CJS is by Māori for Māori and that needs to be affected from the top down. The decision makers at the top need to be Māori. The processes need to be kaupapa Māori and the delivery of services needs to be culturally appropriate. (CC)

Name me one policy that has been written for Māori, by non-Māori, that is effective? (LL2)

> *There are also a whole lot of social issues that need to be addressed, where we enable and empower people in way that enhances their mana rather than diminishing it. For example, employment is impeded for many offenders because of criminal history. They live a silent sentence which deprives them of their ability to earn a living and provide for their families. For many, criminal enterprise is all they know or what they will always fall back on simply to survive in a world driven by capitalism and free-market ideologies that widen the gap between the "haves" and the "have-nots" (CC)*

However, one further comment that warrants mention and conveys Section 27's potential for further gains in positive outcomes is as follows:

> *The impetus of s27 information underpinning sentences over the past three years has illustrated how significant quite minor changes to practice can influence shifts in justice outcomes. I think it could be a model for similar shifts in relation to other existing provisions - for example the standing down of dispositions to allow for rehabilitation programmes (as per s25 and the practice of the Matariki Court) or better argued application of the "least restrictive outcome" provision in s16 (CC)*

iv. Discussion

The data from the interviews demonstrate many positive aspects and outcomes from the presentation of a comprehensive Section 27 report. What is also highlighted, however, are inconsistencies in both the understanding and usage of Section 27 as part of sentencing strategies and related decision making. This is apparent at the legal representative level, and also described as entrenched within the New Zealand judicial core.

Whilst the knowledge of the Section's very existence is one issue (see O'Driscoll, 2012; Toki, 2018), an understanding of the complexities of cultural context, both current and historical, as they relate to an individual's culpability of offense when enacting sentencing law appears profoundly lacking within policy makers and judiciary. The very nature of this gap in knowledge appears to have necessitated the progression from what was initially intended as an oral representation by whānau/community, into the emergence of, and the desire for the professionally produced, in-depth, written report that now dominates usage of the section.

The success of a Section 27 report is perceived to rely upon both a comprehensive understanding of both cultural contexts and sentencing law. On this issue one of the participants stated that:

> *There is a huge cultural chasm between the legal framework and judicial and practitioner education as to how to utilise it effectively, or at all. A well-framed package of sentencing information should be referencing s27 in conjunction with s8, s25 and the range of purposes and principles of sentencing in Sections 7, 8, 9, 10, and 16. This is rarely done in practice. (CC)*

One could argue that a whānau/community member is unlikely to hold both sets of knowledge necessary to deliver a successful oral report without

appropriate legal guidance. If one of Section 27's purposes was indeed to enhance community participation in sentencing, then the current legal climate appears to have stymied that outcome.

Whether this level of knowledge in delivery was intended from the Section's infancy, or if it evolved through the necessity for cultural and background contexts to be heard and understood, is unclear. What is clear, however, is that several of the legal practitioners that participated in this research feel unsupported and unsure of how to progress with Section 27 reports amidst a black and white legal landscape with no clear framework to build it upon. The ambiguous nature of Section 27, described by one of the participants as "trying to put sociology into law", appears to be a large barrier for those with limited knowledge of those aspects of culture that could potentially reduce culpability through a Section 27 delivery. This aligns with Williams' (2001) views that many of the State policy implementations within the justice sector lack both the long-term vision and supportive framework vital for achieving the desired outcomes.

The lack of cultural understanding within New Zealand's judicial system is of further concern. Whilst examples were provided of oral and other alternatives to the written report having demonstrable impact given the right circumstances, the general view is that professionally produced reports are a more powerful tool in litigation. Many highlighted judicial ignorance regarding what cultural/background factors contribute to criminal behavior and it was

suggested that even those culturally trained remain inept. Written reports may have become a tool for bringing together cultural contexts and sentencing law in a cohesive and easily absorbed format for those judges/lawyers with a limited cultural frame of reference. This could explain to some degree why cultural considerations have been highlighted by participants as more difficult to ignore when partnered with clear connections to the law and presented in a solid document. As it stands, however, there appears to be a large discrepancy between report outcomes depending on which judge (more specifically which judge by ethnicity, gender, or age) is sitting in judgement. This discrepancy adds to the legal fraternity's angst regarding the value of compiling/arranging a Section 27 report for sentencing.

It appears that the current increase in demand for written reports presents its own unique set of problems. First, the use of written reports (and their perceived heavier impact) seems to be creating a precedent for the further use of written reports over that of the oral deliveries originally intended. Secondly, the interview responses demonstrate that while the demand for reports is increasing, there is a significant shortage of report writers nationwide. Some legal representatives, unable to find report writers and/or confused by what is culturally pertinent, are not actioning Section 27 at all during sentencing. These factors alone are creating inequality in representation and sentencing. Consider, for example, how one report writer detailed a 13% discount generally (sometimes more) in sentencing to those offenders for whom they had provided a written report.

This begs the question, was it ever actually intended that Section 27 would have any significant impact for Māori? Is Section 27, in line with Tauri's (2005) critique of the intent of the Children, Young Persons and Their Families Act 1989? He argues here that the inclusion of the FGC in that legislation stemmed from the desire for the State to look proactive in response to societal concerns for the woeful incarceration rates of Māori. The earlier version of Section 27 (Section 16 of the CJA) is of the same era; is it also of the same ilk? We might also ask if the Section is another example of what Williams (2001, p. 62) describes as a "… piecemeal legislative or operational project"? The experiences of participants in this research are in keeping with that description. No explanatory framework exists, no booklet for offenders/whānau to inform them of the intent of the Section or how to procure one, no guidelines for court practitioners, nor any mandatory judicial instruction to account for a report's content during their deliberations. However, unintended or not, and regardless of the lack of framework or other Stated barriers, Section 27 appears to be finally gaining traction and perhaps evolving into a positively received sentencing practice.

Many participants believed that Section 27 reports should be mandatory and fully funded. Some expressed conflicting views, espousing potential risks from the Section becoming mandatory, including solicitors losing autonomy in deciding whether or not to present a Section 27 report (should it be perceived as potentially damaging to offering a defence), clogging up the court system

unnecessarily (in cases where a Section 27 report would be of no consequence to sentencing decisions), and a lack of report writers trained to produce reports. However, a significant number of participants viewed State funding and the mandatory provision of Section 27 during sentencing as a positive step forward in alleviating barriers to the Section's potential efficacy. This solution, however, fails to redress the existing cultural knowledge abyss (of solicitors and judges) that has been described by participants in this study. What it does achieve, is greater exposure to the cultural/background contexts surrounding offending. In doing so, it creates an opportunity to educate the judicial and legal fraternity.

This process of addressing sentencing inequalities through private submissions in court aligns with Foucault's ideas around governmentalisation and the art of governing. This is a prime example of the State relying on outside actors, such as the legal fraternity, community and employed professional report writers to be filling a 'need' that the State cannot (or will not) fulfil (Foucault, 2003). One can also argue that, from a Foucauldian perspective, this shift in delivery of Section 27 from oral to professionally written reports can be interpreted as a State strategy of control. The shift to written reports, seemingly preferred, and at times specified by certain judges (the actors of the State), can be viewed as giving the appearance of action (the acceptance/up-take of cultural reports) whilst manoeuvring towards greater control through mandate and State funding. Once the State assumes responsibility for the provision and funding of the reports, the State (rather than community/whānau/lawyers) gains (further) control of the writers, of the

content and structure of reports, and of the levels and nature of collaboration involved in the reports construction. Is this the beginnings of the professionalisation of Section 27 reports? What was not discussed directly in the interviews is that Section 27 could become wholly embroiled in State bureaucracy through State funding and mandatory legislation. Potentially, like the FGC discussed above, Section 27 risks becoming (even more) another State action 'for Māori' designed within, and appropriated by, an oppressive colonial framework (see Moyle, 2013; Tauri, 2009).

While the system remains as it is, written reports appear to be a necessary tool for bridging the cultural deficit within the court system, depending upon the presiding judge's views. To beat upon the old drum again, an effective solution would be 'by Māori for Māori' delivery and interpretation of said reports, or at least an acceptable level of cultural competence presiding over Māori sentencing decisions (although how that could be ascertained is complex and potentially a politically sticky decision). One of the respondents pointed to the fact that the system is already somewhat in place within Matariki and Rangatahi court processes. For this to be of equal benefit for all Māori facing sentencing, it must be extended to all district court areas.

Another enhancement discussed by respondents, is to produce a set of guidelines directed at both the legal fraternity and the judiciary that highlights key points in the production or analysis of Section 27 reports. A similar variation of this publication could be provided to the offender or their

whānau/community, allowing their interpretation to be delivered within the environment of the court in a constructive/impactful way. For this to be effective at all, however, requires a foundation of deep cultural knowledge and understanding alongside a comprehensive knowledge of sentencing law. This potentially results in a different inequality issue depending on the literacy levels of those receiving such guidelines. One of the participants commented on the fact that there is no library containing Section 27 reports, and perhaps such a reference source could be made easily available. If the framework and support was in place and clear, the data from the interviews suggest that the uptake of Section 27 in the courtroom would increase.

Chapter 7: Conclusion

In summary, Section 27 is, in theory, a mechanism to counter Māori over-representation in New Zealand prisons and within the criminal justice system. This research sought to understand the effectiveness of Section 27 in the Sentencing process for Māori by address the following:

- Is Section 27 being utilised as intended by legislation?
- What are the underlying rationale and reasons why the Section is utilised by Court officials?
- What are the underlying rationale and reasons why the Section is not utilised by Court officials?
- What changes to legislation, policy or institutional practice are required to enhance the use of Section 27?

This chapter summarises the findings that the thesis has presented in the previous chapters to answer these questions; then provides a summary of propositions (as described in Chapter 4 section iv.) for a way forward and potential further research.

Summary of Key Findings

<u>Is Section 27 being utilised as intended by legislation?</u>

The interview data gathered show that the lived reality of Section 27 in action is inconsistent, in that it ranges from complete inattention in one area, to a low

level uptake in another. While participants from Location 2 seemed savvy in the Section's application, those in Location 1 generally were not. Thus, there appears an inequality in representation and therefore sentencing outcomes, depending on geographic location.

While, it would seem that an oral presentation by community member(s) providing the cultural context was the initial ambition of Section 27, a metamorphosis from community provision to that of written reports has occurred. Within this factor is the evolution of the professionally written report, and although seemingly very beneficial, it represents a further step away from the principle of community participation in sentencing.

What are the underlying rationale and reasons why the Section is utilised by Court officials?

All participants within the study, whether experienced in the implementation of Section 27 or not, saw value in the theoretical reasoning and potential of Section 27 within the sentencing domain. This was particularly noted in regard to the possible implementation of a sentencing reduction, allowing for a community-based sentence rather than a custodial one. This was noted as highly advantageous particularly for those avoiding first time incarceration.

While better sentencing outcomes are a common rationale for the implementation of Section 27, so too is the ability for Section 27 to re-involve

offenders with their communities. In doing so, many of the research participants believe that offenders gained access to crucial support and connection for ongoing rehabilitation within the community. The reports also aid offenders in seeing their own patterns of behaviour, and in understanding the historical contexts that lead to those behaviours.

A reduction of recidivism was highlighted as a possible positive effect of Section 27, particularly within the cohort of those gaining sentence reductions allowing community-based sentence instead of a first time custodial sentence. Some participants saw prison time and recidivism as closely connected and ascertained that less time in prison could assume less chance of reoffending. These were personal opinions of the participants.

Another key rationale, and perhaps not planned in the original design of Section 27, is the ability for comprehensive cultural context reports to educate both the judicial and the legal fraternity. This is perhaps what is already occurring considering the apparent increasing (but still very low and inconsistent) uptake of Section 27.

<u>What are the underlying rationale and reasons why the Section is not utilised by Court officials?</u>

There is no denying that there are many issues rationalising Section 27's underutilisation. Whilst a lack of knowledge of the Section's very existence is

one factor, it appears that the lack of guidelines and framework lead to an ambiguity that hinders its utilisation. The ideas of ‘culture’ and ‘cultural context’ are not clear to all. This lack of clarity and understanding seems to create a space of uncertainty and a fear to implement.

More disconcerting, however, and perhaps a far larger issue to breach, is the lack of cultural understanding (some participants described this as racism) within the courts. This ‘cultural chasm’ creates an inevitable lack of consistency and therefore an unclear and confused space for the Section’s implementation. The research clearly shows a defined undercurrent of frustration from participants in regard to traversing this space in practice.

In addition, the difficulty in obtaining funding for reports and the shortage of availability of report writers were also significant rationales for a limited utilisation of Section 27.

What changes to legislation, policy or institutional practice are required to enhance the use of Section 27?

The proposition for fully funded Section 27 reports was the most common suggestion for improvement. Again, this assumes the position of the professionally written report of higher status than a community driven pitch. The professionally written report, however, does seek to somewhat answer

the need to educate the judiciary and the legal fraternity. This was highlighted as a method to significantly improve Section 27s application.

Many however, voiced concern that a lack of cultural understanding would remain inevitable until a ‘changing of the guard’ occurred within the judicial. The need for ‘by Māori for Māori’ to gain any substantial changes to current practices was voiced clearly.

Further Research

This research was meant as a preliminary view of the current lived reality of Section 27 within the courtroom context. It was limited in scope and space due time and financial aspects constraining a Master’s thesis. Further research into the views of the both the judicial and the offenders would add to the nexus of knowledge surrounding the benefits, barriers and improvements that could be made to Section 27’s use in practice.

The Way Forward

This research shows that whilst it is irrefutable that Section 27 has by no means lived up to its primary purpose, the potential for it to have significant impact is apparent. What is required is a willingness to embrace the whole

notion of directly addressing societal issues stemming from colonisation. Notwithstanding the highly innovative and proactive court officials currently active in promoting ways forward for Māori, responsibility needs to be taken - an environment within the criminal justice system conducive to addressing cultural discrimination and colonial legacy needs to be established. This pathway has been mapped out by those few court officials and consultants. Now, the pathway needs consolidating with cultural education, guidelines, funding and support, and access for all Māori to a Matariki court. Most essentially, for this to happen, what is required is an openness and willingness in mind-set to imbed solutions that reflect the true impact of colonialism. With this in mind I give the final word to Nigerian criminologist Biko Agozino who argued that:

> *"Victimisation is not always interpersonal or intergroup, it is sometimes also structural and institutionalised. The decolonisation of victimisation from the expanding penal colony must come to terms with the fact of internal colonisation at the institutional level of punishment and also at the level of political space. The struggle involves and always has involved people who are black and people who are not. The important thing is to relate the struggle for decolonisation and against recolonisation to the cultural politics of the people" (Agozino, 2003, p. xi).*

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Appendix 1: Sentencing Act 2002 Section 9

Section 9 Aggravating and mitigating factors

(1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:

> *(a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:*
>
> *(b) That the offence involved unlawful entry into, or unlawful presence in, a dwelling place:*
>
> *(c) that the offence was committed while the offender was on bail or still subject to a sentence:*
>
> *(ca) that the offence was a family violence offence (as defined in section 123A) committed—*
>
> > *(i)while the offender was subject to a protection order (as defined in section 8 of the Family Violence Act 2018, or that was made under section 123B of this Act); and*
> >
> > *(ii) against a person who, in relation to the protection order, was a protected person (as so defined):*
>
> *(d) the extent of any loss, damage, or harm resulting from the offence:*
>
> *(e) particular cruelty in the commission of the offence:*
>
> *(f) that the offender was abusing a position of trust or authority in relation to the victim:*
>
> *(fa) that the victim was a constable, or a prison officer, acting in the course of his or her duty:*
>
> *(fb) that the victim was an emergency health or fire services provider acting in the course of his or her duty at the scene of an emergency:*
>
> *(g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:*
>
> *(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and*
>
> *(i)the hostility is because of the common characteristic; and*
>
> *(ii)the offender believed that the victim has that characteristic:*

(ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):

(hb)the nature and extent of any connection between the offending and the offender's—

(i) participation in an organised criminal group (within the meaning of section 98A of the Crimes Act 1961); or

(ii) involvement in any other form of organised criminal association:

(i) premeditation on the part of the offender and, if so, the level of premeditation involved:

(j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time:

(k) any failure by the offender personally (or failure by the offender's lawyer arising out of the offender's instructions to, or failure or refusal to co-operate with, his or her lawyer) to comply with a procedural requirement that, in the court's opinion, has done either or both of the following:

(i) caused a delay in the disposition of the proceedings:

(ii) had an adverse effect on a victim or witness.

(2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:

(a) the age of the offender:

(b) whether and when the offender pleaded guilty:

(c) the conduct of the victim:

(d) that there was a limited involvement in the offence on the offender's part:

(e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:

(f) any remorse shown by the offender, or anything as described in section 10:

(fa) that the offender has taken steps during the proceedings (other than steps to comply with procedural requirements) to shorten the proceedings or reduce their cost:

(fb) any adverse effects on the offender of a delay in the disposition of the proceedings caused by a failure by the prosecutor to comply with a procedural requirement:

(g)any evidence of the offender's previous good character:

(h) that the offender spent time on bail with an EM condition as defined in section 3 of the Bail Act 2000.

(3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).

(3A) In taking into account that the offender spent time on bail with an EM condition under subsection (2)(h), the court must consider—

(a) the period of time that the offender spent on bail with an EM condition; and

(b) the relative restrictiveness of the EM condition, particularly the frequency and duration of the offender's authorised absences from the electronic monitoring address; and

(c) the offender's compliance with the bail conditions during the period of bail with an EM condition; and

(d) any other relevant matter.

(4) Nothing in subsection (1) or subsection (2)—

(a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or

(b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

(4A) In subsection (1)(fb), emergency health or fire services provider means a person who has a legal duty (under any enactment, employment contract, other binding agreement or arrangement, or other source) to, at the scene of an emergency, provide services that are either or both—

(a)ambulance services, first aid, or medical or paramedical care:

(b) services provided by or on behalf of Fire and Emergency New Zealand to save life, prevent serious injury, or avoid damage to property.

(5) In this section, procedural requirement means a requirement imposed by or under—

(a) the Criminal Procedure Act 2011; or

(b) any rules of court or regulations made under that Act; or

(c) the Criminal Disclosure Act 2008 or any regulations made under that Act.

Appendix 2: Participant Information Sheet

University of Waikato - Faculty of Arts and Social Sciences

Human Ethics Research

Participant Information Sheet

Project Title

A Critical Analysis of Section 27 of the Sentencing Act (2002)

Principal Researcher

Ms Tara Oakley, Post-Graduate student, University of Waikato, Faculty of Arts and Social Sciences

Introductions

Kia ora, my name is Tara, I am a student at the University of Waikato, enrolled in a Masters of Social Science. As part of my course of study I am undertaking research on the use of Section 27 of the Sentencing Act (2002). I am contacting you as a potential participant in my research. The purpose of this document is to provide you with background information that will enable you to make an informed decision as to whether or not to be involved.

What is the study about?

The purpose the proposed research is to undertake a critical analysis of the use of Section 27 of the Sentencing Act (2002). The research focuses on two key issues, to what extent is Section 27 being utilised within the Courts as intended by the legislation passed in 2002, and what, if any, are the barriers to the section not been used as intended.

Why is this study important?

The proposed study is important because although the section has been available for use since 1985, and updated in the 2002 amended legislation, little research has been completed on its use. Therefore, the potential benefits from the research include that it will provide the policy sector, Court practitioners and consultants

with information on the use of Section 27, including i) reasons why it is used in some cases, and ii) some of the reasons why it may not be used as intended.

What is involved if you participate?

If you agree to be involved you will participate in a 1-on-1, semi-structured interview with the Principal Researcher. It is anticipated that the interview will take between 45 minutes to 1 hour to complete.

Is our interview confidential?

Yes. Except for the main researcher, no one else will know we met; nor will they be able to link you to what we talked about. Any information written about you will be de-identified, meaning that your transcript or my notes will not have your name and any other identifying factors that people can identify you with, such as where you live, your age or gender, on it. We will give you a code name or you can choose one for yourself. The Principal Researcher will take all reasonable steps to make sure that your right to confidentiality is protected.

What happens if I talk about something criminal I have done or am doing?

The researcher will make every effort to ensure communications with the participant are treated as confidential, but if any activity poses a serious threat to the health and safety of an individual or the public, the researcher will disclose that information to the appropriate authority.

Where can I go to for more information on this project?

You can call me on my contact details below.

Thank you for taking the time to read this and for participating in our research (should you decide to do so).

Researcher: Ms Tara Oakley
0274805700
tara.oakley74@yahoo.com

This research project has been approved by the Human Research Ethics Committee of the Faculty of Arts and Social Sciences. Any questions about the ethical conduct of this research may be sent to the Secretary of the Committee, email fass-ethics@waikato.ac.nz, postal address, Faculty of Arts and Social Sciences, Te Kura Kete Aronui, University of Waikato, Te Whare Wananga o Waikato, Private Bag 3105, Hamilton 3240.

Appendix 3: Amended Participant Information Sheet

University of Waikato - Faculty of Arts and Social Sciences
Human Ethics Research
Participant Information Sheet

Project Title
A Critical Analysis of Section 27 of the Sentencing Act (2002)

Principal Researcher
Ms Tara Oakley, Post-Graduate student, University of Waikato, Faculty of Arts and Social Sciences

Introductions
Kia ora, my name is Tara, I am a student at the University of Waikato, enrolled in a Masters of Social Science. As part of my course of study I am undertaking research on the use of Section 27 of the Sentencing Act (2002). I am contacting you as a potential participant in my research. The purpose of this document is to provide you with background information that will enable you to make an informed decision as to whether or not to be involved.

What is the study about?
The purpose the proposed research is to undertake a critical analysis of the use of Section 27 of the Sentencing Act (2002). The research focuses on two key issues, to what extent is Section 27 being utilised within the Courts as intended by the legislation passed in 2002, and what, if any, are the barriers to the section not been used as intended.

Why is this study important?
The proposed study is important because although the section has been available for use since 1985, and updated in the 2002 amended legislation, little research has been completed on its use. Therefore, the potential benefits from the research

include that it will provide the policy sector, Court practitioners and consultants with information on the use of Section 27, including i) reasons why it is used in some cases, and ii) some of the reasons why it may not be used as intended.

What is involved if you participate?

If you agree to be involved you will participate in either a 1-on-1, semi-structured interview with the Principal Researcher or an online questionnaire of similar content should time constraints dictate. It is anticipated that the interview will take between 45 minutes to 1 hour to complete.

Is our interview confidential?

Yes. Except for the main researcher, no one else will know we met; nor will they be able to link you to what we talked about. Any information written about you will be de-identified, meaning that your transcript or my notes will not have your name and any other identifying factors that people can identify you with, such as where you live, your age or gender, on it. We will give you a code name or you can choose one for yourself. The Principal Researcher will take all reasonable steps to make sure that your right to confidentiality is protected.

What happens if I talk about something criminal I have done or am doing?

The researcher will make every effort to ensure communications with the participant are treated as confidential, but if any activity poses a serious threat to the health and safety of an individual or the public, the researcher will disclose that information to the appropriate authority.

Where can I go to for more information on this project?

You can call me on my contact details below.

Thank you for taking the time to read this and for participating in our research (should you decide to do so).

Researcher: Ms Tara Oakley
0274805700

tara.oakley74@yahoo.com

This research project has been approved by the Human Research Ethics Committee of the Faculty of Arts and Social Sciences. Any questions about the ethical conduct of this research may be sent to the Secretary of the Committee, email fass-ethics@waikato.ac.nz, postal address, Faculty of Arts and Social Sciences, Te Kura Kete Aronui, University of Waikato, Te Whare Wananga o Waikato, Private Bag 3105, Hamilton 3240.

Appendix 4: Participant Consent Form

University of Waikato – Faculty of Arts and Social Sciences

Research into the Use of Section 27

Participant Consent Form

Name of person interviewed/questioned:

_____

I have received a copy of the Participant Information Sheet describing the research project. Any questions that I have, relating to the research, have been answered to my satisfaction. I understand that I can ask further questions about the research at any time during my participation, and that I can withdraw my participation at any time *[up to four weeks]* after the interview.

If I elect to be interviewed, during the interview, I understand that I do not have to answer questions unless I am happy to talk about the topic. I can stop the interview at any time, and I can ask to have the recording device turned off at any time. Should I choose the questionnaire, I understand that I am not under any obligation to answer the questions unless I am happy to do so.

When I sign this consent form, I will retain ownership of my interview/questionaire, but I give consent for the researcher to use the interview for the purposes of the research outlined in the Information Sheet.

I understand that my identity will remain confidential in the presentation of the research findings.

Please complete the following checklist. Tick [✓] the appropriate box for each point.	**YES**	**NO**
I wish to view the transcript of the interview/questionaire.		
I wish to receive a copy of the findings.		

Participant :		Researcher :	
Signature :		Signature :	
Date :		Date :	
Contact Details :		Contact	

Appendix 5 : Interview Schedule

Interview Schedule

What is your experience with s27 reports?

What do you see the benefits of these reports as having?

Do you see any barriers affecting section 27 ability to achieve its original purpose (reduce Māori incarceration)?

Does there appear to be a set of "ideal circumstances" when this legislation is most effective?

Is there a section of the population that you think benefits more from s27 reports than others?

In your opinion does s27 have the potential to somewhat counteract the institutional racism that is evident in the criminal justice system?

Do you think that a reduction in a custodial sentence length due to discount through cultural reports would influence a lower rate of recidivism.

Do you see or have you noticed any changes in offender's responses or attitudes towards the criminal justice system with the acknowledgement of cultural hardship in the section 27 processes of sentencing decisions?

Do you perceive any risk of an unacknowledged claim of cultural hardship during sentencing on offender's wellbeing or risk of reoffending?

Is there becoming somewhat of an expectation of a reduction in sentencing due primarily to being Māori?

Do you find that particular organisations are more successful in obtaining a bigger sentence reduction than other companies due to the quality of their reports?

Do the professionally produced reports have greater impact that a report produced by whānau?

Has there been an obvious drop in cultural reports being ordered since the MOJ has become aware of the legalities around funding these reports?

Are these reports being used in sentencing decisions when they are looking at a home detention sentence anyway?

If you could wave a magic wand and the ideal policy or policies be put in place so as to positively influence the reduction of Māori incarceration…..what would they look like do you think

Appendix 6: Questionnaire (Lawyer)

Questionnaire for Defence Lawyers

A critique of Section 27 of the Sentencing Act 2002

I have received and read the Participation Information Sheet and agree to the information on the Participation Consent Form

If you wish to receive a copy of the findings, please enter your email address below.

Where is your predominant area of practice?

How many years have you been in practice?

How many times have you used Section 27 (not including Youth Court)?

What type of reports was mostly given?

What do you see the benefits of these reports as having?

Do you see any barriers affecting Section 27's ability to achieve its original purpose - a reduction in Māori incarceration rates?

Does the surrounding legislative framework provide support for section 27 to function effectively?

Does there appear to be a set of ideal circumstances when section 27 is most effective?

Do you think that section 27 has the potential to somewhat counteract the institutional racism that is evident in the criminal justice system?

Do you think that a reduction in custodial sentence lengths, due to a discount through cultural reports, could influence a lower rate of recidivism?

Do you find that certain report writing companies are more successful than others in obtaining reductions in sentencing due to the quality of the reports?

Are these reports difficult to source?

In what way does legal aid facilitate/impede on section 27's functionality?

Do professionally produced section 27 reports have a greater impact than representation by whānau/hapū/iwi?

Has there been a drop in the number of reports being ordered since the Ministry of Justice became aware of the legalities of funding them recently?

Often policy is written from a perspective outside of the lived experience that it is to be implemented in. In your opinion, what should a policy look like so as to positively influence a reduction in Māori incarceration rates?

Is there anything else that you would like to add?

Appendix 7 : Questionnaire (Cultural Consultant)

Questionnaire for Cultural Consultants

Q2. A critique of section 27 of the Sentencing Act 2002

I have read the Participation Information Sheet and agree to the information on the Participation Consent Form

If you wish to receive a copy of the findings, please enter your email address below.

Current predominant area of practice

Approximately how many reports have you written?

What do you see the benefits of these reports as having?

Do you see any barriers affecting section 27's ability to achieve its original purpose - a reduction in Māori incarceration rates?

Do you believe that the surrounding legislative framework provides support for section 27 to function effectively?

Does there appear to be an ideal set of circumstances when section 27 is most effective?

Do you think that section 27 has the potential to somewhat counteract the institutional racism that is evident in the criminal justice system?

Do you think that a reduction in custodial sentence lengths, due to a discount through cultural reports, could influence a lower rate of recidivism?

Do the reports that you write typically offer options of community based programs/interventions prior to sentencing?

Do the reports that you write typically offer options of community based programs/interventions post release?

In what way does legal aid facilitate/impede on section 27's functionality?

Has there been a drop in the number of reports being ordered since the Ministry of Justice became aware of the legalities of funding them recently

Is the demand for section 27 reports difficult to meet in the area where you currently practice?

Often policy is written from a perspective outside of the lived experience that it is to be implemented in. In your opinion, are there changes that could be made to this policy (or

the surrounding framework) so as to positively influence a reduction in Māori incarceration rates.

Is there anything else that you would like to add?