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## Assignment Thesis

### 593 Assignment

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Does the Pre-Sentence Report carry weight in the sentencing process and does it uphold the principles of the rule of law?

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## **PART A**

### **1. Introduction**

#### *1.1 Principles of criminal justice*

The criminal justice system plays a pivotal role in the social contract which determines our system of democracy. Contemporary democracies in the Western world find their origins in the writings and theories of philosophers such as Hobbes,<sup>1</sup> Locke<sup>2</sup> and Rousseau<sup>3</sup> who explored the human condition in the 'state of nature' which was either 'nasty, brutish and short'<sup>4</sup> or a state of happiness disrupted by the growth of human activity and the value placed on property. These philosophers argued that, in order to create some order to the state of nature, it was necessary to enter into a social contract which would protect individuals from the behaviour of others and would create a system of order which would provide protection to all citizens. That system of order is what underpins what we know of as democratic government, brought about by a contract whereby some rights and freedoms are given up to achieve protection, to live without fear, and to punish those who do not live by the rules that the system of the order puts in place to achieve its goals.

These philosophers, while suggesting a social contract was necessary, had different visions for what that contract would look like. There was division between Hobbes, an absolutist who thought the contract would be overseen by a sovereign who would determine the rules which everyone would live by and without which there would be unending conflict, and Locke, who thought that a government should protect the rights of individuals (particularly in relation to private property) but that when a government failed in that protection, the people should withdraw their consent to be governed.

The development of the concept of the social contract from Hobbes to Locke and then to Rousseau was a progression away from an absolutist idea of government towards an idea of government whereby consent was given by the

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<sup>1</sup> Hobbes, T *Leviathan* first published in April 1651.

<sup>2</sup> Locke J, *Two Treatises of Government* first published in 1689.

<sup>3</sup> Rousseau J, *The Social Contract* first published in 1762.

<sup>4</sup> As at n 1.

people to be governed, and where that consent could be taken away if the government was not just and was not protecting its citizens (contemporary general elections). Locke disagreed with Hobbes' view that absolute power could rest in one authority or sovereign because it would result in arbitrary decision making and rules of order which were not consented to by the people. Locke instead believed in a system of order which had a focus on justice. Locke brought to the fore the ideas of some of the great thinkers of antiquity, such as Aristotle, who had propounded ideas around a need for rules and a need for equity which would be brought about by the just administration of those rules. Locke's attention to these ideas brought into modern history the concept of the rule of law, which has become the fundamental underpinning of any democratic society. Locke's rule of law has since been debated and built on by other philosophers such as Hayek and Dicey and by modern jurisprudentialists such as Hart and Rawls.<sup>5</sup>

The rule of law comprises three main concepts: (i) government power must be regulated, (ii) there must be equality before the law and (iii) there must be procedural and actual justice. These principles protect individuals against arbitrary rules, or laws, ensure that nobody, and no authority, is above the law (that is, the law applies to everyone, even the lawmakers) and that there is a system which provides a known, accepted and expected process for instances where laws are broken.<sup>6</sup>

The third of these principles underpins our criminal justice system. The rule of law in the criminal justice system requires that every person has access to justice (right to representation) and every person is treated equally, there is a right to protection against coercion, there is a right to a fair trial, there is a

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<sup>5</sup> *Stanford Encyclopedia of Philosophy* The Rule of Law, First published Wed Jun 22, 2016 <https://plato.stanford.edu/entries/rule-of-law/> Retrieved 19 December 2020 at 10.46am and *Wendel, W Bradley* Political culture and the rule of law: comparing the United States and New Zealand" [2012] *OtaLawRw* 3; (2012) 12 *Otago LR* 663

<sup>6</sup> As at n 5.

presumption of innocence, there is the right not to be detained without just cause (habeas corpus) and that there should be no punishment unless there is a pre-existing law (protection against the retrospective application of law). These rights mean that the rule of law should accompany a defendant throughout the entire criminal justice process, from arrest right through to sentencing (if it goes that far). The rule of law provides checks and balances for the treatment of defendants and should ensure the most just outcome. The following diagram illustrates the role of the rule of law in the criminal justice process:<sup>7</sup>

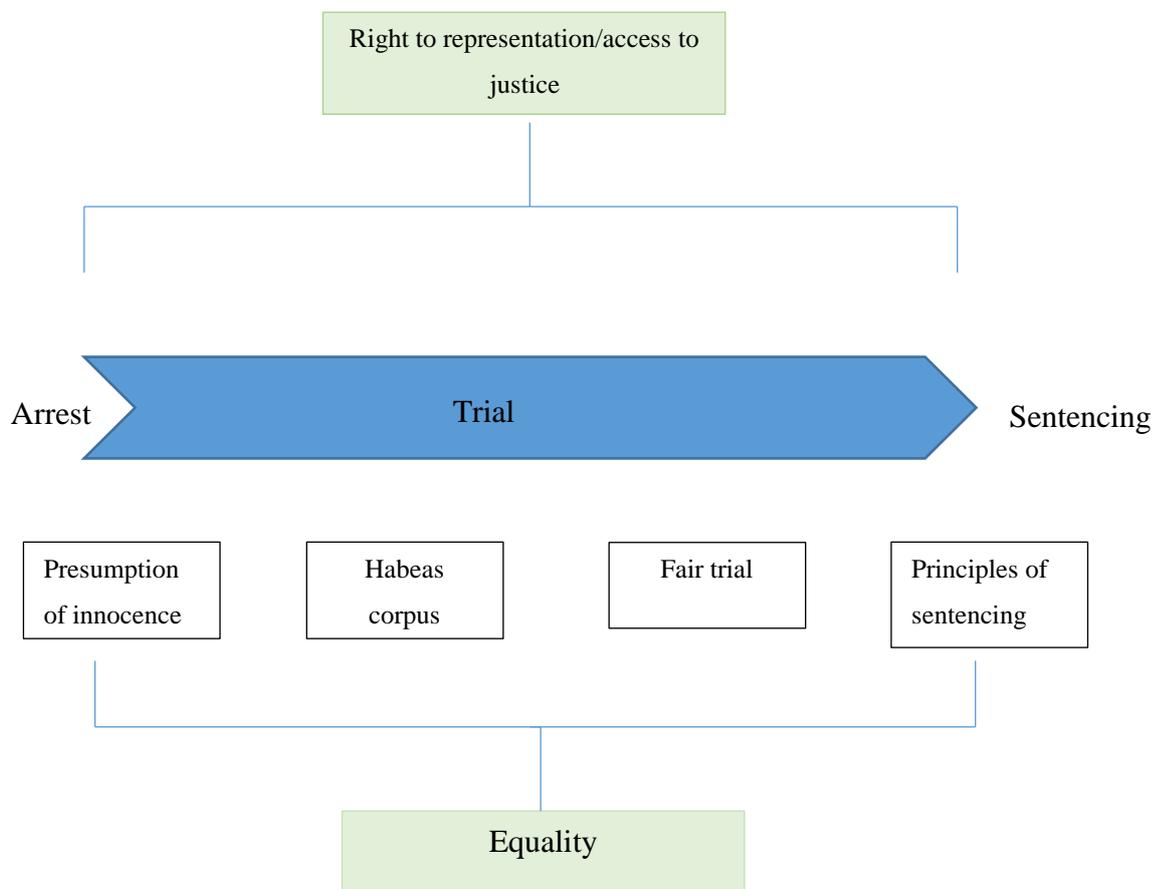


Figure 1: the rule of law in the criminal justice process.

<sup>7</sup> Adapted from a diagram provided on the IBJ Criminal Defence Wiki website <https://defensewiki.ibj.org/images/9/9e/Criminaljusticeprocess.jpg>

*1.2 Experience as a defence lawyer*

Practising criminal law requires a commitment to the rule of law and to the principles of criminal justice. At every step of the criminal justice process those principles must be front of mind. A criminal lawyer in 2020 New Zealand operates in a system which has developed over time and which is built on fundamental democratic and legal principles. The principles of the rule of law should be applied in every aspect of the system, from the initial arrest by the police, first appearances in court, name suppression, providing the best advice to the defendant in order to progress the case, requesting additional time for the provision of disclosure and the arrival at an informed decision, entering a plea, maintaining the right to defend the charge, preparing for trial or pleas in mitigation for sentencing, the pre-sentence report and the ultimate decision-making of guilt or innocence, or end sentence.

There are so many phases and stages of the process once the defendant is within the system that it is fraught with possibility for something to go wrong, that is, for injustice to result. As professionals, criminal lawyers will be on their guard against such an outcome; they will strive for justice at every step of the way. New Zealand's system of justice is adversarial; prosecutors are also striving for justice and for the rule of law to be upheld as they attempt to bring redress for the alleged wrong against the complainant. The actors in the criminal justice sector in New Zealand are the police, the Crown (represented by a Crown Solicitor and Crown prosecutors), the defence bar, the Court criers and registrars, the Department of Corrections (in-court representatives of Probation Officers who act both as prosecutors and information providers), the judge and the jury (in trials where a defendant has elected to be judged by a jury - for offences carrying penalties of 2 years' imprisonment or more or for particular offences where the matter has to be decided on by jury (such as murder)). Every actor within the system, and the system itself, must be cognisant of the rule of law. It is possible that this is not always the case and that there are aspects of the criminal justice process where the rule of law is forgotten, overlooked or deliberately ignored.

### 1.3 *Inconsistency in sentencing*

One area where the rule of law may not be at front of mind is at the sentencing stage. This is the point following a defendant either having been found guilty at trial or having entered a guilty plea, so as to admit responsibility. The defendant's right to representation continues on through the sentencing process as counsel have the opportunity to put forward a plea in a mitigation to the sentencing judge, providing reasons to the judge, based on the purposes and principles of sentencing, case law and personal circumstances, for the least restrictive outcome for the defendant.

The prosecutor may also make submissions about an outcome that is appropriate from their perspective, but it is the judge's decision as to what the end sentence will be. The judge may be assisted by other material such as a pre-sentence report, a restorative justice report, a cultural report or a victim impact statement. Each one of the pieces of information provided to the judge needs to have been created in accordance with the principles of the rule of law and must be received by and applied by the judge within the same principles.

Although there are guidelines for sentencing in New Zealand, contained in the maximum penalties for offences, in sections 7, 8 and 9 of the Sentencing Act 2002 ("the Act")<sup>8</sup> and in tariff cases and guideline judgments, there is much room for discretion from the sentencing judge, and much of that discretion is based on the information the judge is provided with when making his or her sentencing decision. Because of this discretion, there may be inconsistency in sentencing outcomes and that there may even be a disparity in sentencing outcomes depending on background information provided about the defendant.

The 'Gluckman report' of 2018<sup>9</sup> examined crime rates and rates of incarceration in New Zealand. The report found that crime rates in New

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<sup>8</sup> Sentencing Act 2002.

<sup>9</sup> Gluckman P, *Using evidence to build a better justice system: The challenge of rising prison costs* Chief Science Advisor, Office of the Prime Minister's Chief Science Advisor, Auckland, New Zealand 29 March 2018.

Zealand are currently the lowest since the 1970s and have steadily been falling since 2009. While crime rates have been falling, incarceration rates, though, have sharply risen since the early 1990s.

Sentencing is a crucial part of the criminal justice process and one that can have the most impact on the defendants involved. The tendency to sentence to imprisonment has been, according to the Gluckman report, due to successive government responses to media panics over serious crime and a public perception about being soft on crime. Policy as a response to public and media pressure, rather than being based on evidence, brings in to question whether defendants are being treated fairly and whether the rule of law is being properly applied.

Alongside a rise in incarceration rates, there has been a rise in the rates of Maori being imprisoned. Statistics show that New Zealand's overall incarceration rates place it at the third highest in the developed world. The rate of incarceration of New Zealand Europeans is 93 per 100,000 while for Maori it is 660 per 100,000, a rate that is equal to the US rates which are the highest in the world.<sup>10</sup> Such discrepancies inevitably raise questions about equality and fairness.

It is statistics such as those presented in the Gluckman report that turn the spotlight on why there are different sentencing outcomes for different individuals or groups of people. Questions can be asked about whether there is an unconscious institutional bias for or against a particular group of people, or about the impact that socio-economic inequity might have on sentencing outcomes. Investigating sentencing as a whole is an enormous task since there are many different aspects to sentencing which can be explored; they include, but are not limited to, the adherence or otherwise to guideline judgments, the absence of guideline judgments, the role of the restorative justice process, submissions made by the prosecution and victim impact statements.

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<sup>10</sup> As at n 9.

One factor which may have a significant impact on the sentence which is imposed, or on how a judge might approach the sentencing exercise, is the Provision of Advice to the Courts, commonly known, and named in legislation as the Pre-Sentence Report (for the purpose of this paper the Provision of Advice to the Court will be referred to as the Pre-Sentence Report (“PSR”)).

The PSR is an opportunity for the sentencing judge to consider not just the offence that is before the court, but background information about the defendant. This is meant to ensure the sentence is appropriate in terms of whether imprisonment is necessary or whether a sentence of home detention may be a better outcome and in terms of whether the defendant requires a rehabilitative element to his or her sentence. The consideration of the personal circumstances of the defendant acknowledges that there may be different reasons why individuals offend, and acknowledges that treating everyone in exactly the same may not produce the just outcome that is the goal of all those involved in the criminal justice system strive for.

The PSR, therefore, introduces a subjective element into the sentencing process, which, combined with the ultimate discretion of the judge, may mean that not everyone is treated equally. Subjectivity and discretion can open up many ways for the rule of law to be overlooked. This paper will, in its search for assurances that the rule of law is being applied appropriately in the criminal justice system, and in an effort to examine one aspect of the complex process of sentencing which produces such varying results, explore the role of the PSR.

## **2. Thesis Statement**

Applying the rule of law at every stage of the criminal justice process is fundamental to our criminal justice system and to our social contract. There are indications that the rule of law may be being forgotten, ignored or breached within the criminal justice system, producing what appear to be unfair outcomes which further marginalise particular sectors of society. An examination of PSRs, as one small but important part of the criminal justice process, and the sentencing process in particular, will assist in testing and

establishing whether assumptions about inequality in the sentencing process are justified.

### 3. Background – contextualising the Pre-Sentence Report in New Zealand<sup>11</sup>

Section 26 of the Sentencing Act 2002 makes provision for the Pre-sentence Report. Section 26 says:

#### **26 Pre-sentence reports**

- (1) Except as provided in section 26A, if an offender who is charged with an offence punishable by imprisonment is found guilty or pleads guilty, the court may direct a probation officer to prepare a report for the court in accordance with subsection (2).
- (2) A pre-sentence report may include—
  - (a) information regarding the personal, family, whanau, community, and cultural background, and social circumstances of the offender;
  - (b) information regarding the factors contributing to the offence, and the rehabilitative needs of the offender;
  - (c) information regarding any offer, agreement, response, or measure of a kind referred to in section 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case;
  - (d) recommendations on the appropriate sentence or other disposition of the case, taking into account the risk of further offending by the offender;
  - (e) in the case of a proposed sentence of supervision, intensive supervision, or home detention, recommendations on the appropriate conditions of that sentence;
  - (f) in the case of a proposed sentence of supervision, intensive supervision, or home detention involving 1 or more programmes,—
    - (i) a report on the programme or programmes, including a general description of the conditions that the offender will have to abide by; and
    - (ii) confirmation that the report has been made available to the offender;
  - (g) in the case of a proposed sentence of supervision, intensive supervision, or home detention involving a special condition requiring the offender to take prescription medication, confirmation that the offender—
    - (i) has been fully advised by a person who is qualified to prescribe that medication about the nature and likely or intended effect of the medication and any known risks; and
    - (ii) consents to taking the prescription medication;

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<sup>11</sup> This section has been informed by desk research and an informal but on the record conversation with a court-servicing PO.

- (h) in the case of a proposed sentence of community work,—
  - (i) information regarding the availability of community work of a kind referred to in section 63 in the area in which the offender will reside; and
  - (ii) recommendations on whether the court should authorise, under section 66A, hours of work to be spent undertaking training in basic work and living skills:
- (i) in the case of a proposed sentence of intensive supervision or possible release conditions for a proposed sentence of imprisonment for 24 months or less, the opinion of the chief executive of the Department of Corrections as to whether—
  - (i) a condition that prohibits the offender from entering or remaining in specified places or areas at specified times or at all times (a whereabouts condition in this paragraph) would facilitate or promote the objective of reducing the risk of the offender reoffending while subject to the sentence or release conditions; and
  - (ii) a whereabouts condition would facilitate or promote the objective of rehabilitating and reintegrating the offender; and
  - (iii) a further condition requiring the offender to submit to electronic monitoring of his or her compliance with a whereabouts condition is warranted, having regard to the likelihood of non-compliance with the whereabouts condition.
- (3) The court must not direct the preparation of a report under subsection (1) on any aspects of the personal characteristics or personal history of an offender if a report covering those aspects is readily available to the court and there is no reason to believe that there has been any change of significance to the court since the report was prepared.
- (4) On directing the preparation of a report under subsection (1), the court may indicate to the probation officer the type of sentence or other mode of disposition that the court is considering, and may also give any other guidance to the probation officer that will assist the officer to prepare the report.
- (5) If a court has directed the preparation of a report under subsection (1), the probation officer charged with the preparation of the report may seek the further directions of the court on—
  - (a) any particular item of information sought by the court; or
  - (b) any alternative sentence or other mode of disposition that may be considered by the court if it appears that the sentence or other mode of disposition under consideration is inappropriate.

Section 26A provides that if the court is considering a sentence of community detention (“CD”) or home detention (“HD”) then a PSR *must* be ordered. The provisions of s26(2) apply under s26A and there are additional requirements such as information about the suitability of the proposed address and the consent of other occupants of the address.

Making legislative provision for the PSR raises the significance of this means of providing information to the court. Although there are rule of law principles in operation in our democratic society, legislating for particular purposes raises the significance of that purpose, and makes it even more important that the achievement of the purpose adheres to the principles of the rule of law.

Providing legislative guidance for what the PSR should contain is intended to be helpful in ensuring that there is consistency in PSRs that are presented to the court.

PSRs did not make their first appearance in New Zealand with the introduction of the Act. Prior to the Act, which guides the sentencing process at present, PSRs were first provided for in the Criminal Justice Act 1954<sup>12</sup> and then in the New Zealand Criminal Justice Act 1985.<sup>13</sup> The provisions in the 1985 Act were implemented following the recommendations of the Penal Policy Review Committee<sup>14</sup> that

the scope of the pre-sentence reports be widened to assist the court in making an informed, rational, and fair decision meeting the needs of a particular case. They should provide an up-to-date portrait of the offender in a real social setting.<sup>15</sup>

These fuller reports came with problems encompassed by ‘biased attitudes of report writers’<sup>16</sup> which ‘could be executed in a subtle or blatant manner in the style and language of the report, and in the recommended policy’.<sup>17</sup>

In April 2019 the Chair of the Criminal Justice Reform Panel said that PSRs currently being prepared for court were badly written and did not provide relevant information: ‘they are cut and paste documents using the same phrases

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<sup>12</sup> Criminal Justice Act 1954, s 4(1): ‘to report on the character and personal history of any person convicted of an offence punishable by imprisonment’.

<sup>13</sup> New Zealand Criminal Justice Act 1985, s15.

<sup>14</sup> Report of the Penal Policy Review Committee, 1981.

<sup>15</sup> As at n 15, p 135.

<sup>16</sup> Deane, H *The Influence of Pre-sentence Reports on Sentencing in a District Court in New Zealand* *The Australian and New Zealand Journal of Criminology*, Volume 33 No 1 2000 pp 91-106.

<sup>17</sup> As at n 16, p 93.

over and over again'.<sup>18</sup> In the same article, high risk offenders' advocate Billy McFarlane said 'probation officers often miss out key information in the reports and have actually been incorrect.'<sup>19</sup>

This means that a very important part of the sentencing process has been criticised for providing biased, inaccurate and incompetently assembled information to the court. The question must be asked whether this really is serving the defendants and the criminal justice system well. If instruments such as the PSR influence the justice process they surely must be of an appropriate standard to do so. The PSR is clearly part of the system and it is easy to assume that ticking the box and completing the report means that this required part of the process has been completed. But what if the PSR has a huge influence on the sentencing outcome – is it fair that they are being written by people who may miss important information, who cut and paste information and who may bring their own bias to bear? Are the report writers cognisant of their important role in the delivery of justice and of ensuring the rule of law is upheld?

PSRs are ordered by the judge at the point at which guilty pleas are entered or a defendant is found guilty at trial. Sentencing is adjourned for approximately six weeks to allow time for the report to be completed and be presented to the court. A judge is mandated to order a PSR if a sentence of CD or HD is being considered because it is necessary to establish that the proposed address is suitable, technically feasible and everyone who resides at the address consents to a defendant potentially serving a sentence there. PSRs are otherwise ordered by a judge for a range of reasons, including whether the defendant should receive a rehabilitative sentence. A judge may ask for the PSR to ascertain the suitability of the defendant for a sentence of supervision or intensive supervision rather than a sentence of community work or even community detention. A PSR may also be used by the judge to assist in justifying a step

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<sup>18</sup> McLachlan, Leigh-Marama *Pre-sentencing reports criticized by Judges and lawyers* RNZ, 29 April 2019 <https://www.rnz.co.nz/news/national/387988/pre-sentencing-reports-for-offenders-criticised-by-judges-and-lawyers> retrieved 25 August 2020, 3.54pm.

<sup>19</sup> As at n 18.

back from a higher sentence if the report presents material about the defendant which establishes high levels of remorse and low prospects of reoffending.

The PSR is the domain of the Department of Corrections and Probation Officers specifically.<sup>20</sup> The law stipulating that the Department of Corrections should provide the provision of advice to the court means, technically, that the PSR is completed by an independent body, or an independent individual (the Probation Officer (“PO”). This recognises the importance of the PSR in terms of the kind of information that can be presented to the court and the notice that will be taken of it. Handing the responsibility to an independent body means there is no reason to present information that is anything other than objective. This is not quite the reality, however, because the Department of Corrections and POs not only provide this advice to the court, they also manage sentences for defendants already sentenced on other charges and prosecute defendants who have breached the terms of their community-based sentence which is overseen by them.<sup>21</sup> In this sense, even though their vested interest is different from that of the prosecutors and defence counsel, POs cannot be said to be truly independent. Often the PSR is written by a PO who currently, or has in the past, overseen the defendant’s sentence; they may have breached (prosecuted) the defendant and although they may have developed a relationship with the defendant, this doesn’t always mean that the relationship is a good one, and this may have an impact on their view of the defendant.

Although prior knowledge may seem to be helpful for a PO writing a report for the court, it may also mean that a defendant is never able to escape from their past and will always be cast as a person with particular traits, even if they may be capable of change (especially if they had someone new to work with). Defendants can request a different PO if they feel they have a poor relationship with their PO but this must be done in writing (something that the majority of defendants might find to be an overwhelming hurdle) before it is considered. Similarly, if there are factual inaccuracies in a PSR, defendants are told they

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<sup>20</sup> Corrections Act 2004, s 25.

<sup>21</sup> As at n 20.

can inform the Report Writer (“RW”) about this before sentencing so that the mistakes can be corrected; the reality is that defendants are very unlikely to do this.

A Court-service PO will sit in the courtroom and will take note that a PSR has been ordered. It is the responsibility of POs to complete the report. The information presented in the PSR is gathered through an interview between a PO and the defendant and a review of the defendant’s criminal history and the summary of facts for the current offending; there may also be conversations with family members and employers and investigations made with Oranga Tamariki and the Police. The PO, therefore, has considerable control over the information which is presented to the court. The PO in court starts this process and it is crucial that the correct information is recorded at this point. For example, it is not uncommon that when guilty pleas are entered some original charges may be withdrawn or amended by the police, and the summary of facts may be amended to reflect the changes to the charges the defendant is pleading to. The registrar in court records this information and from the Ministry of Justice the information is passed to the Department of Corrections. It is crucial this information accurately records any changes because if defendant is interviewed based on the incorrect set of charges or an out-of-date summary of facts, it is likely that inaccurate information will be presented to the court in the PSR.

A PO will arrange to interview the defendant to discuss the offending and their circumstances. This of course, depends on the PO being able to contact the defendant; defendants are often transient and do not always have cell phones, defendants can therefore be disadvantaged right from the outset since, if the PO is unable to interview the defendant, this will create a poor impression to the sentencing judge.

It is also the PO’s responsibility to keep trying to track the defendant down, some POs may, however, be more conscientious than others which could mean

an unfair advantage for those defendants who have particularly conscientious POs.

The interview format requires an ability to communicate and a sophistication on the part of the defendant to ensure they present themselves in the best light possible; this assumes that all defendants will be able to cope with an interview and have had some experience of engaging with figures of authority. A formal face-to-face interview may not always be the most culturally sensitive means of getting information from the defendant who has no other choice but to participate. The way in which a defendant engages with the PO (who becomes the RW) will necessarily influence the information presented in the PSR which will be considered by the sentencing judge.

At the beginning the RW will explain to the defendant what will happen during the interview and what is the purpose of the interview; some more experienced defendants will already know this. They are also told that it is not compulsory for them to participate in the interview. If a defendant chose not to participate this would be reported back to the court and would not look good for the defendant so virtually on every occasion the defendant will remain in the interview. Defendants can bring a support person with them apparently, though, this does not happen often.

In the Tauranga region very few POs are of Maori background. This is true of other sectors of the court operation too, there are very few Maori lawyers and the majority of the judiciary and the Community Magistrates are NZ European. This produces a situation where at least nine times out of 10 a Maori defendant is seen by a NZ European lawyer and is told by a NZ European Judge or Magistrate to go to an interview with a NZ European PO.<sup>22</sup> It is little wonder that often by the time defendants present for their PSR interview they are angry at a system populated by people they do not recognise and who do not recognise them.

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<sup>22</sup> Based on knowledge from working in the Tauranga DC and from observations of the Court process and from a conversation with a senior court-based Probation Officer.

The PSR uses a risk-need-responsivity (RNR) model<sup>23</sup> for making a sentence recommendation to the court. It presents 'Key considerations', which will be a summary of the offending and whether the current offending is an escalation or reduction in seriousness or frequency. There will also be a summary of relevant personal information, such as employment or health issues, that will impact on the type of sentence recommended; a summary of offending needs is provided, though it is not clear how this assessment is made, and then the report should provide reasons for the sentence it recommends. The report will then go on to provide additional information variously under the following types of headings: Domestic and Cultural Circumstances, Relationships, Income, Work Skills and Education, Lifestyle, Friends and Associates, Attitudes, Alcohol Use and/or Drug Use, Gambling, Violence, Offending-Related Sexual Arousal, Emotional Health and Wellbeing, Risk of Harm to Self, Physical Health and Wellbeing, Remorse and Offers to Make Amends, Ability to Comply, Likelihood of Re-offending, Risk of Harm to Others.

There will then of course be a section on electronic monitoring considerations if appendices (consideration of CD or HD) have been ordered by the judge. A single PSR will not necessarily address all the headings above. The information provided will largely be based on the information-gathering approaches identified above.

There is a 'Departmental Tool' called the DRAOR (Dynamic Risk Assessment of Offender Re-entry tool) which RWs can use when assessing the Likelihood of Re-offending.<sup>24</sup> The DRAOR is a score-based tool which ranks 19 risk factors under the headings stable, acute and protective as per the following table:

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<sup>23</sup> Department of Corrections, *Managing Offenders to Reduce Reoffending* 2013, Controller and Auditor General <https://oag.parliament.nz/2013/reducing-reoffending/glossary> Retrieved 26 August 2020, 11.25am.

<sup>24</sup> As at n 23, p 44.

Dynamic risk assessment offender re-entry tool

<b>Stable (slow-changing) factors</b>	<b>Acute (fast-changing) factors</b>	<b>Protective factors</b>
Peer associates	Substance abuse	Responsive to advice
Attitudes to authority	Anger/hostility	Pro-social identity
Impulse control	Opportunity/access to victim	High expectations
Problem solving	Negative mood	Costs/benefits
Sense of entitlement	Employment	Social support
Attachment with others	Interpersonal relationships	Social control
	Living situation	

Figure 2: Source: Department of Corrections.<sup>25</sup>

Each factor is rated by the PO or RW on a three-point scale, whereby a 0 score means there is a low risk and 2 is high risk. The tool enables a PO or RW to assess a defendant in real time and to monitor changes to risks. It is a tool that is to be commended but it would seem inevitable there is still a level of judgement and subjectivity being used to determine scores, meaning that it is not a foolproof system. The outcomes of these assessments are not included in the PSR in a quantitative format; the PSRs are written in narrative only, meaning the assessments become doubly subjective.

To become a PO applicants are required to have a tertiary qualification in criminology or sociology and, if appointed, to receive training in all aspects of

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<sup>25</sup> As at n 23.

being a PO, including report writing.<sup>26</sup> POs come from a range of background including mental health, social work, the military, the police force and law.

POs receive training to write reports; of the six to eight weeks undertaken by POs the training for report writing is about two days long. RWs are not 'experts' to the same extent as a medical expert who provides evidence at trial. POs are trained in the motivational interview technique to draw information from defendants through naïve questioning. RWs are also POs who manage an offender's sentence and often they are writing reports on defendants who are also under their guidance for completing a previous sentence. Every time a defendant reports to their PO on sentence they go through the DRAOR process.

The practice of the RW seems to be very subjective, based as it is on conclusions drawn from what a defendant says at interview, on what information they choose to include in the report, on whether departmental tools are used or not and, if they are, making a judgement as to what score to give to each factor, to the way the information is presented, how the report is written, particularly the language used, and of course correctly recording the initial information provided in court. All of this subjectivity must inevitably have an impact on the application of the rule of law in the PSR process. The PSR has the potential to have a huge impact on the outcome for the defendant and, as such, it must accord with the upholding of the rule of law. This leads one to wonder what role the PSR does actually play at sentencing.

#### **4. Research question and sub-questions**

How much weight does the Pre-Sentence Report carry in the sentencing process? Is the weight it carries appropriate? Does the PSR place the rule of law in jeopardy?

- What is a PSR? (addressed above).
- What are the stakeholder views of PSR?

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<sup>26</sup> Department of Corrections, Careers at Corrections, <https://careers.corrections.govt.nz/home/probation-officer/> Retrieved 20 December 2020 at 1.43pm.

- Is there are a better system for presenting information to the Court at sentencing which would be more faithful to the rule of law?

## 5. Significance

This research topic is significant in general terms because, as a society, we should constantly be testing our structures and systems to ensure they provide what they are meant to provide: specifically here, that the rule of law is upheld in the criminal justice system. It is significant more specifically because the government has launched a review of the criminal justice system. A Criminal Justice Reform Panel was established by the current government in 2018. Minister for Justice, Andrew Little, announced in December 2019 that his government is proposing to ‘overhaul’ the criminal justice system, stating that the ‘old ways have failed us’.<sup>27</sup> These moves, while not specifically focusing on PSRs, indicate that there is some dissatisfaction with the way justice is being dispensed in New Zealand today. Andrew Little spoke of making the system ‘more effective’<sup>28</sup> for victims and offenders as they go through the criminal justice system. The use of the wording ‘more effective’ sidesteps the issue of fairness, but it is possible to extrapolate from Minister Little’s comments that some of what he wants to address is fairness and equality; he specifically addresses the issue of high rates of imprisonment among Maori which indicates an awareness of issues of equality.

Up-to-date research conducted into the role of the PSR would be interesting and useful to all those who work in criminal justice. There is currently a lack of any such material (as far as research can identify). The most recent study that research can find dates back to 2000.<sup>29</sup> Gaining a feel for the role and content of the PSR would be helpful to RWs and to defence counsel in particular. The research may assist in identifying reasons why more Maori go to prison. It may be that the outcome of the research will level the playing field for defendants

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<sup>27</sup> *Overhaul of Criminal Justice System on its way, Andrew Little announces* TVNZ One News, 12 December 2019 <https://www.tvnz.co.nz/one-news/new-zealand/overhaul-criminal-justice-system-its-way-andrew-little-announces> Retrieved 26 August 2020, 3.35pm.

<sup>28</sup> As at n 27.

<sup>29</sup> As at n 16.

and ensure that all defendants are entitled to have the rule of law applied at the sentencing step of their engagement with the criminal justice system.

Establishing whether PSRs contribute to any inequalities may assist judges when they consider PSRs as an information resource for sentencing; and if the study identifies themes and areas for change, these could be put forward to the Criminal Justice Reform Panel for consideration as it looks at how to improve the criminal justice system.

Prior to designing the study, a literature review was undertaken. Extensive research turned up very little on the topic of PSRs, either in New Zealand or overseas. A single New Zealand study from 2000 was reviewed,<sup>30</sup> this was research into whether there was a gender or race bias in PSRs. The study concluded that there was no bias for either characteristic and noted that PSRs were very influential in the sentencing process. This research was conducted prior to the introduction of the Act and consisted of 217 sentencing observations and content analysis of 139 PSRs. The study did not interview judges or counsel nor did it delve into perspectives on PSRs.

A significant study conducted by the Probation Service in Ireland in 2017 was the most comprehensive research found on PSRs.<sup>31</sup> This research investigated the role of the PSR in sentencing, with particular reference to the process of communication from the perspectives of POs and judges. While this study interviewed judges and POs, the emphasis of the report was on the effectiveness of communication.

This research paper will explore aspects of the PSR which have not been looked at in depth, and will provide contemporary insights into the role of the PSR in New Zealand.

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<sup>30</sup> As at n 16.

<sup>31</sup> Maguire, N and Carr, N *Individualising Justice: Pre-Sentence Reports in the Irish Criminal Justice System* 2017, Probation Service Research Report

## 6. Theories/concepts

The rule of law is one of the main concepts of this paper, and this has been introduced in prior sections. Not only is this paper concerned with whether the rule of law (particularly equality for all) is being applied in the criminal justice system, in particular at sentencing and specifically in the PSR process, it is also concerned with whether the overall structural and social environment allows for the rule of law to be upheld.

Nicola Lacey has commented that the criminal justice system is the ‘most vivid exercise of state force in relation to individual citizens’.<sup>32</sup> In so saying she is identifying the immense power that the social contract hands over to the government, or the state, in order to regulate society, keep people safe and punish those who break the rules. She goes on to say that there is an ‘obvious disparity of power between state institutions and individual offenders’.<sup>33</sup>

Statements such as these present us with a problem. The social contract creates an inequality which arises because one party in that contract has the weight of the structure of society behind it, and the other party (in the criminal justice system, and for the purposes of this paper, the defendant) has very little to counter the might of the state. The role of the defence lawyer is therefore crucial to try and redress some of the imbalance, and, indeed, the role of the other courtroom actors is also crucial. It is incumbent upon all actors to act and carry out their roles in an ‘equitable and non-discriminatory’ way<sup>34</sup> so that they play their part in upholding the rule of law.

What Lacey describes is a system which is heavily weighted in favour of the establishment and against those at the centre of the proceedings. It is a system where those least able to operate successfully in the system have the most to lose from failing to negotiate the system successfully. Marx recognised this situation in his theory of conflict, which he applied to society generally, but

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<sup>32</sup> Lacey, N *Social Policy, Civil Society and the Institutions of Criminal Justice* Australian Journal of Legal Philosophy, 2001, Vol 26 pp7-25.

<sup>33</sup> As at n 32.

<sup>34</sup> As at n 32.

which applies to the criminal justice system in particular. At its most basic, Marx's theory says that society will always be in conflict because there is a competition for limited resources and that those with the most wealth and power will hold on to their power by suppressing the powerless. The criminal justice system, through its application of the rule of law is supposed to avoid this conflict and protect rather than suppress the powerless. Marx, however, considered that the rule of law could not apply because of the imbalance in place which renders equality impossible (the powerful v the powerless).<sup>35</sup>

In his *Capital*,<sup>36</sup> Marx formulates the ideas of the base and the superstructure; the base being the productive sector - governing work conditions, division of labour and property relations; and the superstructure being the culture, institutions, rules and rituals which govern how society operates. The relationship between the base and the superstructure, according to Marx, is that the superstructure reflects what is happening in the base and exists to support the activities of those in the base who have the power; that is, the superstructure reflects and supports the ruling class' interests and defends the power of the elite.<sup>37</sup>

One of the institutions of the superstructure is the law, and for Marx, therefore, the law is an institution which protects the interests of the powerful. The criminal justice system, in Marxist terms, then, is superstructural and could be said to be concerned with strengthening the status quo. It is a system which is created by the ruling classes and protects the interests of the ruling classes. Applying Marxist principles to the criminal justice sector, it has been said that

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<sup>35</sup> Mandel, M *Marxism and the Rule of Law* 1986, UNB Law Journal 35 pp7-34

<sup>36</sup> Marx, K *Capital: A Critique of Political Economy* Volume One, Ben Fowkes (trans), David Fernbach (trans), Penguin Books in Association with New Left 1990-1992, New York.

<sup>37</sup> Cole, N L *Core Concepts of Marxist Theory* ThoughtCo. 24 January 2020;

<https://www.thoughtco.com/definition-of-base-and-superstructure-3026372#:~:text=Base%20and%20superstructure%20are%20two,all%20other%20aspects%20of%20society>. Retrieved 29 August 2020, 3.06pm.

the rule of law, if it exists, is the application of equal laws to persons in unequal circumstances.<sup>38</sup>

Canadian academic, Michael Mandel however, views the criminal justice superstructure slightly differently stating that it is far from an equal law applied to people in unequal circumstances but is, in fact, a system that does not apply the law equally at all and which is not concerned with the prevention of harm to individuals but is concerned with enforcing the social relations of production (that is, re-enforcing the 'base').<sup>39</sup> This idea has been taken up by others<sup>40</sup> who say that criminal justice system may actually be 'aimed at controlling certain segments of the population – the dangerous classes – in order to serve the ideological interests of the powerful'.<sup>41</sup>

British historian, E.P.Thompson, who was greatly influenced by Marx, also saw difficulties with the application of the rule of law in the criminal justice setting. Thompson said the rule of law was 'a cultural achievement of universal significance' but that 'in a context of gross class inequalities, the equity of law must always in some part be a sham'.<sup>42</sup> Thompson recognised, as did Marx, that where there is inequality the rule of law is difficult to apply. This would be the case whether it was an equal law applied to people in unequal circumstances or the law was applied unequally depending on whether the person in the centre of the proceedings, the defendant, was part of the elite or was one of the dangerous classes.

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<sup>38</sup> Balbus, I D *Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law* The Sociology of Law: Classic and Contemporary Perspectives, 2008, Routledge, New York.

<sup>39</sup> As at n 35.

<sup>40</sup> Reiman, J. *The rich get richer and the poor get prison: Ideology, class, and criminal justice* 2003, (8th ed.). Boston, MA: Allyn & Bacon and Sheldon, R. *Controlling the dangerous classes: A critical introduction to the history of criminal justice*. 2000 Boston, MA: Allyn & Bacon.

<sup>41</sup> Robinson, M *Assessing Criminal Justice Practice using Social Justice Theory* 2010, Social Justice Research 23 pp77-97 <https://link-springer-com.ezproxy.waikato.ac.nz/article/10.1007/s11211-010-0108-1> Retrieved 29 August 2020, 4.02pm.

<sup>42</sup> E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (Harmondsworth: Penguin Books, 1975) 206.

Thompson has a slightly more sophisticated view of the rule of law which provides some comfort to those who believe in the rule of law and believe that it is worth fighting for, but who also acknowledge that there are times when it is not being applied. Thompson suggested that the rule of law does, in fact, impose some limitations on those in power, and that this occurs as 'democratic' rule of law, that is, where there are clear rules which are adhered to and which limit official power. He suggests there is another type of rule of law, the 'juridical' rule of law where there is much legal discretion which tends to strengthen the status quo of unequal social power.

The sentencing process is a discretionary process. Mandel explains how the sentencing process further enforces the base and superstructure theory of the criminal justice system, opining that criminal law and sentencing departs from democratic principles of equality before the law;<sup>43</sup> after all, how can it be equal, even with the best of intentions, if those who make decisions (and make recommendations to the court as to what the decision should be) have not lived and do not live in the same world as the majority of those who are being brought to justice? Those who administer justice (that is the juridical branch of the rule of law referred to by Thompson), all the courtroom actors, are part of the superstructure and the ruling classes; the criminal justice system is another institution that protects their interests.

Mandel describes the sentencing process as 'undemocratic' because it makes 'punishment dependent on who one is and not upon what one had done'.<sup>44</sup> He describes how the defendant in the proceedings is seen as a social being due to the consideration of their criminal record, employment status and place in society. He says that in considering the personal attributes of the defendant (which is done through the production of the PSR and through defence counsel submissions) the defendant is being assessed on his or her ability to fulfil his or her role in the productive apparatus of society; this focus reinforces the divide

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<sup>43</sup> Mandel, M *Democracy, Class and Canadian Sentencing Law* 1984, Crime and Social Justice 21/22, pp163-182; Social Justice/Global Solutions.

<sup>44</sup> As at n 43.

which is present in the base structure whereby the division of labour keeps the ruling classes in a position of power.

Mandel runs through some of the principles and purposes of sentencing and in so doing demonstrates how the sentencing process maintains the inequalities identified in conflict theory.<sup>45</sup> The principles he focuses on, denunciation, deterrence and rehabilitation, are the same as the principles on which the New Zealand Act is based on.

Mandel explains that each of these three principles addresses social factors and that in placing importance on those factors assists in maintaining the status quo. In addressing denunciation, the criminal justice system indicates to the rest of society the societal values that have been challenged by the offending; the point of denunciation, then, is to teach a societal value to the rest of society. Everything about the defendant is assessed, through the consideration of aggravating and mitigating features of the offending and of the defendant, assigning a value or worth to the defendant's background; the lower the value (that is, the less able to take their place in the productive process) the more severe the punishment will be.

In New Zealand law, the Act allows for a discharge without conviction to be granted by the court should the defendant be able to prove that the gravity of the offending is outweighed by the consequences a conviction might have on the defendant. The most likely candidates for a discharge without conviction tend to be those who are presently, or will in the future be, constructively engaged in society, fulfilling their role in the productive apparatus, and for whom the offending is out of character.

Deterrence, Mandel explains, is based on fear and a sentence is designed to frighten the defendant into not repeating the behaviour in the future and to discourage others from offending in the same way. Mandel explains that

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<sup>45</sup> As at n 43.

deterrence, in the way that it is approached in the Canadian criminal justice system, is another means of reinforcing the social values needed to ensure the ruling classes maintain power.<sup>46</sup>

The principle of rehabilitation also requires an assessment of a defendant's social history. In assessing past engagement with societal superstructures, such as the department of corrections, social services, education, employment and the defendant's criminal history, the PSR will predict a defendant's future behaviour. Through this prediction a judgement will be made as to whether the defendant warrants a rehabilitative aspect to his or her sentence or, indeed, if they will benefit or take advantage of such a sentence; the sentence is then determined after taking these factors into account.

Mandel describes this as another assessment of whether the defendant is fulfilling his or her role in the productive apparatus, rewarding productive engagement in society's status quo with further opportunities to engage in it, and for the ruling classes to maintain their own position.<sup>47</sup> Overall, Mandel says that credit is given in the sentencing process for adhering to social values; that is, values which have not necessarily been established or bought into by defendants in the criminal justice system and which maintain the status quo.

If this view of societal structures is accepted, the question of how inequality is to be redressed arises. Marx argued that there will ultimately be conflict between the ruling classes (the bourgeoisie) and the proletariat and this conflict will lead to revolution whereby the proletariat rise up and overthrow the ruling classes and proceed to create a society which is more equal.

Revolution is not, however, the only path to creating social justice and to creating a more equal criminal justice system which upholds the rule of law.

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<sup>46</sup> As at n 43.

<sup>47</sup> As at n 43; what New Zealand describes as rehabilitation is described as reform in Mandel's article.

Rawls, in his work *A Theory of Justice*,<sup>48</sup> addresses the issue of social inequality and social injustice. He recognises there is a state of conflict due to the way goods might be distributed in society and he argues that a set of principles which assign rights and duties to citizens is a means of ensuring that society can function with equality as a leading aim.

Rawls' concept of justice is a 'proper balance between competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance'.<sup>49</sup> He argues that 'justice as fairness' can be achieved by ensuring that every individual has an equal right to basic liberties, such as a home and personal belongings (the liberty principle) and that there should be a fair equal opportunity for any individual to hold office (be part of the superstructure) regardless of their background (the equality principle) and that inequalities must be regulated making them unacceptable unless they are necessary to provide the greatest benefit to the least advantaged (the difference principle).<sup>50</sup>

Rawls says that this can be achieved by viewing the structure of society from the 'original position' whereby the parties who set the rules for society do so from a starting point of not knowing their own position. The parties are to decide on the rules from behind a 'veil of ignorance' whereby they are to presume not to know their own gender, class, intelligence, talents, status, and so on. Rawls' principle is that if it is possible that the parties could enter society as the least advantaged member, then the kind of society they will design will be one which is just and fair and which will look after the least advantaged.<sup>51</sup>

In Rawls' world the social contract will ensure that the state of conflict described by Marx does not exist and instead the institutions which put the

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<sup>48</sup> Rawls, J *A Theory of Justice (Revised Edition)* (1971) 1999, The Belknap Press of Harvard University Press of Cambridge, Massachusetts, US.

<sup>49</sup> As at n 48, ch 1 p 9.

<sup>50</sup> As at n 48, ch 1.

<sup>51</sup> As at n 48, ch 3.

rules in place will ensure they are for the betterment of everyone without considering the implications for their own selfish gain.

The application of Rawls' principles to the criminal justice system would create an administration of justice which would ensure that, at every step of the way, those who have discretion (parties who will design the outcome; the judiciary, the POs) will approach it with the principles of justice in mind, and from the original position. This would mean that the rule of law, in Rawls' terms, which he sees as the 'impartial and regular' administration of public rules, would mean the obligation to treat everyone equally and with an eye to any inequality only being permitted if it will benefit the least advantaged (that is, to assist those most at risk).

The ideals of social justice espoused by Rawls are ideals which should be translated into the criminal justice system. In so doing, they would ensure that every part of the process, procedures, decision making and judgments would be made in a way that would challenge the superstructure and the status quo.

Matthew Robinson says in his article *Assessing Criminal Justice Using Social Justice Theory*,<sup>52</sup> 'citizens actually hold dear the principles of social justice laid out by Rawls'. Robinson, applying Rawls' principles to the criminal justice system, examines how just it is, and he concludes that while the ideals of the criminal justice system may well adhere to social justice principles, the practices of the agencies of the criminal justice system 'make achieving social justice impossible'. He goes on to urge actors within the criminal justice system to operate from behind a veil of ignorance to ensure that social justice, that is, equal treatment of everyone as directed by the principles of the rule of law, can be achieved.<sup>53</sup>

Adopting a similar approach to Robinson, this study will assess the role of the PSR in the sentencing process to determine whether it is consistent with

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<sup>52</sup> As at n 41.

<sup>53</sup> As at n 41.

principles of social justice and the rule of law. The study will examine the information the PSR presents to the court and the way that information is received and treated by defendants, defence counsel and judges. Through an assessment of the role played by the PSR this study will establish whether the sentencing process is in a conflict state or whether the rule of law is being upheld and social justice, in Rawls' terms, exists.

### **7. Methodology including research and ethics, how selected, limitations**

The purpose of this research is to investigate the role played by the PSR in the sentencing process, with a particular emphasis on whether the PSR as a tool in the sentencing process upholds the rule of law and principles of social justice.

To achieve the goal of the research, the study has the following objectives:

- To explore the contents of PSRs
- To explore the impact particular demographic characteristics (eg. Ethnicity, gender) might have on the way the PSR is written, and on the recommendations made
- To gain an understanding of defendants' views of PSRs
- To gain an understanding of the weight judges place on PSRs
- To gain an understanding of defence counsel views of PSRs

To achieve these objectives a mixed-method empirical research methodology was adopted.

A mixed-method approach means that both qualitative and quantitative data can be collected. The strand of mixed-method collections used is the convergent strand which means both quantitative and qualitative data was collected concurrently and were used together to answer the research question. The findings from the combined data are triangulated, meaning that data from

different groups using different methods are used to draw the same conclusion.<sup>54</sup>

The qualitative and quantitative data were collected using empirical research techniques. The study has used empirical research because:

Quantitative and qualitative empirical research into law and legal processes provides not just more information about the law; it provides information of a different character from that which can be obtained by other methods of research. It answers questions about law that cannot be answered any other way.<sup>55</sup>

The methods used to capture the empirical data were:

*Observations:*

- Reading of PSRs
- Attending meetings where defence counsel read the PSR to the defendant and discuss its contents – notes taken
- Asking the defendant for their view of the PSR
- Observing the sentencing and taking notes with particular regard to defence submissions on the PSR and the judge's comments about the PSR
- Noting the recommendation

*Interviews:*

- In-depth interview of judges

*Questionnaire:*

- Questionnaire sent to defence counsel

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<sup>54</sup> Geist, M and Lahman, M *Mixed Methodology Research* Encyclopedia of Counselling 2008, Vol 1. pp 300-305.

<sup>55</sup> Bradney, A cited in Watkins, D and Butler, M *Research Methods in Law* 2017, 2<sup>nd</sup> ed., Routledge, London UK.

*Informal but on the record conversation with a court-servicing Probation Officer*

- A three hour conversation conducted at a local café.

7.1 *The approach*

The approach taken in the research is a socio-legal approach. This approach was adopted as it sits well with an empirical study and it is curiosity-driven. While the study has a theoretical framework underpinned by conflict theory, social justice and the rule of law, the study itself is genuinely curious as to whether the PSR is consistent with principles of social justice and the rule of law. The study is not designed or structured to prove one thing or another, but is designed to explore the ideas and to draw a conclusion from the exploration. In many ways, the study could be a first step towards greater exploration of the criminal justice system and whether or not there is a need for reform.

Socio-legal research is ‘fast becoming the dominant mode of scholarship with the discipline of Law’.<sup>56</sup> Definitions for socio-legal research are hard to come by due to the breadth of the discipline. A UK report in the mid 1990s described socio-legal research as ‘an approach to the study of law and legal processes’ which ‘covers the theoretical and empirical analysis of law as a social phenomenon’.<sup>57</sup> For the purposes of this research, socio-legal research is interpreted to be a curiosity-driven means of analysing law in context supported by a traditional theoretical framework.

7.2 *Ethics*

Prior to beginning the research a proposal was submitted to the Ethics Committee of the University of Waikato. The template for the observations (annexed at **Appendix One**) and the interview questions (annexed at **Appendix Two**) were submitted for approval. Issues of consent,

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<sup>56</sup> Cownie, F and Bradney, A *Socio-legal studies: A challenge to the doctrinal approach in Research Methods in Law* as at n 46.

<sup>57</sup> As at n 56 citing ESRC *Review of Socio-Legal Studies: Final Report 1994*, Swindon ESRC.

confidentiality, vulnerability and refusal were explored in detail. Approval was provided at the end of March 2020.

### 7.3 *Chief District Court Judge approval*

In addition to obtaining approval from the Ethics Committee it was also necessary to gain approval from the Chief District Court Judge because the study intended to interview judges who sit in the District Court. The application to the Chief District Court Judge sent a copy of the proposed questions and asked for permission to approach judges who sit in the Tauranga, Hamilton and Rotorua District Courts. The questionnaire was approved provided two of the original questions were removed and permission was given to approach the Executive Judge of each court. A letter was sent to the Executive Judge of each court by the Chief District Court Judge to inform them that approval had been given for them to be interviewed; it was made clear that it was an individual decision for each judge to decide whether or not they would agree to be interviewed.

### 7.4 *Practical methods*

#### 7.4.1 Observations

Observations were carried out at the Tauranga District Court ("DC") during the period from February 2020 to the end of August 2020. Observations included a review of the PSR, attendance at the meeting between defence counsel and the defendant at which the PSR was discussed, and observations of the sentencing; notes were taken at each stage. The subjects of the observations were randomly sourced in the sense that permission to view the PSR (see permission form annexed at **Appendix Three**), attendance at the meeting and attendance at the sentencing was by invitation of defence counsel. It was widely known that the study was underway and defence counsel were asked to consider whether there were sentencings where a PSR was ordered that could be observed. There were no criteria set out for defence counsel other than that the sentencing to be attended would be one where a PSR had been completed. Invitations came by way of email.

Notes were taken on the template (Appendix One) and these were then transcribed, word for word, into a Word document. The transcribed material was then imported into the Nvivo qualitative software package where the transcript was coded into themes.

#### 7.4.2 Interviews with Judges

Having received permission from the Chief District Court Judge to approach the Executive Judges, letters were sent (via email) to the Executive Judges at each of the three courts. The letters were sent first on 25 March 2020. None of the Executive Judges responded. On 2 June 2020 a follow up email was sent. The Executive Judge of the Tauranga DC responded straightaway to the follow up email giving permission for the individual judges to be contacted, together with the contact details of the judges' executive assistants. Contact was made, the questionnaire sent and the option of a face-to-face interview or completion of the questionnaire in writing was offered. All those who agreed to participate in the study chose to have a face-to-face interview. Judges were interviewed in Chambers. The interviews were not recorded and anonymity was guaranteed to each participant. Notes were taken in longhand and these were transcribed word for word into a Word document. The transcriptions were then coded in the Nvivo software package.

The Executive Judges from Rotorua and Hamilton DCs did not respond to the reminder letter.

#### 7.4.3 Defence counsel questionnaires

Individual counsel who regularly practise at the defence bar at the Tauranga DC were approached, where possible, by email. The email explained the purpose of the study and had the questionnaire attached (**Appendix Four**). Defence counsel were asked to spend a few minutes completing the questionnaire and to send it back by email. Several reminder emails were sent out during the period of time the questionnaire was open (from 1 July 2020 to 4 September 2020). The questionnaire included some questions which required responses to Likert scale questions. Answers to the Likert scale questionnaires

were quantified<sup>58</sup> and the remainder of the responses were transcribed and coded using Nvivo.

### 7.5 *Limitations*

It was originally intended that the study be carried out in three courts: Hamilton, Rotorua and Tauranga. At the beginning of January 2020 a pandemic – novel Coronavirus, Covid-19 – began to sweep around the world. The pandemic arrived in New Zealand in March 2020, coinciding with the launching of this study. On March 25 2020 New Zealand went in to Level 4 Lockdown for four weeks which was followed by a further two weeks at Level 3 Lockdown. The initial letter to the Executive Judges at the three courts went out on 22 March 2020. The absence of a response from the Executive Judges can be attributed to the extraordinary circumstances of an emergency and extreme response to a global pandemic. It is likely the letter was lost in the rush of Judges having to convene, discuss and plan how to manage District Court business during the lockdown. The follow-up letter was sent when New Zealand went in to Level 2 which meant that citizens could return to work and court business began to return to normal. It was at this stage that the Executive Judge at Tauranga DC responded; the remaining two judges did not respond. It is likely the Tauranga Executive Judge responded as the researcher is a defence lawyer at the Tauranga DC and is therefore known to him. The Executive Judges at Hamilton and Rotorua DCs did not have a connection with the researcher and would have continued to be dealing with the implications of the pandemic on their respective courts. Without those Judges involved in the study, the decision was taken to limit the entire study to the Tauranga DC.

It is acknowledged that as the study was undertaken at only one New Zealand District Court the study is limited. The Tauranga DC is reflective of the community in which it exists and has a court culture unique to it. Any findings must be considered in terms of the geographical limitation of researching in only one court.

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<sup>58</sup> Geoff Norman, *Likert scales, levels of measurement and 'laws' of statistics* (2010) *Advances in Health Sciences Education*, Dordrecht, Vol 15, Iss 5; pp 625-632.

Not only is a lack of geographical diversity acknowledged as a result of the study having to be unexpectedly limited, the numbers of observations, interviews with judges and responses from defence counsel have also been limited.

The study set out to observe at least 100 sentencings. This number has not been achieved, not only because the study was limited to a single court after its launch, but also due to the lost opportunities during lockdown periods which caused scheduled court hearings to be suspended for six weeks. For the duration of lockdown the only matters being heard in the district courts were custody matters and arrests where bail became an issue; essentially matters bringing the principle of habeas corpus into play. Some of the custody matters were sentencings but only the prosecutor, judge, defence lawyer and defendant could attend the hearing and, in fact, the majority of hearings were conducted by audio visual link (AVL) for all parties. Lockdown, consequently forced a limitation on the number of observations that could be included in the study.

The number of judges who participated in the study was also affected by the pandemic. The decision not to follow up the judges from Rotorua and Hamilton DCs came about with the realisation that observations would be difficult to pursue in those courts, and the researcher decided not to add to the workload of the Executive Judges by sending a further follow-up letter. The number of resident judges in the criminal jurisdiction in the Tauranga DC is a small one (just seven). Six judges were interviewed by appointment over a period spanning four weeks. The relationship between the researcher and the interviewee was based on a professional background of the researcher appearing in Court before each judge as defence counsel. The interview necessarily was conducted with an element of formality and with deference on the part of the researcher. It is acknowledged that this may have hindered the robustness of the interview to some degree and also caused the researcher to be cautious in the interview question design. The researcher was also mindful that

judges are busy, that they were being generous in giving over some time to the project and consequently the researcher moved swiftly through the interviews.

Being forced to limit to a single court also meant that the number of defence counsel who could be asked to complete the questionnaire was also reduced.

## **PART B**

### **Results**

The study was conducted in the way described above. What follows is a description of the information gathered. The results will be presented in a mix of tables, graphs, charts, direct quotes and paraphrasing. The findings will be presented in three sections: **observations**, judges and defence counsel. The results from the observations will include sections created through the coding feature of Nvivo and will include whether the defendant was happy or unhappy with the report, whether the defence lawyer was happy or unhappy with the report, whether there were inaccuracies or reports of perceptions of bias. The results part of this paper will include commentary to explain the information being presented, analysis of the results will come in the next part of the paper.

#### **1. Observations**

A total of 54 observations were completed. By way of introduction and to get a feel for the cohort of defendants who were the subject of the PSRs (Pre-Sentence Reports) and, therefore, the sentencings, the following tables show the gender of the defendants (**table 1**), the ethnicity of the defendants (**table 2**) and whether defendants are employed or not (**table 3**).

**Table 1** shows the number of male defendants and the number of female defendants. It also shows the percentage of the whole cohort made up by each gender.

<b>Gender</b>	<b>Number</b>	<b>% of total</b>
<b>Male</b>	44	<b>81.5%</b>
<b>Female</b>	<b>10</b>	<b>18.5%</b>

**Table 1:** proportion of male and female defendants.

**Table 2** provides a breakdown of the ethnicity of the defendants involved in the observations. It shows the number overall who are Maori, NZ European, Pasifika and ‘other’ and also shows these as a percentage. **Table 2** also breaks down each ethnic group by gender.

Ethnicity	Number overall	% overall	Number of male (%)	Number of female
Maori	31	57.4%	25 (80.6%)	6 (19.4%)
NZ European	21	38.9%	17 (81%)	4 (19%)
Pasifika	1	1.85%	1 (100%)	0
Other	1	1.85%	1 (100%)	0

**Table 2:** breakdown of defendants by ethnicity

**Table 3** provides a breakdown of the number of defendants who were in employment at the time of sentencing. The majority of defendants were not employed at the time of sentencing; many had lost their jobs as a result of the offending that had brought them before the court. Of those who were employed, 100% were male; the proportion of all males employed is 54.5% which compares to 100% of females not being employed. 76% of NZ Europeans were employed and 66.6% of all those employed were NZ European, compared to 33.3% of all those employed being Maori and 45% of Maori defendants having employment.

	No. defendants Employed (%)	No. defendants Not employed (%)
All	24 (44.4%)	30 (56.6%)
Male	24 (54.5%)	20 (45.5%)
Female	0 (0%)	10 (100%)
Maori	14 (45%)	17 (55%)
NZ European	16 (76%)	5 (14%)

**Table 3:** number of defendants employed; by ethnicity and gender

Of the 54 defendants who were the subject of the observations, only two were first-time offenders.

Having provided some demographic background information, the data collected also provides some interesting information about the types of offending that brings defendant before the court. Figures 3 – 10 provide some insight into offending.

The overall number of offences committed by the 54 defendants who make up the observation section of this study is 169. Figure 3 shows the number of offences by offence type. For the purpose of this study, violence offending includes common assault, assault with intent to injure, assault with a blunt weapon; drug offences range from possession of cannabis through to possession for supply of class A drug; dishonesty offending includes shoplifting, theft, burglary, unlawfully taking or interfering with a vehicle and obtaining by deception; family violence includes breaching protection orders and assaults on a person in a family relationship; driving offences include dangerous and reckless driving, driving while suspended or disqualified, driving with excess breath or blood alcohol; defiance includes resisting and obstructing police, failing to stop, refusing, breaches of sentences such as community work, supervision, intensive supervision or of release conditions, and failing to appear in court; the firearms offence was unlawful possession of a firearm and the sexual offending included indecent assault and doing an indecent act.

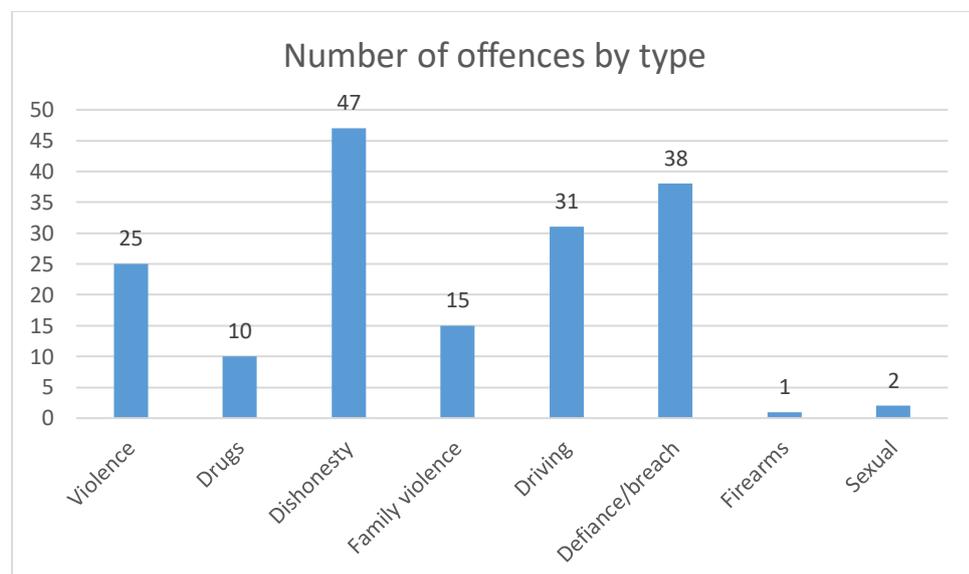


Figure 3

Of the 169 offences, 120 (71%) were committed by males and 49 (29%) by females. This means that females were more likely than males to have more than one offence that has brought them before the court. Figure 4 provides a statistic regarding violence offences, of the 25 violence offences 13 of them were committed by a female. This represents 52% of the violence offences which, in terms of general discourse about males and females, is surprising.



Figure 4

Conversely, of the 15 family violence offences just one (7%) was carried out by a female, with the remaining 14 (93%) being carried out by a male (figure 5). This is more in line with societal discourse about the behaviour of males and females. When taken together, figures 4 and 5 suggest that violence committed by females tends to be more random and less targeted, perhaps in response to other things going on around them, while male violence appears to be much more targeted towards those they are close to.



Figure 5

Figure 6 shows the breakdown of family violence by ethnicity and demonstrates those offences are overwhelmingly committed by Maori, with only 13% carried out by NZ Europeans and none by other ethnicities.

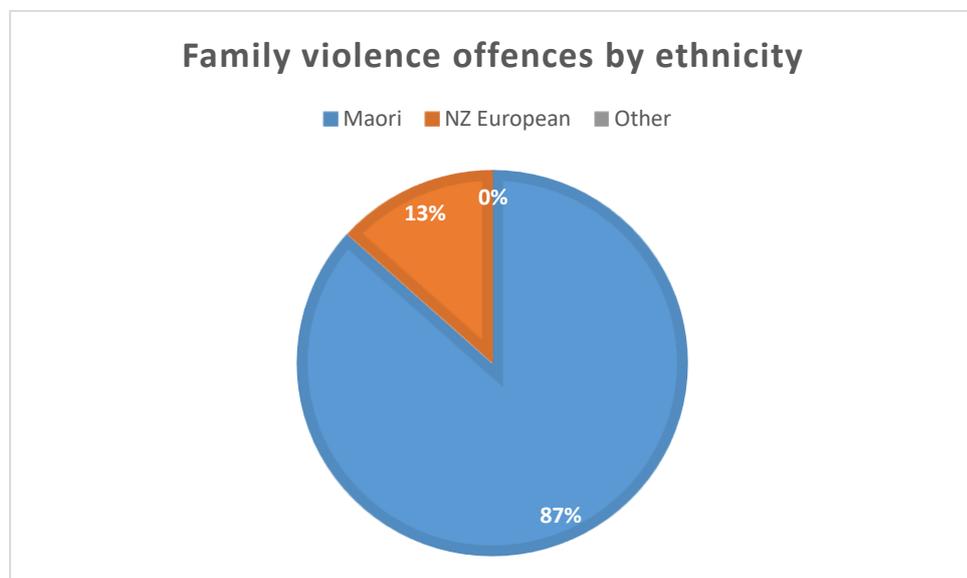


Figure 6

Exploring the breakdown of offence type and ethnicity further, figure 7 shows the vast majority of defiance/breach type offences are committed by Maori offenders. This is a very interesting statistic and is perhaps indicative of the process of colonisation and imposition of western cultural approaches and

systems on the indigenous people of New Zealand; this will be explored further in the next section.

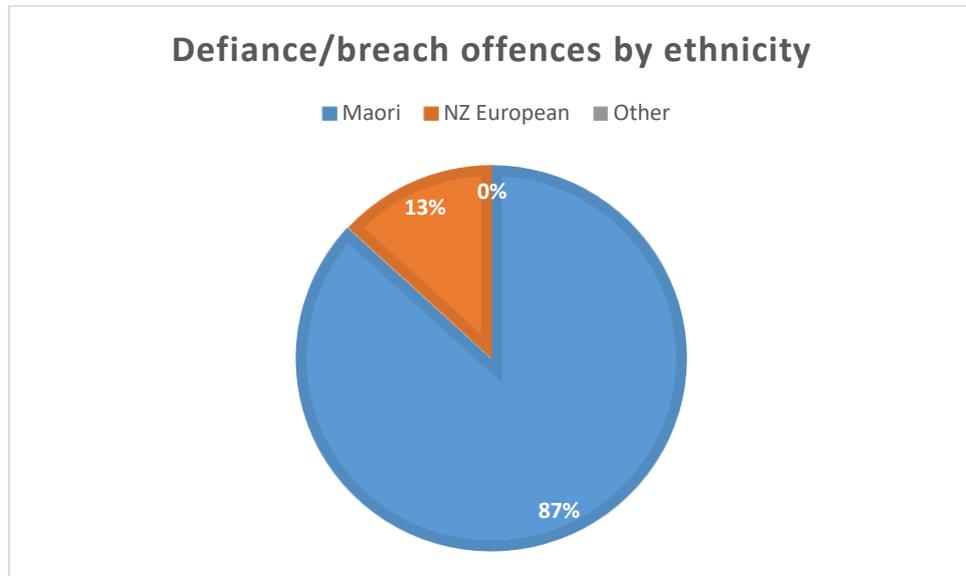


Figure 7

Similarly, the majority of driving offences were carried out by Maori (Figure 8) and the majority of drug offences were also carried out by Maori (Figure 9).

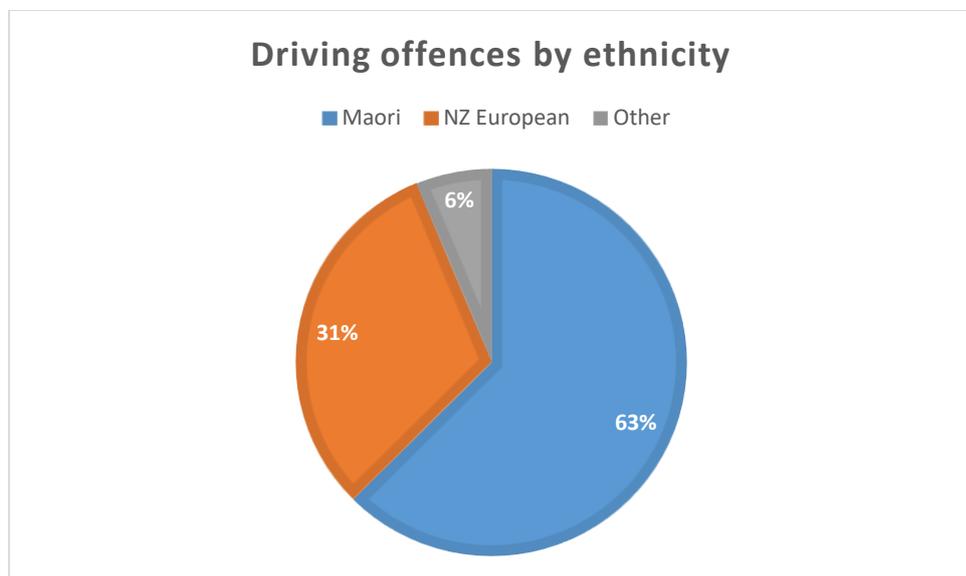


Figure 8.

Driving offending is similar offending to the defiance/breach type of offending in that there are not identifiable victims (unless injury was caused, though none of the driving offences in these observations included injuring another person).

The driving offending, therefore is a similar type of offence to the defiance/breach offences in that it is offending against authority rather than a person. Drug offending (except where the charge is of supply) is also ‘victimless’; the possession of drugs and of utensils is a defiance of the law and hurts only the offender.

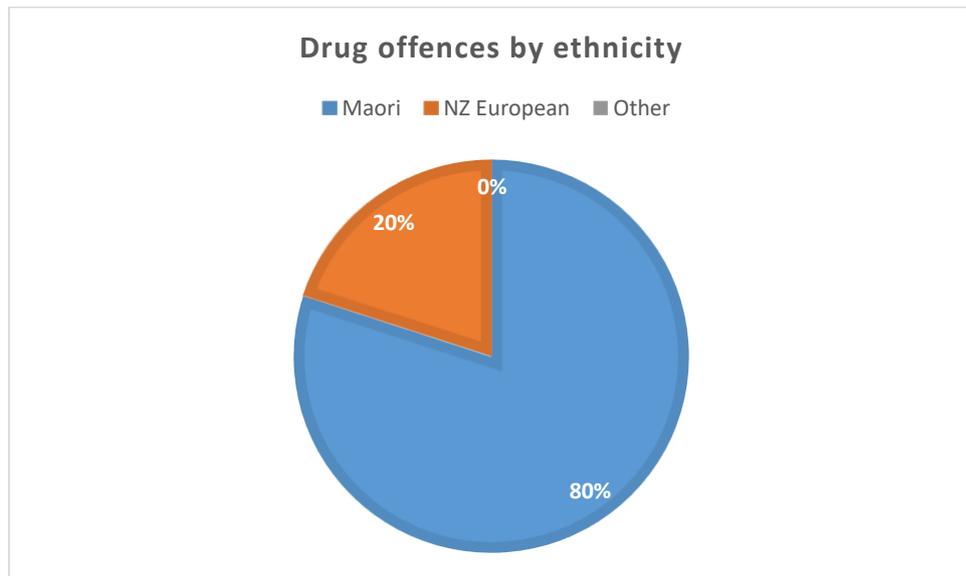


Figure 9

The offending where NZ Europeans make up the majority of the defendants are offences which have an identified victim; they are dishonesty (figure 10), sexual offending (figure 11 - the sexual offenders were both NZ European males who were not employed) and possession of firearms (only one offence of this type).

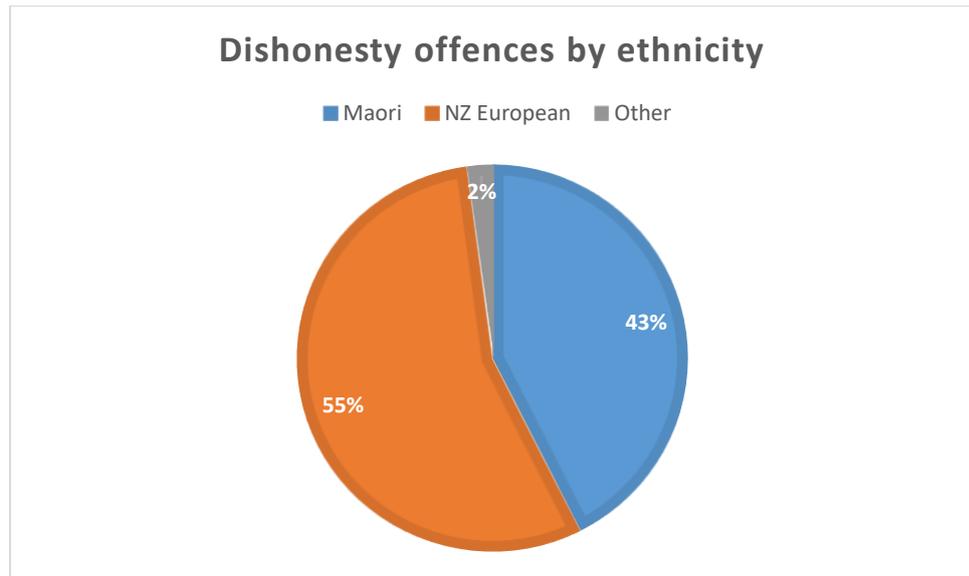


Figure 10

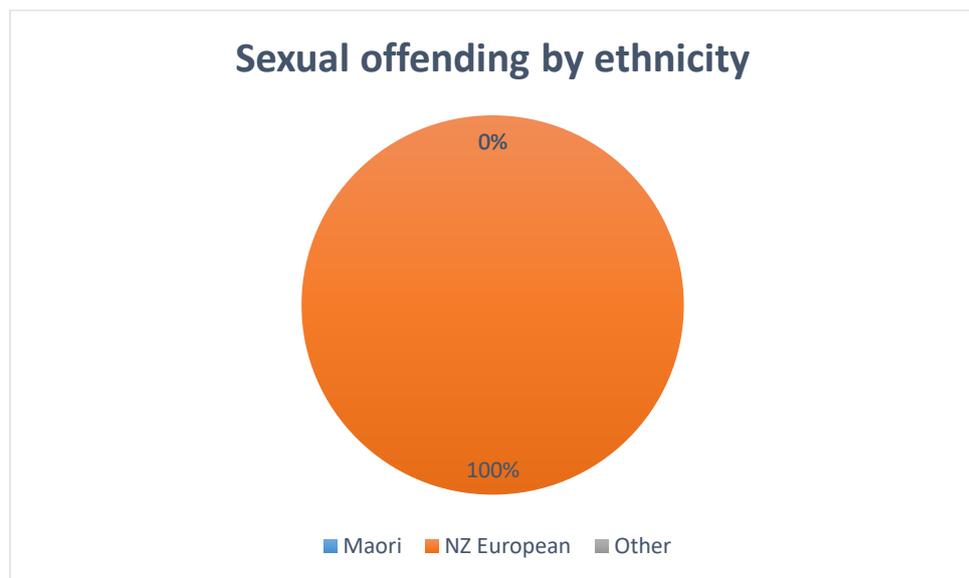


Figure 11

With the exception of the violence offences, there are some very clear distinctions in the types of the offending and the offenders who carry out the offending. Those where NZ Europeans make up the majority tend to be offences with identifiable victims and where the offender stands to gain something for themselves; the offending by Maori tends to be much less focussed on a victim (apart from family violence) and is more in line with failing to do the right thing: the offending tends to be against rules and against authority.

*Recommendation in line with outcome v not in line with outcome*

Other quantifiable aspects of the observations include how often the recommendation of the PSR is in line with the outcome (the sentence imposed by the judge). Figure 12 shows that recommendations are in line with the outcome more than twice as often as not.

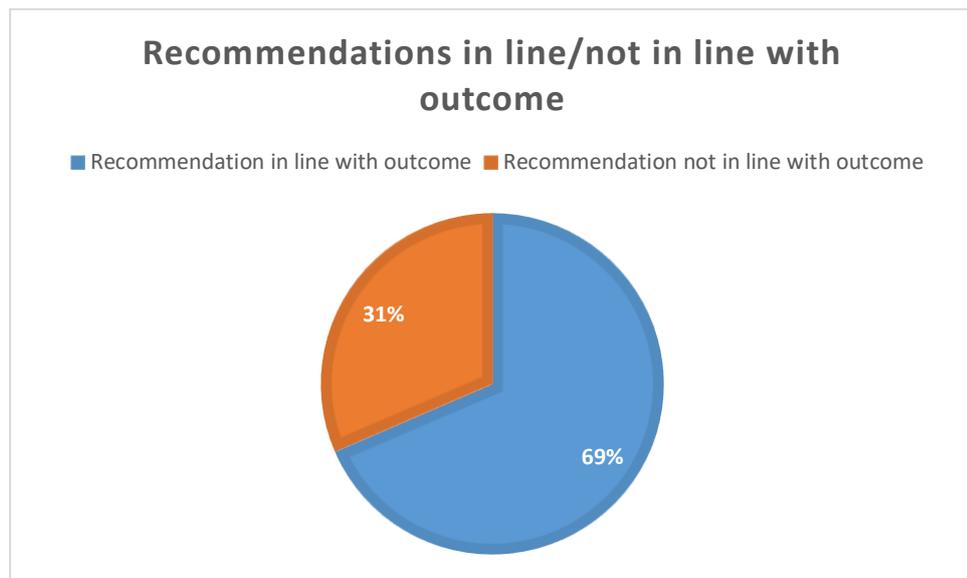


Figure 12

*Number of reports that mention remorse*

It was also possible to quantify how often remorse was mentioned in the PSR and whether defendants were said to have expressed remorse or not. 39 out of 54 reports (72%) make mention of whether the defendant expressed remorse or not. Of those reports which mentioned remorse, 56.5% of defendants are said not to have shown remorse with 43.5% showing remorse (figure 13).

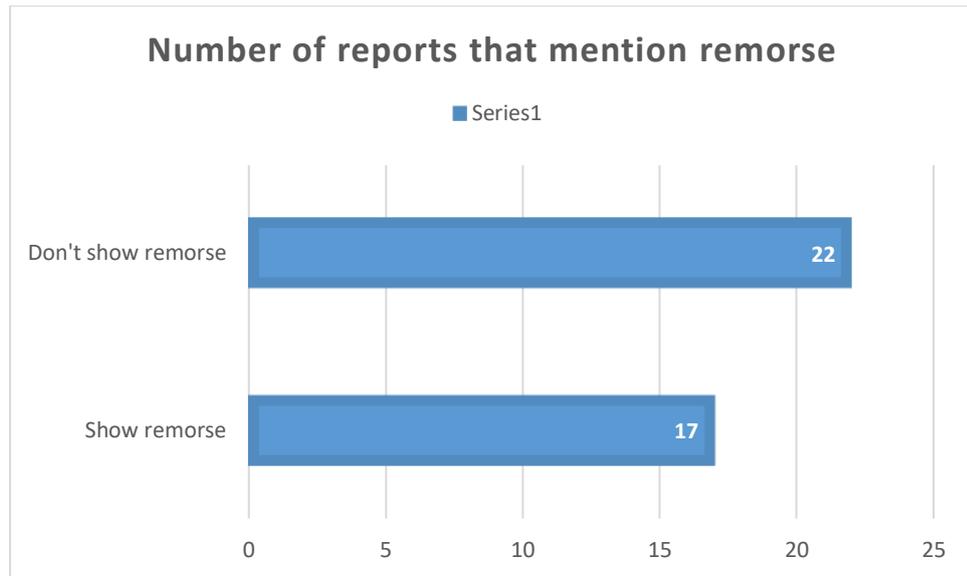


Figure 13  
10 of the 17 reports (59%) which showed remorse were European while 12 of the 22 (55%) of those who did not show remorse were Maori.

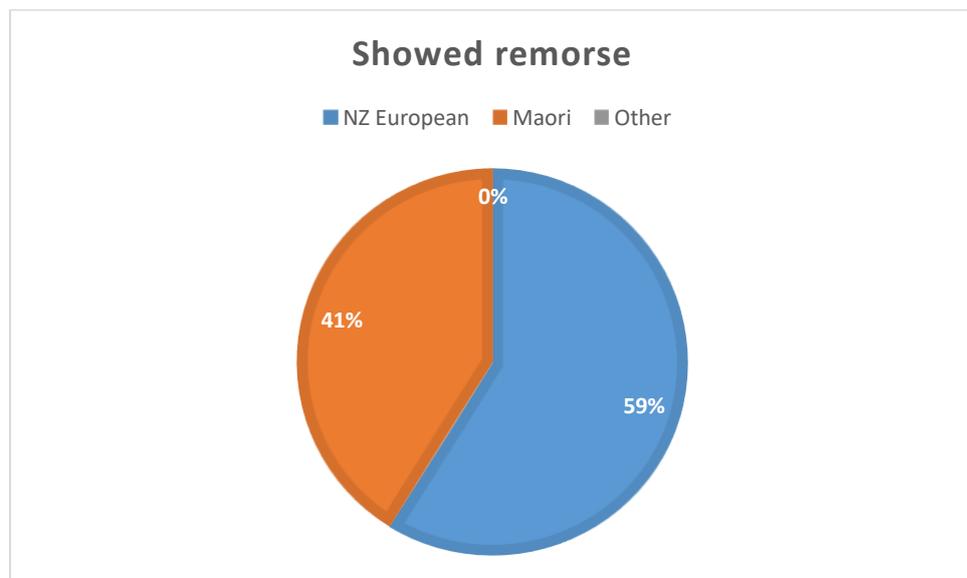


Figure 14

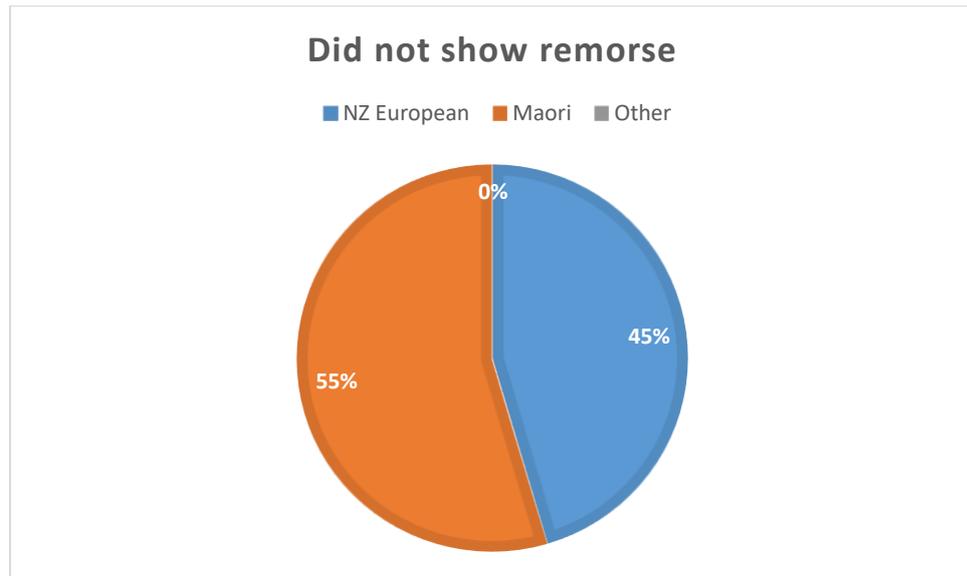


Figure 15

The 12 Europeans expressing remorse represents 57% of the total number of European reports. The 7 Maori expressing remorse represents just 22.6% of Maori reports.

The 6 Europeans that did not express remorse represents 28.5% of the total number of European reports. The 12 Maori not expressing remorse represents 38.7%

The figures show that Maori are over-represented in the negative categories of the factors being looked at.

### 3.1. Qualitative Observation Data

#### 3.1.1 Remorse

The qualitative data regarding whether remorse was shown or not has been grouped together below in the following categories: male Maori unemployed, male Maori employed, female Maori, Male NZ European unemployed, Male NZ European employed, female NZ European, Other unemployed and the additional category of sexual offending which we know was 100% male NZ European, unemployed. These categories seem appropriate and are a good way of measuring how different groups are treated by RWs (Report Writers). The

following comments are taken straight from the PSRs and are the exact wording used by the RWs.

**A. Male Maori unemployed**

The following comments about remorse have a negative feel to them:

a. Defendant on dishonesty and drug offending:

*hard to ascertain level of remorse... his explanation provides limited insight into the consequences of his actions*

b. Defendant on defiance/breach offending:

*appears to lay blame for his behaviour on external events undertaken by everyone else, taking little responsibility for his own actions. No remorse was identified he exclaimed "why did this have to happen over something so stupid*

c. Defendant on violence and defiance/breach offending:

*..no indication he was remorseful.. he appeared more regretful of the impact his behaviour had on himself*

d. Defendant on family violence and driving charges:

*..minimises the impact his offending has had on his former partner – claims he was invited there.. appears to be an attempt to deflect blame.. no remorse was volunteered.*

e. Defendant on drug offending:

*He is assessed as having an inability to consider the seriousness and implications of his offending behaviour to the wider community... did not express any remorse for his offending choosing to focus on the financial and personal stress he has caused his family*

The remaining comments regarding remorse are apparently positive in that they make mention of some expression of remorse, but there appears to be a slightly begrudging tone of recognition of remorse in some of the statements made:

- f. Defendant on dishonesty, driving, violence, drug and defiance/breach offending:

*Stated he was “sorry” for the impact on the victims but that is it. He stated he was “fried” at the time.*

- g. Defendant on family violence offending:

*“There does seem to be some degree of remorse demonstrated by Mr C towards the victim. Mr C lacks insight into the seriousness of his offending and appears blasé about the consequences of his offending. Demonstrated cognitive distortions that served to justify and minimise his actions*

- h. Defendant on family violence offending:

*He advised he is very remorseful for his actions. If I could take my actions back I would*

- i. Defendant on defiance and violence offending:

*Disputes the SOF and minimises his offending.. expressed some remorse....concedes impulsive...*

- j. Defendant on dishonesty, driving and defiance offending:

*Expressed remorse but made no mention of risk driving posed to the public or victims of his dishonesty.*

## **B. Male Maori employed**

The comments about remorse for this group are of a much more positive nature than for those male Maori who weren't employed.

- a. Defendant on family violence offending:

*He presented as extremely remorseful*

- b. Defendant on violence and dishonesty offending:

*..identified that he felt disgusted at himself following the incident, he did not recognise it was due to his ego at being wrongfully accused by his victim that led to him escalating his offending.*

c. Defendant on driving offending:

*He had not eaten or drunk water: Mr K stated this was not an excuse for his actions and accepts full responsibility*

d. Defendant on violence offending:

*Remorse and offers to make amends – states that both parties attended RJ and both will attend Living without Violence.*

e. Defendant on driving and defiance/breach offences:

*Showed some remorse, but argued his reasons for non-compliance throughout the interview*

f. Defendant on driving offending:

*he is aware he needs to change his habitual lifestyle and understands the consequences of his offending.. an alcohol supportive attitude and a sense of entitlement.. minimises the severity of his actions by stating “it was the culture back then*

g. Defendant on driving offending:

*He presented visibly upset and was remorseful for his actions.*

**C. Female Maori**

a. Defendant on driving and defiance offences:

*Lacks ability to problem solve and make better choices... sense of entitlement*

**D. Male Euro Not working**

The following comments are positive:

a. Defendant on family violence offending:

*Appears very remorseful*

b. Defendant on drug and firearms offences:

*Willingness to engage with counselling and treatment*

c. Defendant on violence offending:

*takes full responsibility... I lost the plot*

By contrast these are negative comments:

d. Defendant on driving offending:

*lack of pro-social decision making in response to him saying he didn't want to impose on friends by staying the night instead of driving.*

*There was no motivation evident to address his offending related factors",  
"there appears to be no willingness to implement actual or meaningful change in his life"*

*With regard to saying he has made no attempt to address his offending: this demonstrates a complete indifference to his situation or the offending he has committed... offending supported attitudes and a sense of entitlement.. nothing could make him change his ways other than himself*

*which leads to this: "It appears at this point Mr M is not open to rehabilitative measures"*

e. Defendant on dishonesty offences:

*Expressed some remorse at the situation he now finds himself in and acknowledged he could have handled things differently... There are concerns Mr W is attempting to manipulate Community Corrections and the Court to achieve the most desirable outcome for himself.*

**E. NZ Euro male working**

These positive comments do not have supporting evidence for them, a fact that invites the reader to consider the ‘type’ of person that is being written about. In these examples, the RWs seem to be more willing to accept what the defendant says and it can be speculated this is because they are NZ European and are employed.

a. Defendant on driving offending:

*He expressed disappointment in himself and stated that he accepts full responsibility for his actions*

b. Defendant on dishonesty charges:

*regrets what he did and offered to pay for damage*

c. Defendant on violence offending:

*he is very remorseful, knows it caused physical and emotional harm*

d. Defendant on dishonesty, defiance/breach and family violence offences:

*He expressed empathy and deep remorse; remorse is assessed as genuine*

Negative:

e. Defendant on Driving offending:

*open to interventions designed to address his issue with alcohol... he didn't like the consequences in relation to himself. He appeared to have little conception of the potential impact drink driving could have on others*

**F. Female NZ Euro**

The first two comments in this section could be described as positive:

a. Defendant on dishonesty and defiance/breach offences:

*She acknowledges her lifestyle and relationships are contributing factors towards her offending and she is aware of the seriousness and impact her actions impose on the community*

b. Defendant on driving offending:

*Made no attempt to minimise her offending and acknowledge that she had done wrong*

The following comment could be described as a negative one:

c. Defendant on violence offending:

*expressed regret but does not wholly take responsibility for her actions – citing that she made comments while the SOF (Summary of Facts) was read to her that suggested she was shifting blame to the victim. The PSR comments that the defendant's interest in programmes appears to be a means of gaining a favourable sentence; this was not consistent with what she's done and what her Mum says she's done.*

d. Defendant on violence charges:

*displays some insight into her offending and the impacts on the victim, though no genuine remorse was ascertained she has offered to pay reparation of \$500*

#### **G. Other not working**

a. Defendant on driving offending:

*Lacks insight into the seriousness of his offending*

#### **H. Sexual offending**

All comments made with regard to sexual offending are of a negative type:

a. *demonstrated remorse but demonstrated a lack of insight into the effects of his offending and struggled to take responsibility for his actions... cognitive distortions... displayed signs or remorse and*

*regret.. outwardly distressed.. t This being said Mr F has never mentioned a want to make amends. At times he has attempted to pass blame for his offending to others... ex-partner "forced me to live there. This demonstrates a level of inability to accept full responsibility for his offending*

- b. *Minimises... blames society... presents as difficult to engage with.. unusual societal behaviour views suggest a sense of entitlement that has a potential to derail any rehabilitation sentence... does not present as motivated to address his offending needs.*

The comments identified above will be analysed in the next section of this paper (Part C).

### **1.1.2 Happy with report/not happy with report**

The next area where themes began to develop is around satisfaction (or not) with the PSR on the part of the defence lawyer and the defendant. Satisfaction has been coded as 'happy' and 'unhappy' and these are attributed to both the lawyer and the defendant.

#### **1.1.1 Lawyer's view of report**

The defendant's lawyer expressed happiness at the report 17 times (31.5%) and unhappiness 21 times (39%); the lawyer made no comment either way 16 times (29.5%). A sample of the comments are recounted below.

The following comments are verbatim transcriptions of defence lawyers when talking to defendants about the PSR prior to sentencing. This first collection contain happy sentiments with the comments and recommendations of the reports. Again, the comments are broken down into the demographic categories used in the previous section.

**1.1.1.1 Happy**

**A Male Maori**

- a. Defendant before the court on dishonesty and drug offences:

*Fair – recommendation means you can be released today. Favourable.*

- b. Defendant on dishonesty, drug and violence offences:

*Fair. I have filed subs which go into more detail about your background and personal circumstances (in lieu of cultural report) to achieve discounts at sentencing – youth will get discounts too.*

- c. Defendant on driving offending:

In this instance sentencing was previously adjourned for the defendant to complete a rehabilitation programme. A new PSR had not been ordered to the prior PSR is to be presented; the judge had not considered the recommendation of intensive supervision (ISUP) was appropriate but said he was prepared to consider ISUP if rehab completed.

In this case the PSR has had a big influence on lawyer's approach. Submission will be that he's done equivalent of HD and that ISUP is appropriate.

*I will support the recommendation and will make sure CW is cancelled*

- d. Defendant on dishonesty offending:

Having read through the PSR and talked to the defendant says *I will adjourn sentencing and make an application for a discharge without conviction. The PSR is helpful to us for doing this.*

- e. Defendant on driving and defiance/breach offences:

*She (the RW) has made an assessment that you need some rehabilitation and the Judge is likely to impose supervision because of that*

f. Defendant on violence offences:

*The recommendation is good. You have expressed remorse and your alcohol issues are identified.*

**B. Male NZ European**

a. Defendant on dishonesty and drugs offences:

*That it is a good report is the foundation of what I will say to the judge. Supervision would be a good outcome, CD or perhaps CW will support supervision. A good report overall; sympathetic.*

b. Defendant on dishonesty, drugs and violence offences:

*This is a sympathetic and supportive PSR*

c. Defendant on drugs and firearms offences:

*This is a good report. It won't be better than HD.*

d. Defendant on violence offending:

*This is a fair report but the recommendation of supervision is unrealistic. The Judge indicated HD but because of the PSR I have filed a memo to try to get CD and supervision.*

1.1..1.2 Lawyer Unhappy with report

The following comments are verbatim quotations of things the defence lawyer has said to the defendant when reading through the PSR prior to sentencing.

**A. Male Maori**

a. Defendant on driving, defiance/breach, violence and dishonesty offences:

*Remorse has not been canvassed in the report which is unfair because the judge takes remorse into account and you have written a remorse letter*

b. Defendant on violence and defiance/breach offences:

*The report overstates the seriousness – the report should be considering ISUP instead of prison*

c. Defendant on family violence offences:

*The report writer has expressed a view about not being able to transfer learned skills without any evidence for that.*

d. Defendant on drug offences:

*(Lawyer reminds) you accepted a SI of HD; the PO is not a lawyer, they've interfered with the legal advice by telling you you could get CD*

e. Defendant on driving and defiance/breach offences:

*You shouldn't be going to prison on these charges and we should seek an adjournment for your partner's address to be assessed. The comments about attitude are unfair given you've been working hard They are critical of you because they say you haven't been reporting*

**B. Male NZ European**

a. Defendant on driving offending:

*The opinion expressed about your 'attitude' is subjective.  
I am considering appealing your sentence on basis there was incorrect information in the PSR which was relied on by the Judge.*

b. Defendant on violence offending:

*The recommendation out of line with legal authority, it is far too low; the starting point is imprisonment*

c. Defendant is on dishonesty offences:

*The report is inaccurate; it is incorrect in places; it is unfair and making assumptions – the contrast with the application to recall to prison is stark. The report is bizarre.*

**C. Female Maori**

- a. Defendant on dishonesty and defiance/breach offences:

*The PSR speculation is unhelpful – none of this happened until your relationship broke down*

- b. Defendant on dishonesty, defiance/breach, driving and violence charges:

*The reports are POOR and very disappointing.*

*1<sup>st</sup> report is a 'no show' report; 2<sup>nd</sup> report is scant, lazy and not a full report; it is inaccurate in terms of court recommendation. Report writer hasn't put any effort into doing the PSR.*

*There has been an EM bail assessment at the proposed address but unable to get hold of the occupants– suspects the report writer left this a bit late.*

**D. Sexual offending**

- a.

*I will argue for a community based sentence. Your address is available but not suitable for HD; it is suitable for CD. The indication from the judge was it would not be prison and Probation have a pre-determined attitude based on your offending. You can do ISUP and CD. Probation says you are at medium risk of re-offending but there is no basis for this as there is no offending over the last 10 years. Your earlier report says your offending is 'escalating in seriousness' but this offending is historic and before your last offence. I take exception to the comment you are 'patronising and misogynist' as there is no basis for this: just because you had a difficult upbringing, which you were explaining, does not mean you're like that.*

b.

*They use complicated terminology. I don't agree you have a sense of entitlement*

### 1.1.2.3 Defendant's view of the report

The defendant expressed happiness with the report 12 times; for 19 of the reports the defendant was unhappy; on 23 occasions no comment was made either way.

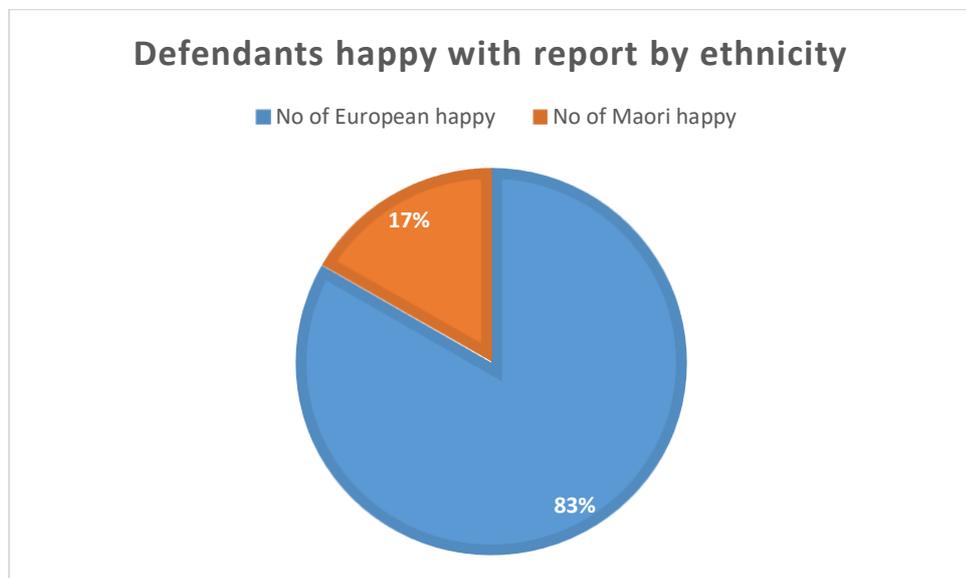


Figure 16

The number of Europeans who were happy with their report was 12 (83%) while only two (17%) Maori defendants said they were happy with their report.

Six of the 19 reports where the defendant said they were unhappy were European (31.5%) and 12 (63%) were Maori.

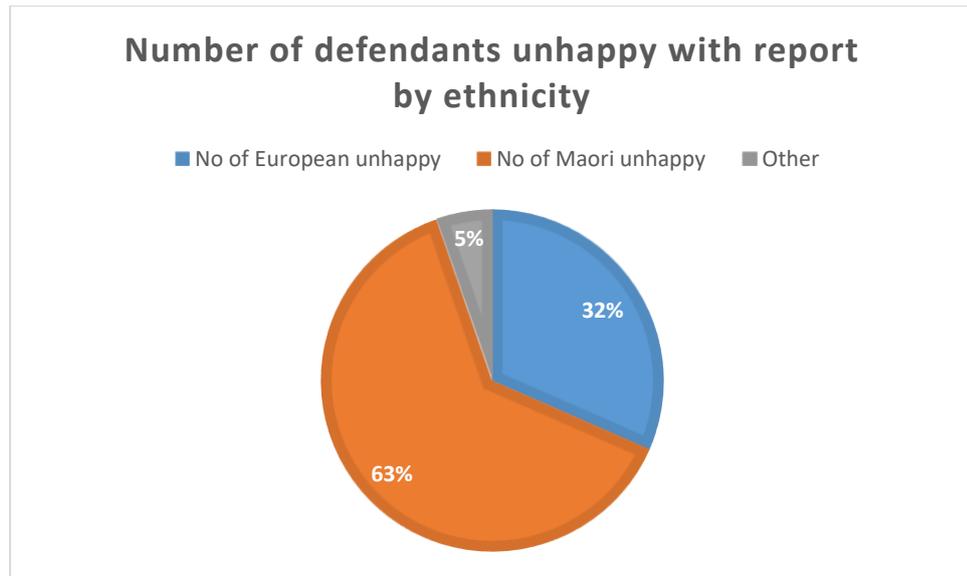


Figure 17

The comments below are either direct quotations or paraphrases of what the defendant said during the meeting with the defence lawyer who read out the PSR to them prior to sentencing.

#### 1.1.2.2.1 *Happy*

##### **A. Male Maori**

- a. Agrees with reasons for offending that are identified. Bi-polar will be explored. Agrees that Nan's death affected him. Wants drug and alcohol counselling. Interview conducted by AVL and ok.

##### **B. Male NZ European**

- a. Nods at report in terms of background and quotes. Had a good relationship with the probation officer.
- b. Agrees it is a sympathetic report; felt he got on with the RW. RW talked about proposed programme 'No Duff'. Says he could do light duties at CW and would prefer it. Felt a good rapport with RW and had not encountered the RW before. Felt content fair and accurate.

**C. Female NZ European**

- a. PSR describes her as ‘a warm woman’ and mentions her Christian values; it notes she likes writing and exercising.

1.1.2.2.2. Unhappy

**A. Male Maori**

- a. *his explanation (for offending) provides limited insight.* He is unsure how they reached this conclusion.
- b. The PSR says *it was hard to ascertain* remorse. He says he tried to repay and takes responsibility so can’t see why it was hard to ascertain remorse.
- c. The defendant says he explained to PO (Probation Officer) he cut off his bracelet because he was in an abusive environment and he is disappointed that is not recorded.
- d. RW came to the house. There was an issue about entering the house because the security guards wouldn’t take their boots off at the doors. PSR says two dogs were hostile. He disputes this and says they were rude.
- e. Did not have a good rapport with the RW. He says the report presents the writer’s opinion about his attitude towards the offending saying he minimised the impact of the offending and had limited insight. He says this is not accurate, that he did not minimise the offending.
- f. I don’t think the report writer listened to me and focused on my past and not what I was saying.

- g. The defendant's partner, present at the meeting with the lawyer, said *The probation officer said to us that he should just go to prison (the lawyer doesn't think the offending warrants prison). The defendant says I tried to explain that I am working; my boss knows how hard working I am. I've been reporting ever since I got arrested. I tried to explain to probation what had been going on with work hindering my ability to comply. We got mixed messages from PO*

**B. Male NZ European**

- a. Unhappy with the report. Takes issue with verbatim reporting 'I won't change my ways' has been taken out of context. Says he reported for ISUP when they note that he hasn't reported. He says they haven't been out to assess his address but they say they have been.
- b. *She told me she wasn't going to recommend supervision. What she has written in the report is the opposite to what she told me and what she told my wife on the phone. He does not think there is any benefit in doing drug and alcohol counselling. The RW said it would be a 6 month DQ but this isn't correct – it would be a year, but in this case it is an alcohol interlock.*
- c. *The PO hates my partner and thinks she is the trigger for my offending. The interview was only 10 minutes long and was on the phone. I provided the address three weeks ago. She's written 'shit' about me. I told her about handing in my patch and she didn't believe me. She doesn't give any evidence to support what she's said. He is described by the RW as 'intelligent and manipulative' which he is baffled about and for which there is no evidence to support such a view.*
- d. Defendant says probation haven't physically checked the address, they spoke to her on the phone. She says they did not tell her there was anything wrong with the address or she would have given another

address. Defendant says she has been trying to better herself and *it's all just thrown back in my face*. She says the interview was on the phone. Has done RJ. Victim (Mum) here in support and has written a letter. She did not wish to continue to go through the PSR because she felt it was so against her. She was not expecting a recommendation of imprisonment.

**C. Sexual offending**

- a. Doesn't want the RW to be his PO as he felt she was against him. The PSR says he didn't demonstrate remorse but he says he is remorseful and the RW didn't understand what he was saying. He does not agree he was shifting the blame. The PSR says EM not canvassed because of health and safety concerns which he says is unfair as they weren't requested to do EM checks: appendices weren't requested. He says the RW was *Judge, jury and executioner*. He is unimpressed that she had the wrong information from the start and says this affected the interview process. He said *she kept saying jail or EM*. The PSR states he is not motivated to address offending needs which he disagrees with as he says he agreed to comply with any sentence.
  
- b. The defendant said of his PSR experience: *They judge you before you've been judged*. He says Probation did not really talk to occupant (the occupant was present at meeting with the lawyer and she confirmed this was the case). The PSR mentions he has consumed alcohol despite supposed to be addressing his alcohol issues; the defendant says *I had a couple at Xmas but apart from that I have been sober 40 weeks*. Of the first report (there were two reports because of issues around finding an address) the defendant says *they've twisted my words*; does not know what they are talking about when they mention being *patronising and misogynistic*; he thinks it must be because he was talking about his bad childhood and how his mother treated him. The PSR describes him as *shifting blame* which he disagrees with, he said

he was just explaining what happened. The PSR says he showed a *lack of insight* but he says this is unfair as he told them he has no memory of the incident but that he takes responsibility for it. He believes it's because of the nature of the offence that they have taken a judgemental attitude towards him.

1.1.4. Inaccuracies

Inaccuracies in the reports were commented on by 17 defendants. That represents 31.5% of the total PSRs identified by defendants as containing inaccurate information. Figure 19 shows how those 17 defendants are broken down by ethnicity.

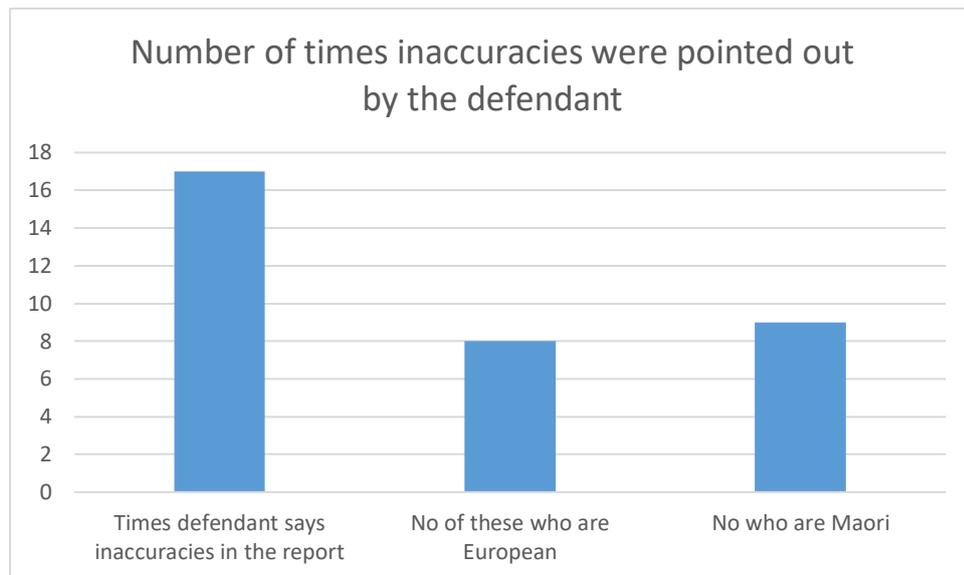


Figure 18

Below are some of the comments made by defendants in relation to inaccuracies contained in the PSRs and which give an idea of the kinds of things that are presented to the court even if not accurate.

- a. The defendant says that despite the PSR reporting so, there is no baby due and he does not accept there is over-crowding at his home address.

- b. The defendant does not think the reasons for the offending identified in the report are accurate and the PSR does not reflect what he said.
- c. The defendant disagrees he said he uses cannabis socially, he says it is for medicinal purposes.
- d. PSR has information about family harm incidents which the defendant denies. The PSR does not support the assertion with evidence. There is also deep confusion about who the defendant is because there are different names being used by Probation and Court/Police.
- e. The report writer's objections to the address has meant the address has been deemed unsuitable and thus HD is not possible; but there is no supporting evidence of Oranga Tamariki or police concerns.
- f. The PSR states the defendant is a business owner, the defendant says *I don't own the business*.
- g. Despite the PSR saying he has done a drink driving course, the defendant says he hasn't done an intensive drink driving course and he doesn't want to do one.
- h. The defendant is happy with report overall, but not that HD was not canvassed with him and the RW told the lawyer that he did not consent to HD; he most definitely would consent to HD. The defendant was also not impressed that the report recorded the wrong address.
- i. The defence lawyer says in his oral submissions that the PSR is inaccurate as to what type of accommodation they had said is not suitable: it is not a 'boarding house' it is a rehab facility. The PSR recommendation consequently is too high; cannot rule out the rehab facility on inaccurate information

1.1.4. Disputes Summary of Facts

Nine of the reports said that the defendant disputed the summary of facts; five of those were Maori and four were European.

A couple of examples of the comments relating to the defendant disputing the summary are:

*disputed the SOF and exhibited a strong attitude towards authority*

*Disputes the SOF and minimises his offending*

1.1.5 Other subjective comments

The researcher has identified a number of comments in the 54 reports which are subjective in nature and which do not appear to have an evidential basis to support them; they are picked out for an absence of objectivity or supporting statement. A sample of these are listed below:

- 1) *High likelihood of reoffending*
- 2) *Shows 'no remorse'; takes little responsibility for his own actions.*
- 3) *The PSR says the defendant has little respect for the law and reacts negatively to authority.*
- 4) *States he has a propensity for violence. There is no evidence for this and he only has a wilful damage in his history.*
- 5) *Says the defendant is likely to prioritise employment and employment could be a barrier to compliance.*
- 6) *The PSR says there was no indication he was remorseful and he appeared more regretful of impact on him, without stating how this conclusion was reached.*
- 7) *PSR says he 'claims' he was invited to the property and the writer says this is an attempt to deflect blame*

- 8) PSR says the defendant *blurs the lines of monogamy* and *he carries an attitude he can be with more than one woman at a time*, points which have no relevance to the offending.
- 9) The PSR says the defendant is ‘likeable’ and ‘personable’.
- 10) The PSR describes the defendant as a ‘warm woman’.
- 11) PSR says *he is assessed as having a lack of insight onto the possible consequences his offending may have on the public*, but there is no evidence to support this.
- 12) The PSR comments that *the defendant’s interest in programmes appears as a means to gaining a favourable sentence*, this is inconsistent with what rehab she has undertaken and the positive steps her Mum says she’s taken.
- 13) The PSR says the defendant *did not display any problematic behaviours during the interview*. There is no reference as to what ‘problematic’ behaviours might be.
- 14) The PSR says *he argued his reasons for non-compliance throughout the interview*, the defendant says he wasn’t being listened to.
- 15) The PSR comments the defendant *lacks ability to problem solve and make better choices* and has a *sense of entitlement* without any supporting material.
- 16) The RW comments there was no real remorse and suggests what was expressed was only to achieve the most desirable outcome.
- 17) *It is the report writer’s assessment that Mr K is under reporting his use of substances* – no basis is provided for making this statement.
- 18) PSR notes he likes fishing, works and is proud of his family.
- 19) Report writer considers that because he had a family group hui the defendant should get a low sentence.

#### 1.1.6 Lawyer raises PSR in oral submissions

The lawyer made submissions addressing the PSR on 34 occasions (63% of the time). On 16 of those occasions the lawyer goes beyond simply referring to the completed PSR and that they support the recommendation. The following

comments are some of those which do not simply invite the judge to adopt the recommendation contained in the report (which occurs on 18 occasions (53%) of the time).

*Comments on positive reports:*

- 1) Uses report to present defendant as a person motivated to get on track. On 3/2 the lawyer had spoken to the report writer about remorse and he has written a remorse letter.
- 2) Refers to PSR recommendation and submits this is a defendant who has taken his responsibility for his offending seriously, recognised he needs to do something about his dependency and a rehabilitative sentence is appropriate.
- 3) Refers to PSR and her childhood and says she has been open and honest in the PSR.
- 4) Refers to PSR of December which points to a willingness to engage in rehabilitation (this is the basis for asking for leave to apply for HD).
- 5) Says remorse is shown in the PSR.
- 6) The lawyer submits that the insight shown in the PSR should earn the defendant some credit or at least limit the level of the starting point (for a sentence of imprisonment).
- 7) PSR notes the defendant accepts anger issues and alcohol issues.
- 8) The lawyer explains the defendant is excited by the courses proposed by probation.
- 9) PSR is favourable and recommends HD (the SI was 10 ½ months subject to good report). Explains she has been open and honest and displayed a willingness to engage in counselling.
- 10) Says PSR recommendation is appropriate; state he is a hard worker with family responsibilities. PSR recommends CW and supervision and invites adoption on basis that he has not had a rehabilitative sentence before (referred to in PSR).

*Comments on negative PSRs:*

- 11) The lawyer says the remorse letter handed up to the judge demonstrates insight which is not referred to in the PSR.
- 12) The lawyer raises the issue of the inaccuracy of the PSR. The lawyer says there is no foundation for comment in the PSR that the occupants are colluding 'I don't understand where that comment has come from'. The lawyer says that the PSR provides background to the defendant's upbringing but he does not agree with the RW that he is shifting blame but rather is explaining what happened.
- 13) The lawyer explains defendant takes issue with PSR and explains which aspects the defendant says are not accurate.
- 14) The lawyer asks the judge to step back from recommendation of imprisonment and asks for ISUP only. Acknowledges PSR does not speak well of defendant and his attitudes and explains there was not a good rapport between him and the rapport writer.
- 15) PSR – he is 'not well served by the writer'
- 16) PSR is inaccurate as to what type of accommodation

1.1.7 Conclusion on observation results

The PSRs were rich in content. This paper could go deeper into the detail contained in the PSRs. However, for the remit of this paper, taking a curiosity-based approach and attempting to determine whether PSRs tend to apply the rule of law without preconceptions, thus being a tool for social justice, what has been drawn out of the PSRs and observations presented above is sufficient; it may be there are more in-depth studies which could be undertaken based on the findings of this paper.

**2. Survey of Judges**

There are seven judges at the Tauranga DC who regularly sit in the criminal jurisdiction. Of the seven, six agreed to be interviewed by the researcher. The interviews took place in judges' chambers during business hours.

The judges were invited to give their opinions, in general terms, of the PSR. They were asked about how much they value the PSR and about how much weight they might place on it in the sentencing process. Issues around subjectivity and objectivity, quality of reports, bias and how they might respond to defence counsel explaining issues they or the defendant might have with regard to the report were explored during the interviews. The interviews followed the same format and recorded information in response to the questions, in order, as set out at Appendix two.

2.1 The results are recorded below in a combination of summarising responses, paraphrasing particular answers and, occasionally, direct quotation of what was said. The results are recorded against each question numbered from 1-37.

1. When asked what their general view of the PSR is, the majority of the responses were positive. Only one of the responses spoke negatively about the PSR meaning 83% of responses were positive. The one negative comment referenced that the reports are (generally) poorly written and poorly thought out. One respondent qualified their answer saying that the quality of reports vary across courts and they felt that Tauranga DC, Whakatane and Waihi are particularly well-served by the RWs to the extent that they *put a lot weight on what they say*. This particular respondent went on to say that if the information is in the PSR *I need some persuasion not to accept it*. This respondent reported that the PSR is the first thing they look at; the respondent who spoke negatively about the PSR said it was the last thing they looked at. Between these two extremes comments were that the PSR is a useful tool, mostly helpful and gives insight into the personal background of the defendant. One respondent commented that the PSR is *vital*.
2. Asked whether the PSR carries value beyond the technical feasibility checking of proposed addresses for EM sentences five of the six respondents answered positively. The positive responses said the PSR

gives an insight way beyond what the defence lawyer can provide and that the information can impact on the final sentence.

3. Respondents were asked whether the kind of information the PSR provides to the court is a doubling up on information provided to the Court by defence counsel. The majority of answers indicated that it was not considered to be a doubling up. Comments were made that *good counsel will supplement or contradict* what the PSR presents; another commented that the PSR doesn't need to be paraphrased; a further comment made suggested that POs have more ability to check and cross-check information. One respondent said they prefer to hear or read submissions from counsel over the PSR.
4. Respondents were asked if they consider the information provided for by section 26 might be better provided by the defendant's lawyer or an alternative body. Four of the respondents said they did not think the lawyer or another body should provide such information to the court. One commented *I doubt the defence lawyer would have the time to provide such information* and another said the information is *better coming from an independent report writer; when counsel tells me something I don't always accept what they say. Counsel's role is relatively narrow; a RW can ascertain and check*. One suggested an iwi-based organisation might be able to provide similar information to the court and one commented that psychological reports and medical information should come from counsel.
5. Respondents were asked if they agree the information that can be gathered (as per s26) is subjective in nature and is therefore subject to interpretation by the information gatherer/report writer. All responses (five out of six) overall said this was the case to some degree, with one thinking the PSRs are very subjective and the others saying PSRs are a mix of subjective and objective with some factual information in them. One commented that things like remorse are subjective evaluations and

that they *can have quite an impact*; another said *significant chunks are the views of the writer, other parts are from identified sources* and another commented that *the PSR tends to be reliable, thoughtfully written with professional detachment and objectivity*.

6. When asked how much weight they would place on the PSR in the sentencing process there was a mixture of answers. One said they use the reasons for the offending to help look at options, particularly where there is a tariff with a starting point of prison. One said they placed *significant* weight on the PSR. One said the information in the PSR would be *at least a 50% weighting of my assessment*, another said it depends because *a well considered PSR and within norms can be moderately helpful eg. HD or not; where the recommendation is wrong they are no use* and another said they placed limited weight on the PSR preferring to consider submissions of counsel above the PSR.
7. Respondents were asked whether they take most notice of the narrative of the report (the information provided about the defendant) or the recommendation. The majority said that they take notice of both as you can't separate them. One said they always take notice of the recommendations and one said they took notice of the recommendation although they don't always agree with it and they take a good deal of notice of the narrative because they like to work out why the offending happened which is a significant part of their approach at sentencing. One commented *lawyers will only make the difference in shifting a sentence range 15% and a PSR by 20-30%*.
8. When asked what information they consider to be the most valuable one mentioned remorse and attitudes towards rehabilitation, one was interested in the risk of reoffending and addiction issues and four commented they wanted to know the background information about the defendant and the 'why' behind the offending so that they can consider

what can be done about it; one said the ‘snippets’ from employers, family and friends was very helpful as it provides insight.

9. Asked if they thought the report should contain sentence recommendations at all five respondents answered and all five said they thought recommendations should be part of the PSR. One commented they don’t always agree but that it is not common for them to disagree.
10. All respondents answered *yes* (3) or *sometimes* (3) that the inclusion of a recommendation can create a false expectation for the defendant.
11. All respondents thought the recommendation colours the way the defence lawyer approaches the sentencing hearing. A couple of respondents expanded on their answer explaining that *they will give it a go if the recommendation is a generous one; and if it’s on the edge of imprisonment counsel will encourage you to take a step back; and more experienced and capable counsel can make a lot of the contents of the PSR, going behind the recommendation.*
12. When asked what proportion of the time they would consider the PSR is appropriate in its sentence recommendation, five respondents answered and the percentage ranged between 50% of the time and 75% of the time; three saying ‘most’ or 75% of the time, one 66% (two thirds of the time) and one saying 50%.
13. When asked if they had ever found the recommendation to be completely inappropriate all five who responded said that they had, though three qualified their answers that this had not happened often or only occasionally. One commented that when it happens it *devalues the whole report; which may mean you don’t take any notice of the report itself; one gave an example of serious drug dealers with recommendations of CW and supervision when it should be prison, but the RW usually has a reasonable basis.*

14. (and 15) When asked what reasons play a part in their decisions to order a PSR they all referenced the statutory obligation to order one if the sentence is likely to be prison or an EM sentence. Two mentioned that they sometimes order a 'stand down' report (where the defendant talks to the in-court PO about themselves and the PO then makes an oral recommendation to the court; this is would be for a community-based sentence outcome). One said they would not order a PSR if they don't need assistance in decision making but that it can be useful when considering whether ISUP might be appropriate. One said they would order a PSR to explore addiction issues and another said *if I can predict the outcome I usually won't. It's all to do with the why.*
16. Respondents were asked whether they consider there to be a variance in the quality of PSRs from one report to the next. Three of the six respondents said there was, two said sometimes and one didn't think this occurred often. Most respondents expanded on their answers with two saying that sometimes the reports seemed rushed or don't have enough time, one qualified that by saying *I think that is more about the challenges of getting in contact with defendants.* One respondent said they thought the variety was pronounced in bigger centres and one commented that there is a policy push towards keeping people out of prison which has impacted on the quality of the reports. One considered that the reports vary greatly.
17. When asked what they thought was the cause of the variance (for example, presentation, grammar, omitting relevant information, focusing on irrelevant considerations), four respondents answered, two commented that the templated nature assists the quality and one said that they should be using spell checks to assist. One commented that it is counsel's role to identify things that haven't been included; one said the reports sometimes come unstuck on the recommendations.

18. Respondents were asked if the variance influenced how much weight they give to the content and recommendations of a PSR. Five agreed that it would, one saying *I will give a poor report a once over lightly* and another saying *if the quality is low I will side-line it*. One commented that it makes no difference as they make their own assessments and another said *I look for the link between the information and the recommendation; I will wonder at the purpose of some recommendations where there is a disconnect*.

19. Respondents were asked what the characteristics of a *good* PSR are.

One said they wanted the report to be of a good length (not too long), for it to be objective with realistic assessments and recommendations which conform to sentencing requirements and defendant's interests.

Other comments are listed below:

*thorough, balanced and reasoned and for there to be a link between the information and the recommendations and where the RW has talked to family and wider whanau.*

*Clarity: structure, logic and presentation of information (evidence) for example if they are saying they are not remorseful.*

*A summary at the beginning is very helpful, separation of the various topics*

*Thorough detailed analysis of background, motivation and rehabilitation prospects. If on the cusp of HD I look at the conditions on release to see if it has been well thought through*

20. Similarly they were asked what are the characteristics of a *bad* PSR.

One commented that they thought unrealistic recommendations and error made for a bad report. Other comments are listed below:

*I don't see many. Lack of information, lack of inquiry and lack of link. Where they might be saying what's convenient. If they are negative about the person.*

*Should use simpler language. Outdated template. Using language defendants don't understand.*

*One that doesn't have a recommendation and doesn't separate the various topics; all in a narrative*

*If the person can't do what's being recommended; it if hasn't been thought through. Don't want to see someone given something they will struggle to do eg. CW and then get breaches.*

21. Respondents were asked if the formulaic nature of the PSR was useful or if the report should be more nuanced; four of the five respondents said it was useful, though one said they liked the formulaic approach because it was a necessity to have information presented in the same way each time; another said being formulaic provided consistency. One said they thought there needs to be a template to make sure the RW gets it right and one commented that there can still be some nuance though things will inevitably be left out. One respondent said they thought the PSR needs to be more nuanced to increase its value.
  
22. Respondents were asked if they think there is a variance in the kinds of recommendations made depending on factors such as the ethnicity, gender and age of the defendant. One respondent said there was but not due to a systemic bias and drew on the example of a sentence of imprisonment being imposed rather than HD because the defendant didn't have an address as being a socio-economic issue outside of the court's domain. One commented was also made that fewer females receive sentences of imprisonment largely due to childcare issues, and that youth are treated slightly differently due to an acknowledgement that a young person's brain may not be fully developed, a factor which informed their offending and would impact on their ability to successfully carry out certain sentences, such as the restrictive nature of a HD sentence; these comments were echoed by others. One respondent said that there are times when CW will not be appropriate to certain defendants and that sometimes that relates to age, ethnicity and perhaps gender.

23. When asked if they had ever seen a PSR which they thought appears to be biased in any way, two respondents said they had and three said they hadn't. Those who said yes did not elaborate on their answers, two of those who said they hadn't qualified their responses:

*I don't think so. Sometimes a defendant thinks they have it in for them, but that doesn't come through in the report.*

*None spring to mind. They are carefully vetted by supervisors. If they are they have been pro-defendant*

24. Asked if it was a common occurrence one who said they had seen bias said no and the other said *only a couple*.

25. Respondents were asked if their view of the PSR was changed if they had detected bias in a report, and whether it changed the weight they gave to the report. Of the five who answered this question, two said it would change their view, one said it would change their view of the RW and their future reports. One respondent indicated that if the RW was showing sympathy or empathy for the defendant then they would *let it slide*. The other respondent said: *It depends. It can colour the perception of the report but if the outcome was still in the ball park then I would still consider it.*

26. Asked about their views of how defence lawyers approach the PSR at sentencing the respondents made the following comments:

*Variance. Some will highlight the positive. Sometimes they haven't read the report. Often once over lightly. Sometimes they miss some gold.*

*Most of them do it well.*

*In a responsible manner.*

*Spectrum of lawyers: at the lower end over-reliance, uncritical reliance. At the top end you get the reverse with a detailed critical analysis an attack on conclusions or recommendations. We are well-served by our defence bar here. Sometimes analysis could be sharper. I have a high opinion of the bar here.*

*They sometimes rely on them too much to make their job easier. I don't want to hear them repeat what is in the PSR I want to hear their view from a lawyer's perspective about what should happen to the defendant.*

27. Respondents were asked if their view of a PSR is altered if a defence lawyer takes issue, on the defendant's behalf, with the quality or accuracy of the report. Two respondents didn't think it changed their view while two said it would change their view; the remaining respondent didn't give a yes/no answer but indicated they would not readily accept that submission from the lawyer. The comments are listed below:

*I would take it with a degree of scepticism and I would check with the PO.*

*No. They are entitled to take issue, for example with regard to remorse and attitude towards rehab, it provides a balance.*

*Not really. I'm sceptical about what the defendant asserts; I would believe the PO over defence.*

*I have had some experiences but not many; if it's going to make a difference I might stand it down. I recognise the importance of the issue and I will find a way to iron it out.*

*Yes, I then have to consider which version is reliable. I need to decide and then I might dial back my reliance on the report.*

*Yes I will listen to counsel and if they are telling me there is a problem with the report I am willing to accept that.*

28. Respondents were asked if they had had experience of a defence lawyer explaining there is an issue around the relationship between the report writer and the defendant. Three of the five respondents said they had, one said they hadn't and one said not one that stood out. One respondent who said yes commented that sometimes the defendant accepts they've said something written in the report.

29. Those who said yes to the previous question were asked how they would approach such a submission. One respondent said they have, from time to time, had the PO cross-examined about what they had written in the report or their relationship with the defendant; one said they would simply take the submission into account; another said *I check with the PO and what is in the system. The defendant may not be being truthful to the defence lawyer.*
30. The five respondents to the question as to whether the type of offence influences how they read the PSR and how much weight they give to the content and recommendation of the report all indicated that when the offending is really serious they look less at recommendations, because tariffs and guideline judgments will determine the starting point. Two of those said the circumstances of the offender then become relegated in importance and the report won't make any difference to the outcome. However, one said that the report will influence whether they say something favourable in their decision which can be pointed to for a Parole Board hearing. One respondent said *prison is prison but when looking at sentences between community work/supervision and CD is when I look at it most carefully* and another wondered whether PSRs should be deeper for serious violence offending.
31. The respondents were asked whether they had noticed whether report writers take a different approach to defendants who are being sentenced on Department of Corrections offences as opposed to Crown or Police offences. Three of the four respondents said that they didn't, with one saying *No. They might have more knowledge. They give offenders a lot of room; they are compassionate and don't want to send them to jail; they might be more exasperated.* Another respondent said it was possible as they had knowledge of the defendant and that relationship might impact on them.

32. Question 32 did not get any meaningful answers.

33. All five respondents to this question thought prior involvement with the defendant on the part of the report writer and their department is appropriate when making recommendations to the Court about sentence outcomes. Their comments are listed below:

*Yes I think their knowledge is useful. It can be positive if they can demonstrate change.*

*Yes because they have knowledge. But if the relationship turns bad it might not be helpful. Familiarity is good if there is integrity.*

*I think that's fine. They have to use that information in a proper and objective fashion.*

*Prior involvement is almost inevitable. It doesn't need to change.*

*Prejudice ought to be detected from PSR content.*

*I am in favour of continuity of PO. I won't overlook the fact that a bad relationship can affect prospects.*

Although this study is not about 'cultural reports', which are provided for by s27 of the Act, the next three questions sought information from the judges regarding their views of the cultural report. The reason for this is that cultural reports are becoming more widely used at sentencing and the curiosity-driven nature of this study means that it should be considered whether these reports might be superseding the PSR.

A judge at the Tauranga DC held an information session about cultural reports for defence counsel at the court in July 2020. The judge told the audience that the PSR uses language which pigeon-holes defendants and they are limited in the amount of information they are able to provide. He said that the cultural report is able to go in to much more detail and link the defendant's background directly to the offending. He felt that the cultural report should be used in situations where the decision on sentencing is between imprisonment and an EM sentence and that they can be a tool to help reduce incarceration rates in New Zealand, particularly among Maori.

34. Asked, in light of the case of *Solicitor General v Heta* [2018] NZHC 2453 resulting in section 27 cultural reports playing a larger role in the sentencing process due to significant discounts available to defendants, what their overall impression of the cultural report is, respondents had mixed reactions. It was pointed out that it is early days but that at present the quality of the reports vary from writer to writer and some are very poorly done. It was commented that the reports must have a clear cultural connection with the offending but that the reports often do not have anything to do with cultural matters. One commented that the information in the cultural report could appropriately be presented by defence counsel or through the court being addressed by someone who could speak to the cultural background of the defendant. There were concerns that the RWs do not have to have qualifications in order to charge the defendant for the completion of the report and it seems the reports are rarely fact checked and are based on self-reporting. Among positive comments it was said some are excellent and thorough and that they provide a helpful perspective.

35. Respondents were asked if they consider the cultural report to be a valuable tool in the sentencing process. There was a consensus that they can be valuable and they are part of the sentencing process.

36. Respondents were asked if they think it is necessary to have both PSRs and cultural reports and if they can imagine a better system. The comments are listed below:

*One report would be better*

*The PSR should be better resourced. The info should be provided by the courts*

*It would mean that PSRs would be longer and POs may not be qualified to do a cultural assessment*

*Yes but PSR wouldn't need to cover background as much*

*I think it is unnecessary to have both and I think the information needed by the judiciary could be presented in a better way.*

37. Asked if they had any suggestions for change to the PSR process and, if so, what they would like to see, respondents answered that they were largely satisfied with the PSR process. One commented that the answer lies outside the justice system and that things won't change significantly unless socio-economic disparity is evened out. A comment was made that sentencing is a pressured situation and that anything that humanises the process and assists the victim and enables the defendant to understand why the court is doing what it is doing will be helpful. One commented they would be happy to see greater consistency in the PSRs and one said that the information should be more uniform it is enquiry. One comment was made that PSRs should identify cultural issues that need further exploration and that seek that exploration.

During the observation part of this study, notes were taken at sentencing of reference judges made to the PSR. These findings could have been presented in the observation section but the researcher considered there may be some value in presenting them in this section where the judiciary has a voice. The comments made and answers given in the interview can be supplemented and supported by these real-time comments made by judges (all of those who responded to the interview questions and the addition of two visiting judges who sat in the Tauranga DC on the occasional day) during a normal list day which has time allocations for scheduled sentencings. The PSR is mentioned by the judge in every sentencing, even if just to say that they have received the report, or they have read the report. Some of the more full or varying comments are recorded below:

*Judges' comments re: PSR at sentencing*

*This would normally be a sentence of imprisonment and you have been thrown a lifeline. To your credit you have completed the residential rehab programme.*

In this sentencing of a male Maori on his fifth drink driving charge the PSR recommended ISUP which the judge didn't think was appropriate. The defence lawyer handed up a certificate verifying the defendant's participation in residential rehab and made submissions in line with the PSR's recommendation. The defence lawyer explained that the sentencing had been adjourned for the defendant to complete the rehab programme and that the previous judge had indicated the PSR report would be adopted if he successfully completed the programme. The submissions and the PSR, and the previous judge's indication, persuaded the judge against a sentence of imprisonment.

*The PSR is sympathetic to you. Your lawyer tells me you had a bad history of male companions, you were young and under the influence of others. I accept this but it doesn't excuse you, it explains and gives the justification to accept the recommendation of HD in the PSR. You have to comply or there will be prison if you breach. This was at the sentencing of a female NZ European on defiance/breach offences and dishonesty offending including burglary. The judge did not consider CW would be appropriate on top of HD in the interests of your children.*

*The PSR speaks of your lesser role and you getting mixed up with anti-social associates. The judge questioned the proposed occupant about why there was no contact with probation – they say they have been waiting for a phone call. It never ceases to amaze me said the Judge about the lack of contact – the judge stood the matter down for enquiries to be made by the PO. In the afternoon the judge accepted the HD address is available. The judge read out the risk of harm and offending -related factors. This was at a sentencing of a female Maori on defiance/breach offences and on dishonesty offences including burglary.*

The judge states that the PSR refers to alcohol-related factors. Accepts recommendation but wants to impose a punitive element.

The judge speaks of the defendant's poor behaviour towards probation (she did not attend her interview for her final PSR report) and for that reason there will be no adjournment and therefore today it will be 9 months imprisonment. The judge says he has read the PSRs *and that prison is recommended. I accept that you have had a difficult past, and unstructured lifestyle, poor associates and drug use.* This was a sentencing on dishonesty offences of a female Maori, who had a significant history of similar offending.

*I have taken the view you are entitled and there is a need for deterrence.* The defendant's lawyer explained that the defendant took issue with the content of the report, but the judge did not accept this.

The judge notes the defendant attended RJ where remorse was explored and reported on positively *but the PSR raises questions about genuineness of remorse.* This was a sentencing of a male Maori on family violence charges. Here more weight is given to the PSR than RJ despite RJ being conducted by trained facilitators, and the issue of a poor rapport between the defendant and the RW was raised by the lawyer.

*The PSR records incorrectly this is your 4<sup>th</sup> offence of this type, this is actually your 5<sup>th</sup> ; this shows little motivation to change*

*I am going to ignore some of your responses to probation. I did not call for appendices.* This was the sentencing of a male NZ European on sexual offending.

### **3. Questionnaire to defence counsel**

Twenty-one questionnaires were sent by email to defence counsel who regularly appear in the Tauranga DC. Of the 21, 16 responded (76%). The 16 respondents did not answer every single question posed. The results of the questionnaire are presented below with some of the information being quantitative in nature and some qualitative; the presentation of the results is therefore a combination of charts and graphs and direct quotes along with some commentary explaining the results.

3.1 Defence counsel were first asked what their general view of the PSR is.

Fourteen respondents answered this question with 9 having a positive view and five having a negative view. This is represented in figure 19.

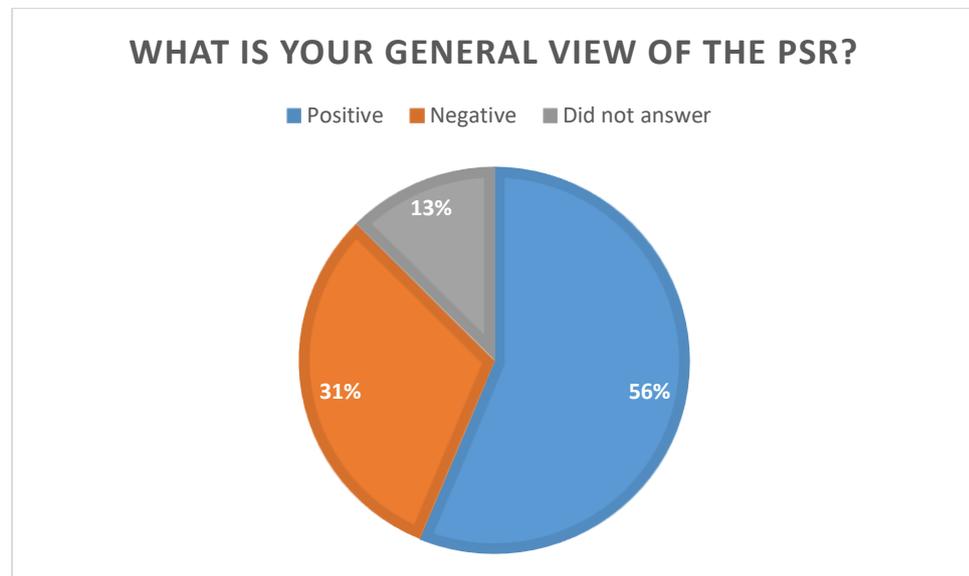


Figure 19

The comments made by defence counsel in response to this question include:

Positive

- Generally helpful but sometimes can be very unhelpful/damaging to the client
- They can be helpful if the recommendation is in line with my own however they often contain unhelpful comments that are not always warranted
- Generally helpful however sometimes this can depend on the RW and on their relationship with the D
- I see it as a means of the judge being able to 'get to know' the D without the J themselves having to interview the D so in that regard it is useful. Sometimes it is inclusive of details about previous compliance with sentences that seems to be a 'black and white' approach whereby I think the PO simply refers to probation records without asking 'why' people may not have been compliant. I think PSRs could go further by looking into socio-economic backgrounds (eg, a D stole a leg of lamb because after all fixed living expenses are paid weekly they only have \$16 left to feed the family). It does allow defence counsel to get to know their client better too. PSR quality differs depending on the RW despite the fact they are in a prescribed format.

- Overall they are a helpful for sentencing, and inform the court of the client's personal circumstances and attitude to the offending as well as the most appropriate sentence
- Essential. Ds often make comments to RWs which would never be made to counsel, particularly in background, education and addictions. It is only rarely I see a report without some point that I had not known.
- A necessary step where more significant sentences are to be considered

#### Negative

- When it is done well it is a useful tool to provide insight and assistance for sentencing. However it has become a tick box document written by people with insufficient time or increasingly insight into the sentencing process and appropriate sentencing levels
- Sparse on info relevant to the cultural context of the client's offending and nothing that contains any material that is sourced from qualified assessors such as psychologists, A good deal of variation in quality btw reports and RWs. In general they carry a lot of weight at sentencing and should be scrutinised for their integrity on many levels.
- Generally helpful but currently obtaining more assistance from s27 cultural reports. Also, there can sometimes be an issue with impartiality, inaccuracy and lack of disclosure in relation to police or family violence issues raised in reports
- I am often concerned about PSRs. They play such a pivotal role in sentencing however RWs never cite their qualifications and they often fail to cite their sources of information, I frequently find that RWs dismiss what Ds tell them about the offending and effectively call them 'liars' rather than simply stating to the Court the D's point of view and leaving it to the court to make a value assessment. I often find PSRs to be biased and the RWs align themselves with the police position rather than being neutral. Some RWs are better than others however and there are some POs I can tell are really invested in trying to help Ds. The POs are few and far btw in my experience.
- They are not particularly useful/helpful for our clients mostly but they are heavily relied upon at sentencing by Js
- A lot appears to depend on the rapport between the defendant and PO.
- I actually find the probation service in Whakatane extremely good. They actually liaise with Counsel and recommend sentences which are realistic and appropriate. They also know the history of the people given it is a small town. They are generally impartial in their reports. Tauranga probation is very different.
  - a. When asked if they thought there was value in the PSR beyond the technical assessments for electronically

monitored sentencing, 13 out of 16 said Yes, one said it depends and two did not answer. The answers were as follows:

- Yes x 9
- Yes especially where they are presenting basic facts about the Ds background and personal circumstances and especially where this can form the basis for submissions relating to credit at sentencing or appropriateness of interventions
- Yes. I do sometimes find that the PSR does tell me a little more info that I knew about the client and I think the clients might tell POs more than they tell us sometimes. BUT I think the current scope of PSRs is too wide and I also think that POs should not be recommending sentences.
- Yes if they are well written and impartial
- Yes most definitely
- Depends on the RW and their genuine interest in the job

b. Respondents were asked, using a Likert scale, whether they considered PSRs to be well written and easy to understand. The results are shown in figure 20. One respondent elaborated on their answer and wrote on the questionnaire paper: *Often written in haste, incorrect names or facts input into templates. Use of English language can be a stretch.*

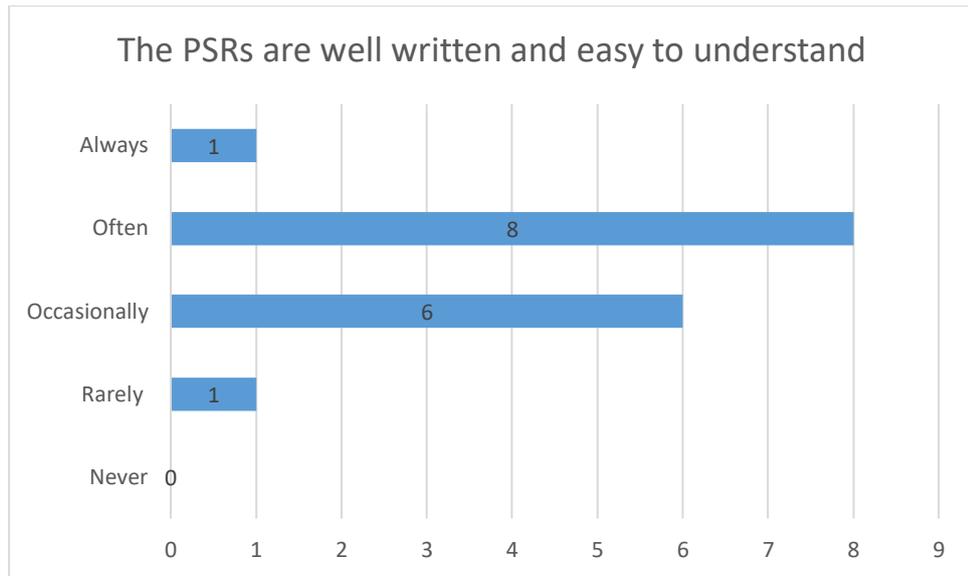


Figure 20

- c. Respondents were asked if they considered the PSR to be impartial. The responses are presented in figure 21, with the largest group of those who answered saying rarely.

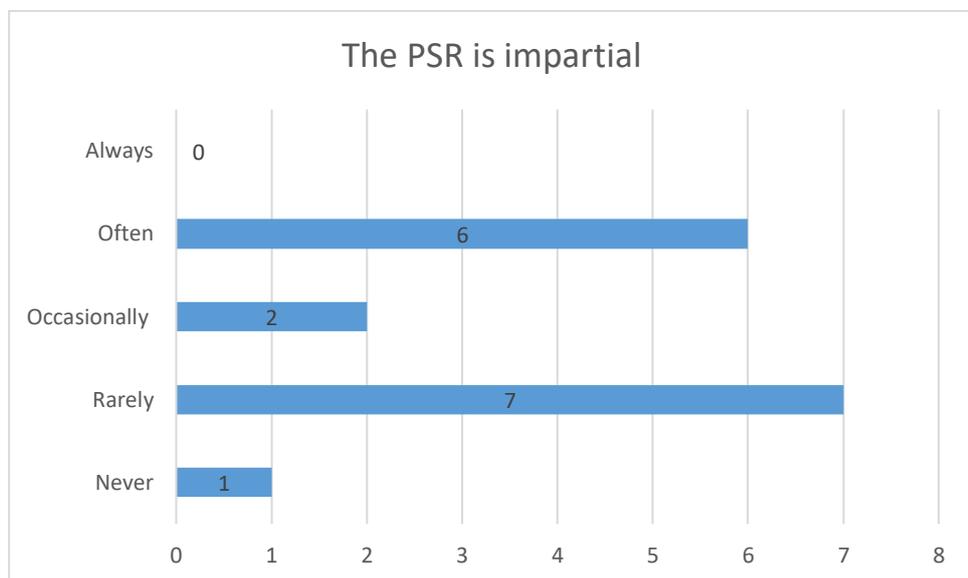


Figure 21

One respondent elaborated and wrote on the questionnaire page:  
*Reports, and in particular on strength reports, assume guilt often beyond the facts of the case. Some RWs take it upon themselves to impose punishment and use the report for that purpose.*

- d. Respondents were asked whether they thought the assessments, opinions and recommendations in the PSR carry significant weight in the sentencing process. The vast majority said they thought they did often. This is presented in figure 22.

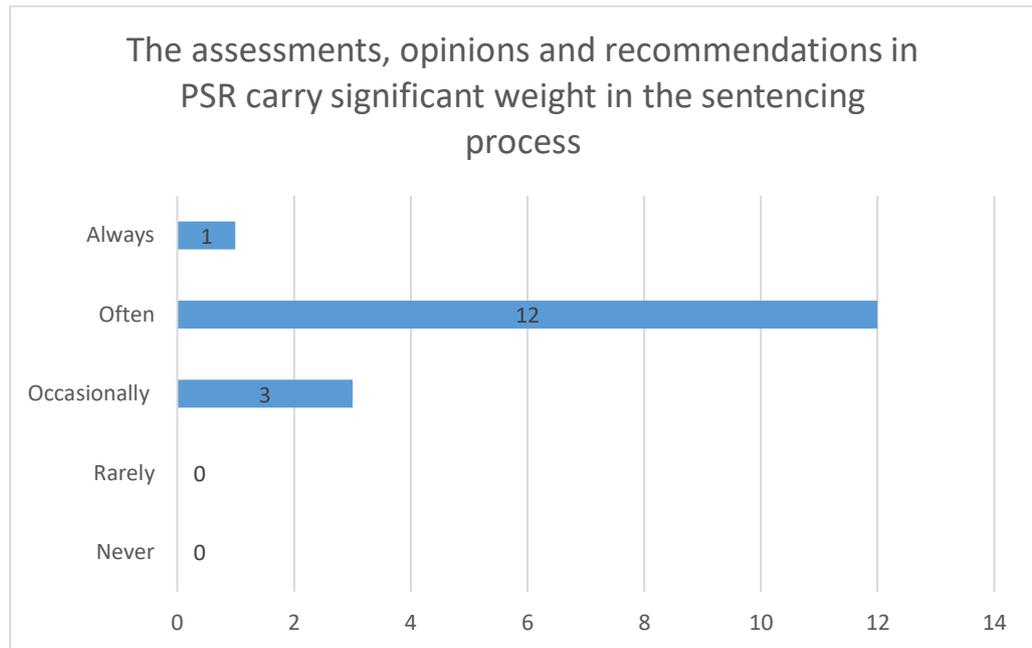


Figure 22

One respondent qualified their response saying: *More often than they should.*

- e. Defence counsel were asked whether they thought the assessments, opinions and recommendations were supported by facts and information contained in the reports. There was a mixed response but the majority fall on what could be described as the ‘negative’ end of the scale, that is occasionally or rarely, as represented in figure 23. One respondent sought to qualify their answer explaining: *Facts can be remote from the report. Usually the opinion of the RW.*

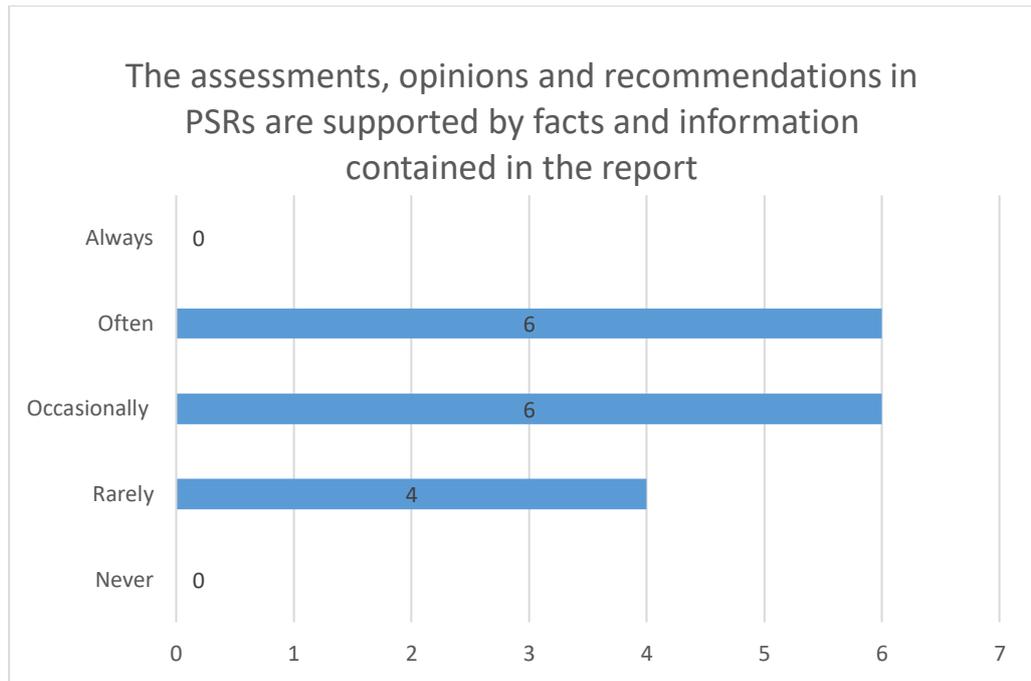


Figure 23

- f. Respondents were asked how confident they were that RWs could make an objective assessment of the defendant. The majority said they were only occasionally or rarely confident; this is shown in figure 24.

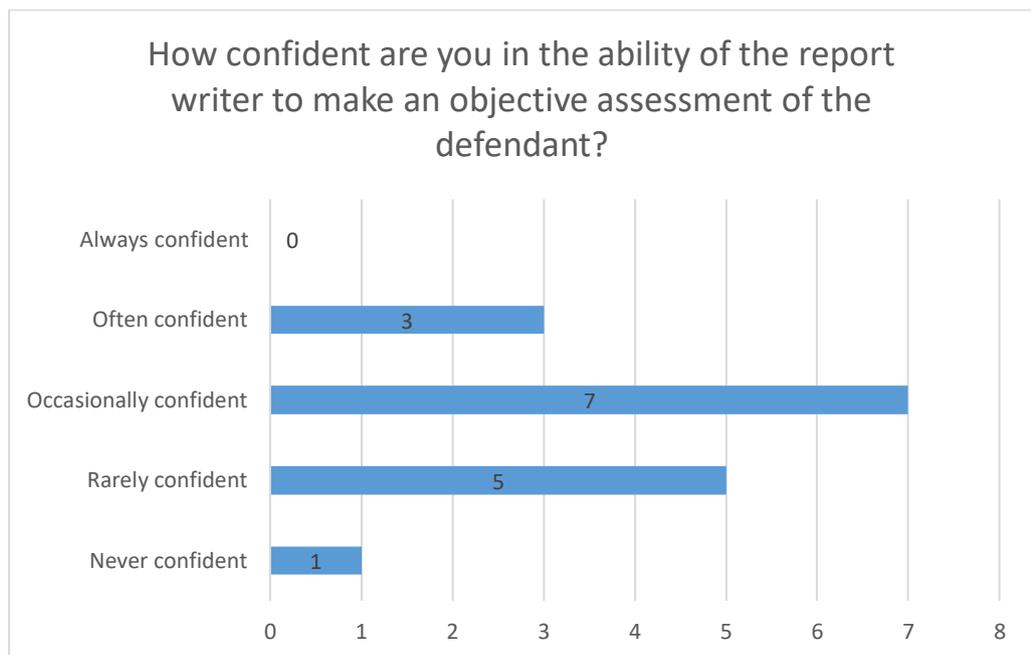


Figure 24

- g. Counsel were asked how confident they were in the ability of the RW to make an appropriate recommendation; again the majority were only occasionally or rarely confident (figure 25) and again some responses were qualified, with the following statements being written on questionnaire pages:

*I am rarely confident about appropriate recommendations because RWs have no knowledge of case law.*

*Do not have proper knowledge of law.*

*They do not know authorities and are often unable to balance severity of one case versus another.*

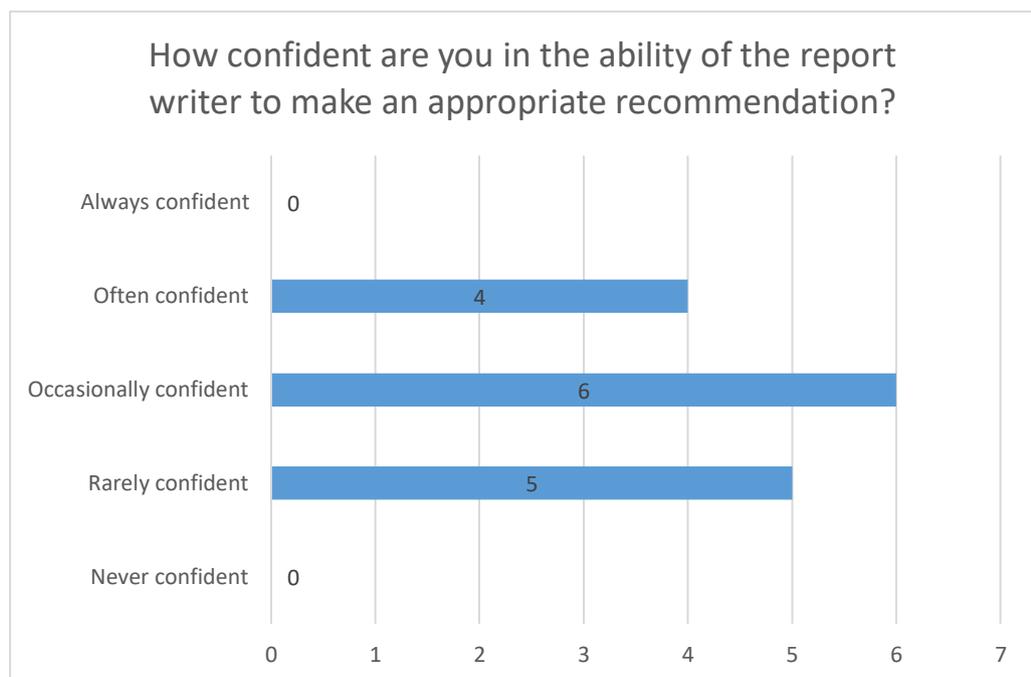


Figure 25

- h. When asked if they considered elements of the report to be a duplication of material that is, or could be, presented by defence counsel, 13 of the 16 respondents answered with 6 saying yes, 5 saying no and 2 saying sometimes. Some respondents gave fuller answers than just yes/no/sometimes and these are listed below:

*No I think it saves time in court and in written submissions to present basic background information prior to sentencing allowing for in court submissions to get quickly to the point*

*No, as above, cultural reports are generally providing much more by way of background to an offender and perhaps further information as to causation of offending*

*Yes but not the whole thing, there is sometimes new info I do not know.*

*Yes but that doesn't make that a bad thing. Hearing the same information from a second source appears to give weight to a particular feature.*

3.10 Respondents were asked to rank the following aspects of the PSR in the order of importance to them, from most important to least important.

1. Prior engagement with probation services (relating to ability to comply)
2. Domestic and Cultural background
3. Relationships
4. Employment
5. Addiction issues
6. Remorse
7. Likelihood of reoffending
8. Attitude towards the present offending
9. Recommendation

Thirteen respondents answered as requested; two stated they could not rank the factors; one did not answer. The raw data was collated with the rankings placed beside each aspect as follows:

Prior engagement with probation	3 9 6 8 8 9 6 2 2 4 4 8 2
Domestic and cultural background	8 3 2 4 1 6 1 3 3 5 8 2 9
Relationships	9 4 9 9 4 8 2 4 5 8 7 1 8
Employment	7 5 8 5 2 7 3 5 8 7 9 6 7
Addiction issues	6 6 7 3 3 1 7 6 4 6 6 3 5
Remorse	5 7 4 1 6 2 8 7 9 3 3 9 6
Likelihood of reoffending	2 8 1 6 7 5 4 8 7 9 5 5 3
Attitude towards present offending	4 2 3 2 5 3 5 9 6 2 2 4 4
Recommendation	1 1 5 7 9 4 9 1 1 1 1 7 1

There was a huge divergence in what was considered to be important.

The ranks were added up for each category; the lowest score was ranked as the most important to the cohort overall, with the highest being the least important. The factors were thus ranked as follows:

1. Attitude towards present offending
2. Recommendation
3. Domestic and cultural background
4. Addiction issues
5. = Remorse  
= Likelihood of reoffending
6. Prior engagement with probation
7. Relationships
8. Employment

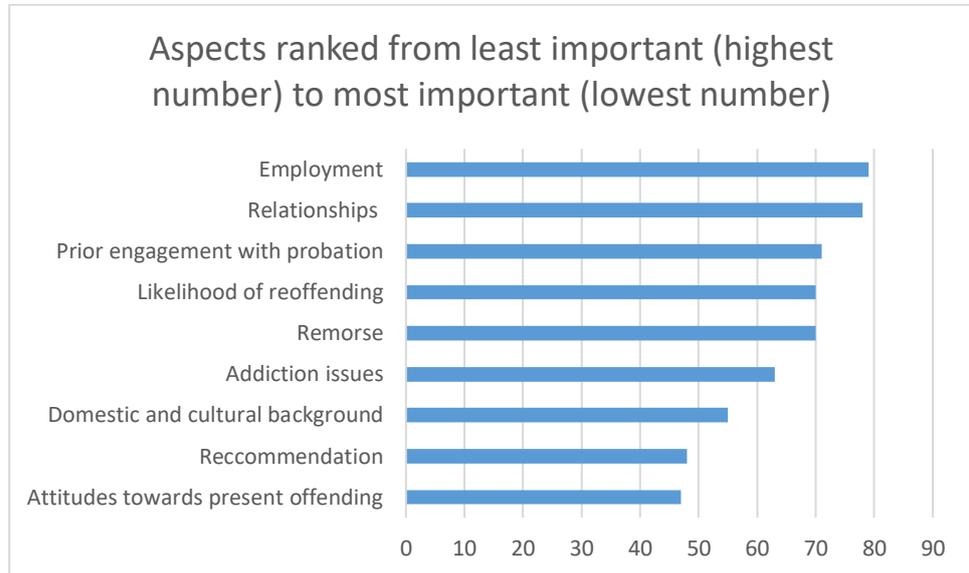


Figure 26

3.11 Respondents were asked which of the above numbered aspects are more appropriate for defence counsel to present to the court. Answers varied with 15 of the 16 respondents answering this question. Each aspect was counted to see how many times respondents included them

in factors more appropriately presented to the court and they were ranked as follows:

1. Remorse (8)
2. Relationships (7)
3. Addiction issues (6)
4. Attitude towards present offending (6)
5. Employment (5)
6. Recommendation (4)
7. Domestic and cultural background
8. Likelihood of reoffending (1)
9. Prior engagement with probation (relating to ability to comply) (1)

3.12 Respondents were asked what proportion of the time they considered the PSR to be accurate. The answers are represented in figure 27. The majority of the respondents (11) considered the reports to be accurate more than 50% of the time. Taking a negative response to this question being 50% and less and a positive response being over 50%, figure 28 represents the proportion of positive and negative responses to this question.

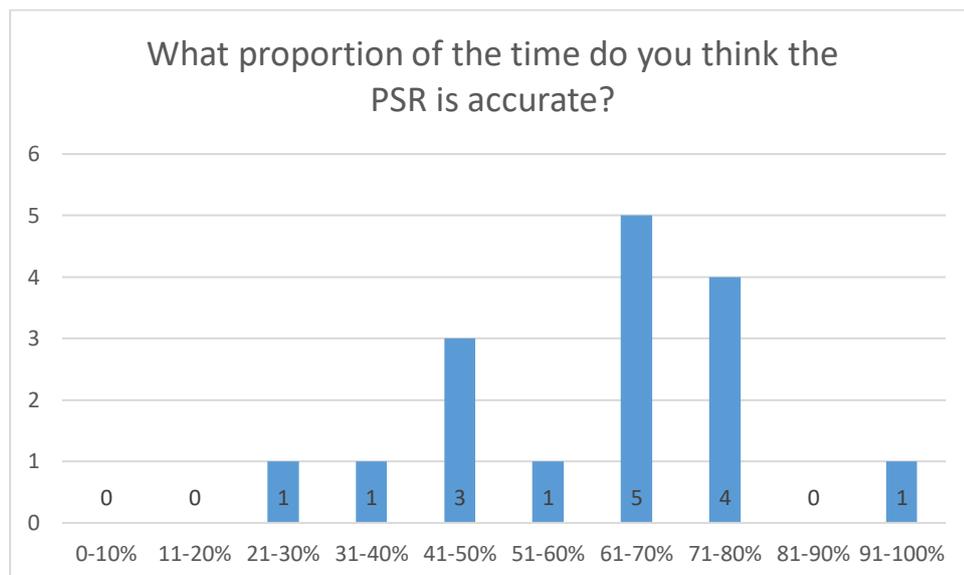


Figure 27

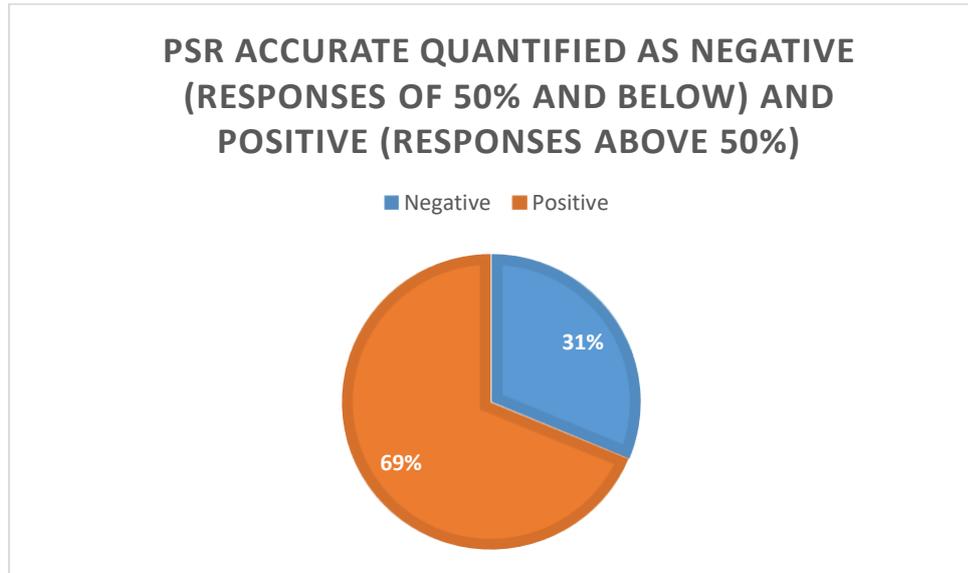


Figure 28

3.13 Respondents were asked what proportion of the time they supported the recommendation in the PSR. Figure 29 illustrates that most counsel support the recommendation most of the time (more than 50% of the time).

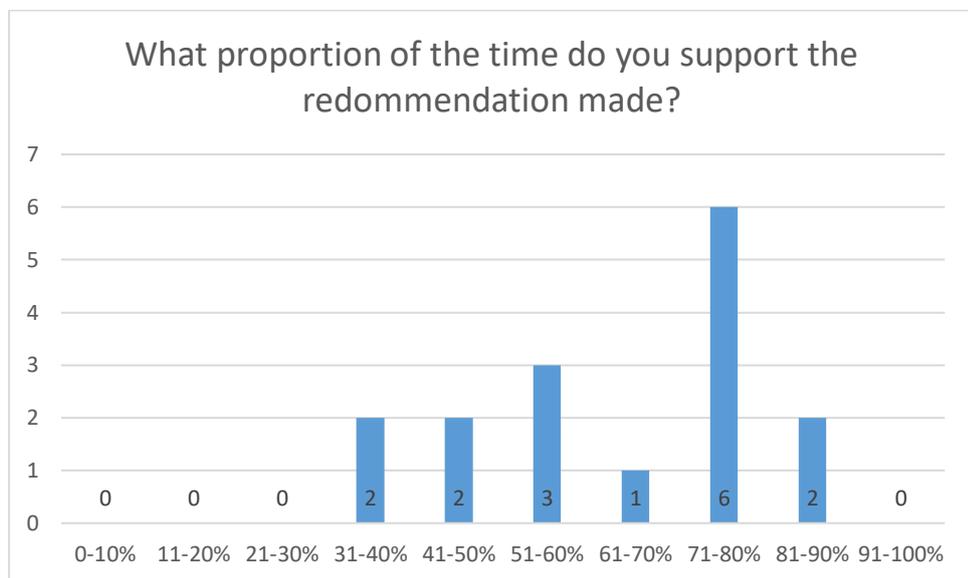


Figure 29

3.14 When asked about occasions when the recommendation in the PSR was inappropriate, all 16 respondents answered the question. The results revealed that:

100%

of respondents said they had experienced occasions when the recommendation contained in the report was inappropriate.

3.15 When asked if the recommendation was inappropriate because it was too lenient or too harsh, 9 of the 15 responses said they had experienced both, 5 said they were too lenient and one said they were too harsh.

3.16 When asked how they had addressed inappropriate recommendations, all 16 respondents answered; their answers are listed below:

- Argue against it
- Different things in different situations; provide in depth (cultural) reasons why D should not be sentenced to imprisonment
- Make more appropriate, realistic recommendation
- I have contacted the RW and/or addressed the judge
- Break the news to the D and be realistic with the court in terms of submissions
- Address it outright at the beginning of oral submissions to the court
- Advise the court. This has caused problems when I have to admit that a recommendation is grossly too lenient. Clients do not expect their own counsel to adopt a principled approach in line with appropriate authorities
- Oral subs to seek further report or PO interview notes in bad cases
- I tell the J the recommendation is not appropriate and make subs on correct sentence
- Advise the client the J will likely disagree and prepare the client for a more realistic outcome
- Subs to the court with material in support (eg. Evidence of addiction counselling etc)

- Produced further info which shows it to be based upon incorrect facts. Contact occupants to verify info. Contact probation about my concerns. Address my concerns and reasons for them to the J.
- I have advised the J that the recommendation is inappropriate and the reasons why
- Advised the court as to why it is inappropriate
- Made submissions to the court, but nothing beyond that. Once I contacted the RW's manager at what appeared to be very biased conclusions advanced in a report.
- Go with it if lenient then deal with the backlash from the J

3.17 Asked if there had been occasions when they or their client had disagreed with the report in terms of its accuracy, all 16 respondents answered and

100%

said there had been occasions when they or their clients disagreed with the report because it was inaccurate.

3.18 Asked what they had done to address those inaccuracies respondents said:

- Tell the judge who will usually listen but make no comment about such disputes. Sometimes a judge may express that they don't doubt the RW.
- Alert the court to the problems with the report
- Tell the court the client's views
- Raised the issues with the presiding judge, spoken to the writer
- I raise it with the J
- Made oral submissions – although this can be difficult in the middle of a busy list
- Taken their instructions and advised the court
- Take instructions on issue, relay client's position to the court
- Address those inaccuracies to the J where they appear to be material
- Raised it with the J at sentencing and letting probation know
- Addressed that with the court
- Raised that with the court
- Seek the notes or address orally or highlight and then sidestep the issue if final sentence is appropriate
- I get the correct information and put it in my subs to the J, On rare occasions I have asked for a second report

- Raised it with probation on instruction from the client
- I had a report that said my client had lived in Australia for a number of years and had convictions for similar offending to which his current charges related. He had actually never been overseas before in his life. From memory it was a 3<sup>rd</sup> drink driving charge and the J wanted to know how many previous he had the same in Aussie. It would have meant the difference btw imprisonment or not. I had the matter stood down for the Police to investigate.

3.19 And when asked whether they thought they had been successful in getting across the correct information the answers were varied:

- Yes x 6
- Yes usually
- Sometimes. Often I have had cases where imprisonment has been recommended but the judge doesn't think the matter warrants that or is prepared to look at something less. In those cases the judge will often accept explanations disputing negative comments in PSR.
- Mostly
- Only sometimes
- Sometimes x 2
- Sometimes. Sometimes probation have muddied the waters already too much.
- Often not. I find that the J will generally take the side of the RW when conflict arises.
- No – the Court didn't believe the D – made the Police investigate!
- No

3.20 When asked whether they have ever considered there to be bias on the part of the report writer

**100%** said they had experienced bias.

Comments from respondents included:

- Yes. One always left me with the impression she was a total man-hater the way she wrote her reports; she's gone now
- Yes. Ds will sometimes report the RW does not like them or have pre-judged based on the charges
- Yes, possibly due to their relationship
- Definitely. I have seen reports where it is clear the RW does not like the D
- Yes I have seen that. Like in any environment some writers are better than others. I am also conscious of some RW being jaded by the process because of longevity or attitude of their/towards their employment . I think the process is too formatted and there is too little enthusiasm for their job which leads to slack investigation or lack of implementation of a thoughtful process to their position which comes across as bias. Basically: if the D's are well known to probation then the lack of quality of report becomes an issue and I also think there is some institutional bias employed. I do not necessarily consider this to be a racial bias.
- Yes most definitely. Especially when the RW has been responsible for overseeing the D before – for example when they have been on release conditions which have not gone well.
- Sometimes. I have seen extremes of bias against, say, tattoos where such items are not relevant to the case.
- Yes especially where the RW knows the D sometimes for years of engagement with past sentences
- Yes I have had reports that in my opinion reveal a moral judgement of the behaviour of the client and lose perspective on the role of the RW. In my opinion this is most often seen in EM Bail reports where writers 'deem' our clients unsuitable because of the writers opinion of the allegations or our client's previous convictions
- Yes because the report is not subject to any reliability testing
- Yes particularly where repeat offending
- Yes. Often. I often find reports to express frustration with Ds usually due to previous non-compliance and write what I call a 'hatchet job' report. Sometimes there are POs who have worked with that D on the sentence and are also writing the report. I believe this should be a conflict of interest but it often happens. I also find that lots of POs call the officer in charge ("OC") of the case who has a dim view of the D and the report goes on to effectively call the D a liar about various matters and takes the OC's view without questioning it. I also find that as soon as there are children at proposed address POs often contact Oranga Tamariki who are always 'concerned' but reasons for concerns are never provided and based upon those 'concerns' the address

is not approved. I have had a Judge literally say that a PO is biased on the above basis.

- Yes they often take an unjustified negative view of the D or, despite their history, are unwilling to accept they have changed/offer any assistance
- As above, often the RW dislikes the client and that is clear through negative comments
- Yes I had one report a number of years ago that inferred my client was a paedophile because he was in a relationship with an Asian woman.
- Very much so. I don't believe RWs are in a position to determine whether a D is remorseful or not. Often it is judged on how the RW views the D as a person based on their own judgement, experiences etc.

3.21 Fifteen respondents answered the question asking whether they considered it appropriate for report writers to express their opinion, for example in relation to a defendant's remorse or attitudes. Nine of those said it was not appropriate while three felt it was appropriate. Of those who said it was appropriate, the responses were qualified with comments that the opinions should be supported by fact, that report writers should understand that not expressing remorse (perhaps because they weren't asked about remorse) should be presented as a neutral and not a negative:

- Yes but reasons should be given
- Yes
- Yes which is not to say they always get it right. However, it forms part of the sentencing assessment and the RW should have the opportunity to attempt to assess the remorse and attitudes of the client. I do think they do not understand lack of remorse is neutral, not a negative, factor in sentencing.
- Attitude yes- this can be gained through the interview, remorse no.
- It is obviously very unhelpful to the D when the RW expresses doubt about the genuineness of a D's remorse, and sometimes that has seemed an unfair or incorrect assessment based on my own dealings with the client
- It should have a factual basis
- I would prefer they did only if it was positive opinions they were expressing. I think that sometimes RW opinions are tainted by bias. I do not see the point of listing previous compliance

flaws of a D when that is plainly obvious in terms of their record in any event

- Sometimes yes and sometimes no. A PO identifying remorse can be helpful to a client. However sometimes a PO will never ask a client if they are remorseful and then adversely state ‘the D did not express any remorse or empathy for the victim in relation to the offending but was rather concerned with the consequences he/she suffered’. I am often concerned by these comments as the PO will ask about family, where children are, what’s happening in their life and OF COURSE the offending and being before the court has affected them.
- No x2
- No. If someone expresses remorse their comments should be included without commentary from the RW as to their genuineness, It is all too often the RW comments that the remorse appears to be superficial – they are not experts in truthfulness and often D’s have difficulty expressing themselves
- Not the RW own opinions unless they can document basis for opinion and give the D the right of reply
- This is where the report becomes subjective to a fault
- No I really don’t. As above, they often have a bias, negative view and this significantly colours their opinions and attitudes.
- Possibly not, although it’s helpful when a client presents as genuinely remorseful. I think that with appropriate briefing of clients before a PSR report (so that they understand what it’s about and how to behave) is helpful.
- Absolutely not, they are not in a position to make that assessment or express their opinion at all. The PSR should be completely fact-based and anything the D says should be recorded as such.

3.22 Respondents were asked whether they thought it was appropriate for the PSR to traverse the circumstances of the offending and record the defendant’s comments in relation to the circumstances. Most respondents did not think it was appropriate (9 said no, 3 said yes and 2 said sometimes with). The comments are recorded below:

- Yes I think there should be greater focus on it. It highlights reasoning behind culpability and gives the J something to think about before the sentencing process begins in Court. It goes towards responsibility and remorse. And it may highlight more

about the situation the D found themselves in pre-offending to cause the offending.

- Again, I think that it is appropriate, However, as above that is not the same as they get it right all the time. Also if our client is not willing to engage in that conversation beyond accepting the SOF then the RW needs to learn to accept the boundaries our clients are setting on the conversation.
- Sometimes that's OK and sometimes it is unhelpful and will draw unhelpful comments from the
- Sometimes as often there have been amendments to SOFs which the writer is unaware of. In such cases the defendant's comments reflect badly on them as facts are put to them that are disputed.
- No. That information is also shared with the lawyer and should be put to the court by the lawyer
- No I think this is appropriate
- No I think it is the role of the D's lawyer
- Limited discussion may be required in order to obtain view as to offender's attitude towards the offending
- No I don't. The offending and SOF has been accepted in court. If any facts are at issue there is a process for disputed facts. The circumstances leading up to the offending or the offending themselves are more appropriately conveyed by defence counsel.
- I think it is inappropriate. This is our role as their advocate and does not need to be in the PSR. Particularly if they misrecord information or take comments out of context. Ds often do not like to work with probation because of their negative attitude and so may not be particularly forthcoming or defensive. They also do not establish much of a relationship with the D as we do.
- I do not think that is appropriate unless it then links in with any sentencing recommendation made.
- I had a PSR once where a client admitted to trying to kill a person during a hit and run. Fortunately, the J placed no weight on it and it was in the context of a statement of acceptance of responsibility and remorse. I have no particular issue with it provided that the D is completely aware of the process and what can happen. It can skew the sentencing process in both a positive and negative way for the D. In saying that, if there was no interview about the offending, there would be little point in a report at all. Departmental tools and EM appendices could be presented without any actual input from the client. That too could create an unfair report.
- Shouldn't be in the PSR. It is up to Counsel to do this. Ds are much more open with lawyers than they are with the PO.

3.23 Asked if they thought the PSR is a fair way of presenting information to the Court the responses were mixed:

- Generally yes
- Very much depends on report writer
- Yes x 2
- Usually yes but together with other information
- Overall yes. I think some sort of report is needed in serious cases. The better the report is the better the information is for the J.
  
- Reasonable
- Most of the time it is
- Certain info that is in the realm of probation eg past engagement and compliance and EM checks
- Usually but as above there are deficiencies in the quality of the info currently contained in many PSRs
- It is the only way available. Additional methods including cultural reports or RJ can assist but they have their own limitations
  
- No I think the interviews should be recorded as there are no checks and balances with the info that is conveyed.
- No, my view is that in-depth reports by suitably qualified persons unconnected with the court is a fairer way
- I'm unsure. Probably not but I cannot imagine an alternative unless it was simply left to counsel
- No I think the court actually needs more information especially where a person is a repeat offender and been in the court system for years. At the cultural report meeting J xx said that PSRs used to be about 20 pages and were pretty much like a cultural report. I am not saying PSRs should be a 20 page report but should go into more factual details about the offender's history and how they were brought up. Although that calls into question whether the PO is actually properly skilled to be able to undertake that task. As long as the report is kept factual and based on first hand evidence they have retrieved themselves from other sources and free from bias and opinions then it would be okay

3.24 Respondents were asked what they thought makes a good PSR, their comments are recorded below:

- A good recommendation and as many positive comments as possible

- Fair and impartial, does not include emotive language or bias on part of RW
- All of the above considered
- Thorough, impartial
- Investigation of actual living circumstances and background. Provides strong indication of why offences carried out.
- An objective report writer who is in a position to include both positive and negative information without bias
- Depth and readability
- Open- minded and fair reporting of comments
- Time spent engaging with the client and getting relevant information. Empathy. The ability to write a negative report without it seeming like an attack on the client. An understanding of relevant sentencing levels. Insight into systematic drivers of crime. Insight into the conditions many of our clients live in and the practical impact (lack of family support, limited means, limited access to travel, limited access to accommodation, limited access to childcare, negative attitudes towards education)
- One that contains assessment info based on qualified assessors
- Objectivity and background retail of offender
- A recommendation appropriate to seriousness of the offending and doesn't just scream frustration on the part of the PO. A balanced view on prior engagement and likelihood of future compliance. A report which doesn't doubt what a D says without cause. A report that has been completed with the goal of finding a workable community-based solution in terms of sentence where the seriousness fits with such a solution. The report should not focus on previous non-compliances without balancing it against previous compliance.
- Helpful/insightful material regarding recommendation particularly regarding rehab and what could be done to assist.
- Objective report that conveys information relevant to sentencing outcome
- One that is balanced, impartial, identifies factors of the offending in more than a cut and paste manner, and recommends an appropriate sentence.
- One that sets out factual background information about the D and one that is impartial

3.25 Respondents were asked what they think makes a bad PSR, their comments are recorded below:

- A bad recommendation and negative comments. Often this comes from the client's own poor comments, presentation or engagement with the RW. On rare occasions I have felt comments have been objectively unfair. On a greater number of

occasions the client has outright denied they made certain comments

- Overly negative report reporting on incorrect information
- Bias
- Cut and paste jobs, failure to be impartial
- A recommendation that is inconsistent with offending or case law. The reason for this is that more often than not the D is given completely false and erroneous expectations as to sentence and it is for the lawyer to essentially break the bad news and 'burst the bubble'. This would not happen if the RW was more aware of actual tariffs.
- A PSR writer who quickly forms a negative view of the D and does not pay any attention to the D's positive traits
- Pre-determination
- Too much opinion and clear bias or disinterest. Some reports are limited in scope and depth and after reading there is little learned.
- Tick box approach to drivers of offending, lack of empathy, lack of understanding of relevant sentencing levels, moral judgement of clients
- Reports that contain info making claims as to the psychological state of offenders
- Bias. Short and negative PRS where reoffending issues raised eg. Family violence OT 'concerns' with no disclosure provided. Counsel can be ambushed with this type of content/no disclosure and no ability to effectively respond or take instructions
- One where the D has not been interviewed but there is still a recommendation, usually imprisonment. One where the PO effectively calls the D a liar without just cause. One where sentences do not make sense even on the best construction of them. One where the PO clearly had an address but cited 'time constraints' for checking it, especially where the report is completed 3 weeks before sentence. One where sources are cited such as OT and Police without citing who the source is and what the info was.
- Partial RWs who have a negative view of the D based on past compliance – not always accurate in their views of them
- Biased report where writer unimpressed with defendant for whatever reason
- A bad relationship with the report writer on the defendant's behalf.
- When RW add their own judgement and/or opinion to the report. It really grinds my gears when they say the D is motivated by their own motivation and it won't be sustained for whatever reason. Who are they to say they won't be able to remain motivated?

3.26 Finally respondents were asked if they can imagine an improved or better system for providing the court with the type of information that is contained in the PSR, their thoughts are recorded below:

- No it's not so broken it needs replacing altogether. If it weren't for PSRs then clients would get even poorer representation. I think Ds take the PSR interview more seriously than instructing their lawyers.
- A lawyer could address the same points – if the court wanted this in a similar format to how probation writes a template of sorts could be provided
- Perhaps add more on upbringing
- Depending on the person's needs perhaps an assessment (initial) of those needs, then a referral to the most appropriate person to write the report, eg. Addictions, someone with experience in that area would be well placed to write a report.
- More focus on the actual D in terms of their background. For instance: 'Joe Bloggs was expelled from TBC at age 13 for drug use and was then shipped around various training establishments until he was no longer required by law to be there, and therefore he is illiterate and nor did he receive any assistance for a long term drug problem and attitude that we know must have existed since 13 because that is when he was expelled, and therefore it comes as no surprise at age 21 he is convicted of cannabis for supply. Information like that, which Probation would have, or should have access to would allow verified and accurate descriptions of backgrounds and should be provided to a sentencing J because we are sentencing humans, not necessarily slotting humans into a sentencing formula.
- Reports should be provided to counsel in advance so that counsel have the opportunity to respond in writing. Reports are currently only provided the day before or two days before.
- Yes but expert reports become more expensive. PSRs are after all a cheap option.
- I think the idea behind PSRs is a good one. However the problem is execution. It takes years for lawyers who are appearing in court almost daily to get a feel for appropriate sentencing levels. It is problematic that people with little or no insight into the possible range of outcomes for a particular type of offending are giving advice to the court that is often given weight. Against that, with time spent with the client, resources and experience a good RW can provide info about drivers of offending and available resources to assist with rehab that may not be available to counsel. I suggest this, bad/and or shallowly written reports damage the integrity of the criminal justice system. For the system to be in any way effective each player within the system needs to have a good reputation to our clients.

If our clients perceive that a report is a 10 minute conversation with a PO who is overworked, under-trained, and not particularly engaged in helping them followed by a 3 page cookie-cutter document that only includes the worst things that the client said, which have been taken out of context and show no insight or empathy to the client's experience, so that a J can deal with them as quickly and impersonally as possible then there is absolutely no reason for our clients to engage in the process. Most of our clients will accept negative outcomes, such as terms of imprisonment, if they perceive they have been treated fairly and with respect by the system. However, if they perceive the system, or relevant parts of it, as something they have to go through and which is not actually interested in them then there is no reason for our clients to engage with it. If they do not engage then we have no opportunity to offer the real and effective rehab assistance.

- Yes with input from cultural advisors and the scientific method that improve integrity and objectivity
- Anticipate that the burden will fall with counsel to fully outline their client's circumstances unless the Ministry revisits the Court directing s27 reports.
- I think counsel should be permitted to attend PSR interviews and if a D wishes, counsel can answer on their behalf. Or if counsel are concerned about a particular answer they can clarify with the PO or seek time to discuss matters briefly with the client before continuing. PSR interviews should be like police interviews. People should be entitled to have counsel present as their liberty is at stake. The interviews should also be recorded. Additionally, I think that clients should have some sort of privilege against self-incrimination in relation to PSR interviews as Ds are often asked if they are associating with victims or doing drugs etc. I think there should be privilege up to a certain level of criminality obviously the exception would be if the D expresses a risk of harm to others or themselves or if they confess to a very serious crime such as manslaughter, murder or of 14 years plus.
- Perhaps an independent branch of probation that writes the reports. Or redo the info contained so that some is not.
- There needs to be more time spent on the reports both with the D and persons nominated by the D and also persons who may not be nominated but that can provide relevant information to assist the court.
- Not really
- By way of cultural reports for each person

## **PART C**

### **Analysis**

This part of the study will discuss the specific findings set out above. There will be more focus on some aspects than others due to space constraints. Those aspects will be where the data collected demonstrates a particular point. The analysis will aim to discover the importance of the PSR (Pre-Sentence Report), whether there are any obvious problems or area of concern in the PSR as a part of the sentencing process, whether the rule of law and social justice is being upheld and whether there may be a better way of presenting material to the court to assist the judge in reaching a final sentence. The aspects that will be the main focus of this part of the paper are: demographic information with specific attention to ethnicity, the over-representation of Maori defendants in the defiance/breach offences and what this might mean in terms of the requirement to interact with figures of authority in the PSR process, the weight placed on the PSR, the disconnect between the view of judges and the view of the defendant and lawyers, the type of information which is given the greatest consideration and the implications of this, whether the treatment of different types of defendants varies, what makes a good and a bad report, bias and inaccuracy, the number of times the defendant and his/her lawyer are unhappy with the PSR and the significance of this, the issue of the report writer having a prior relationship with the defendant and, finally, whether there is a better way of presenting information to the court.

#### *Over representation*

In section 1 of Part B of this paper, demographic information about the defendants who were the subject of the PSRs and sentencing accessed for the observations was presented. The data shows that there are sectors of society who are over-represented in the criminal justice system; this is not a new discovery,<sup>59</sup> but it is an important point as it shows this study is consistent with other study's findings regarding sectors of society that find themselves before

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<sup>59</sup> As at n 9.

the court, and it reinforces the propositions set out in Part A that there is a disparity for some groups when it comes to social justice and that the rule of law is not always consistently applied.

**Table 1** (p. 38) shows that males are grossly over-represented in our snapshot of the criminal justice system. In 2019, the female percentage of the overall population was reported to be 50.84%; with a proportion of 0.99 males to every female. The proportion of male to female amongst those defendants who make up this study was 4.4:1 – significantly out of step with that of the general population. The Bay of Plenty regional population data shows that the proportion of females to males is similar to the New Zealand population at 51.8%.<sup>60</sup>

**Table 2** (p. 39) illustrates an over representation of Maori in the criminal justice system. Contrasting 57.4% of the defendants being Maori with only 16.5% of the general population being Maori there is an amplified over-representation of not only making up more than half of the total of defendants, but of coming from a very small proportion of the population. The statistic of 38.9% of the defendants being NZ European while a huge 70% of the general population is NZ European also highlights the disproportionate representation of the population within the criminal justice system. In our snapshot, there are 1.5 Maori to every 1 NZ European, whereas in the general population the proportion is 1 Maori to every 4.4 NZ European. In Tauranga City, statistics differ from the New Zealand population with 18.2% of people in the Bay of Plenty being Maori and 81.7% being NZ European;<sup>61</sup> this means the proportion of Maori to NZ Europeans in Tauranga is 1:5.4 which is higher than the general population.

The above statistics provide some insight into the disparity between the prospects of NZ Europeans and Maori in society brought about by the over-

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<sup>60</sup> Census 2018 <https://www.stats.govt.nz/tools/2018-census-place-summaries/bay-of-plenty-region>

<sup>61</sup> As at n 51.

representation of Maori in the criminal justice system. They also demonstrate that males tend to be more likely to fall into criminal activity than females.

**Table three** (p 39) showed that the majority of offenders are not employed and are therefore from low socio-economic backgrounds, and this is more true for Maori which again highlights the disparity faced by Maori in society in general.

*Maori defendants and defiance/breach offending*

Although this study turned up some stark statistics regarding representation of ethnicities or genders in the types of offences that were before the courts, one of the most striking statistics is that related to defiance/breach offending (figure 7, p.42). Defiance/breach offences were overwhelmingly committed by Maori offenders. The nature of the defiance/breach offending is essentially an absence of adherence to authority in the form of failing to attend court, not stopping for police officers when requested, resisting arrest and breaching sentences set down by the court (managed by the Department of Corrections through POs (Probation Officers)). The fact that the majority of these were committed by Maori is significant as it highlights issues around a section of society struggling to adhere to rules and regulations imposed by a dominant group from a western (and therefore different) cultural background, and thus it could be argued that this level of defiance has come about as a result of colonisation. As Barnes and McCreanor point out, the Maori population in New Zealand has been subjected to a system which has worn away their rights:

Through land alienation, economic impoverishment, mass settler immigration, warfare, cultural marginalisation, forced social change and multi-level hegemonic racism, Indigenous cultures, economies, populations and rights have been diminished and degraded over more than seven generations.<sup>62</sup>

The effect of colonisation has seen ‘abusive, exploitative, racist power relations’ imposed on society which has resulted in steady gains for Pakeha and

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<sup>62</sup> H M Barnes and T McCreanor *Colonisation, hauora and whenua in Aotearoa* Journal of the Royal Society of New Zealand, Vol 49 2019.  
<https://www.tandfonline.com/doi/full/10.1080/03036758.2019.1668439> Retrieved 27 September 2020 at 3.22pm.

disastrous losses for tangata whenua.<sup>63</sup> This is another version of the conflict scenario where the majority of those in the superstructure are New Zealand European and Maori are largely in the base structure, or even completely outside the structure. Maori have had to grapple with the erosion of their way of being, and have had to adapt to a new form of society which is alien to them. Studies have shown that Maori feel their entire identity is at risk which could mean that, at some point, they will rebel ‘against Pakeha authority that shackles [them] with minority group status and its attendant disadvantages’.<sup>64</sup> It is little wonder that living in an alien environment which imposes the will of the majority on them that Maori find themselves over-represented in the criminal justice system, and defying the rules in place which may bear little resemblance to the Maori way of life:

Democratic societies of West-European origin accept the principles of majority rule as a functional convention by which social life is ordered to achieve the greatest good for the greatest number... Minority rights have no safeguard in democracies and depend entirely on the whim or altruism of the majority.<sup>65</sup>

This sentiment echoes Mandel, who points out that those who fare best in the criminal justice system are those who are able to fulfil a role in the productive sector and who will support and reinforce the status quo. Maori have not necessarily bought into the status quo, or are marginalised from it, and, as a consequence, are less likely to gain credits at sentencing for the attributes that conform to the status quo of the substructure and superstructure.

The over-representation of Maori in the criminal justice system, and in the defiance/breach type of offending, illustrates the effect colonisation has had on Maori. The conflict between Maori culture and the Western society which creates rules to benefit the majority, which excludes Maori, is pertinent to the very way information is gathered and presented to the court through the PSR.

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<sup>63</sup> As at 53.

<sup>64</sup> Dr Rangī Walker *Authority and the Individual, A Maori viewpoint* Salient, VUW, Vol36 no. 18, 26 July 1973 <http://nzetc.victoria.ac.nz/tm/scholarly/tei-Salient36181973-t1-body-d20.html> retrieved 27 September 2020 at 3.35pm.

<sup>65</sup> As at n 55.

The PSR is a tool of authority, and is another way that Maori are forced into the Western way of doing things. They are expected to make an appointment for an interview, to attend the interview, to talk openly about themselves and what has occurred, they are expected to demonstrate remorse in a way that is acceptable to the RW (Report Writer) and are to engage in a conversation with an authority figure, usually from a different cultural background, in a way which will best represent them.

The imposition of one culture on another in such an important exercise as gathering information which will influence the sentence a defendant will receive, shows little or no respect to the Maori way of doing things. In Maori culture there is an emotion called whakamaa (the literal translation of which is 'shame') which influences how Maori interact with others and how they might express themselves, or not. As Clive Banks points out 'there is some evidence that whakamaa can be misinterpreted as guilt, rudeness, stupidity or rejection'.<sup>66</sup> Attitude and the ability to express remorse are an important aspect of the narrative of the PSR and the misinterpretation of these elements could mean the difference between HD (home detention) and imprisonment. Given that whakamaa might play a part in the way Maori present themselves at the PSR interview, it would be appropriate for RWs to be fully trained in Te Ao Maori to ensure that they can adequately assess Maori defendants and apply the principles of social justice throughout the interview process. Banks' study found that:

Maori are likely to experience different patterns of emotions such as embarrassment, shyness and shame in reaction to certain situations and respond differently in these situations to Pakeha<sup>67</sup>

This should be a relevant consideration when writing PSRs and understanding that this can have a huge impact on how defendants behave at interview and how their behaviour is understood. There is no evidence that these differences

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<sup>66</sup> C Banks *A comparison study of Maori and Pakeha emotional reactions to social situations that involve whakamaa* 1996, Massey University Library New Zealand and Pacific Collection

<sup>67</sup> As at 57.

in presentation are taken into account at the PSR interview or in the assessment tools or PSR template. Although POs are encouraged to take a culturally sensitive approach to their engagement with their clients there is no specific training provided to POs for interviewing clients from Maori backgrounds for the purpose of the PSR (or any interview they have).<sup>68</sup> When asked if there were many Maori POs working in the Tauranga region and servicing the Tauranga DC, the answer was that that is something that is being worked on but there are not many (if any). This further highlights the problems there are for Maori defendants in the criminal justice system.

One Maori defendant complained to his lawyer that he was trying to explain to his PO/RW that he had been away at sea, fishing – his job involved him in working away for one month and then being at home for three months. This had impacted on his ability to engage in his sentence of supervision. He said that at the PSR he was telling the RW about this but the RW commented that the defendant had argued with the RW during the course of the interview. What seems to have been an attempt by the defendant to explain himself when he wasn't being listened to was interpreted by the RW as him being argumentative and not taking responsibility for his offending.

In asking Maori defendants to participate in the process in this way, the PSR becomes another means whereby the minority, who do not fit into the conventions put in place by the majority, are disadvantaged. The rule of law and social justice cannot possibly be at the fore if some sectors of society are asked to behave in ways that go against their very being. The reality of this is summed up beautifully in an online blog written by Trinity Browne:

there is a struggle all Māori share silently — the struggle to express our culture in a way that doesn't bring back the hellfire of colonisation all over again.... this is for Māori, our *life*, our *pain*, and the culmination of all our suffering.<sup>69</sup>

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<sup>68</sup> As at 11.

<sup>69</sup> Trinity Browne

[https://www.thatsus.co.nz/10\\_things\\_i\\_wish\\_my\\_friends\\_knew\\_about\\_being\\_maori](https://www.thatsus.co.nz/10_things_i_wish_my_friends_knew_about_being_maori)

*The weight placed on reports is significant (by judges and lawyers alike); it is therefore important they are got right*

Judges place enough weight on the PSR for it to be an influential tool in the sentencing process. In section 2 of Part B, the majority of respondents said they placed considerable weight on the PSR with the range being from moderately helpful, through at least 50% of the weighting, to 'significant' weight. Defence counsel seem to be aware that judges place weight on the PSR at sentencing with 12 out of 16 respondents saying they thought the reports often carry weight, one saying they always carry weight and three saying they occasionally carry weight; none said that they never carry weight. The fact that defence counsel are aware of the weight given to the PSR may have an influence on the way defence counsel think about PSRs and the way they approach the PSR at sentencing. One judge drew a comparison between the information provided by the PSR and the information provided by defence counsel and the influence both have on the sentencing decision; the comment (at B, 2 (7)) made it clear that they place more weight on the PSR than on what the defence lawyer has to say.

This theme is repeated in judges' responses to questions about whether the information contained in the PSR would be better coming from defence counsel (B, 2 (4)). None of the respondents thought defence counsel were better placed to provide the type of information that is presented to the court through the PSR, with one judge commenting that the information is better being presented in the PSR because the report writer is 'independent', and another commenting that they 'don't always accept' what counsel says. This is alarming because, as was identified in Part A, the RW is not always independent: they are often at the same time sentence manager, prosecutor and RW; the multi-role position of the PO/RW undermines the perceived independence which allows their reports to carry such weight. It is true that RWs can ascertain and check information (as one judge pointed out), and PSRs are peer-reviewed before they are provided to the court, but there is still plenty of room for the information provided to be tainted by factors that an otherwise independent person would not have available or be aware of.

In the comments about their general view of the PSR (B, 2, 1), respondents in the judges section indicated that they place ‘a lot of weight’ on what is in the PSR and that if the information is contained in the report they are inclined to accept it. Answers to whether there was value beyond the technical feasibility (B, 2, 2) again point to the value placed on PSRs by judges with respondents saying the information goes way beyond what the defence lawyer can provide and that the information impacts on the final sentence.

Overall then, it seems that the PSR is highly valued and significant weight is placed on what is contained in the report. The perception of independence suggests that information provided by RWs is accepted more readily than information presented by a defendant’s lawyer, despite the fact the lawyer’s first duty is to the court.

*Prior relationship with defendant*

In Part A, 3 of this paper, ‘contextualising the PSR’, the PSR process was described. It was established that RW is not a specific role but that report writing makes up part of the job of a PO. Alongside report writing, the PO manages sentences and makes the decision to breach offenders for not fulfilling or complying with their sentence. On many occasions, given that most of the defendants who are the subject of a PSR have offended on previous occasions (96% of the defendants in this study) and the majority of those have received previous community-based sentences, the defendant will be previously known to the RW, either as their own client whose sentence they are managing or have managed, or through the defendant’s involvement with the local probation office where the RW works.

Whether prior knowledge of the defendant is a positive and helpful aspect of the PSR or not is an important question to be considered. From the Department of Corrections perspective<sup>70</sup> the prior relationship is an extremely important

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<sup>70</sup> As at n 22.

part of the process. POs are trained to have a focus on relationship building, to gain the trust of the defendant and to be able to discuss things with the defendant through naïve questioning, all so that they can assess the needs of the defendant in terms of what may assist them to help prevent themselves from reoffending.<sup>71</sup> It is through this process that the DRAOR scores are given to defendants. The POs would view their knowledge of the defendant as an advantage when providing advice to the courts as they feel they can tell when a defendant is lying, when they are giving answers to get the best outcomes and when they are attempting to manipulate the system.<sup>72</sup> If the PO could be truly independent and could make their assessments objectively then the prior relationship may be a positive aspect of the PSR process; however, the subjective nature of the assessments, the view held of the defendant and what is eventually written in the PSR make the prior relationship much more complicated and difficult to evaluate.

In the survey of judges at Part B, 2, 33, all the judges who responded to the question regarding prior involvement with the defendant on the part of the PO thought this was appropriate. Their answers were qualified by saying that the information provided can be helpful and that it must be used objectively. They also indicated they were confident in their own ability to assess if there is a bad relationship and to take that into account. This is another subjective response to material presented to the court as it depends very much on whether a judge does detect whether or not there is prejudice in the report, and then, if there is, whether to do anything about it.

The views of defence counsel are quite different on the issue of prior involvement, on the whole seeming to view it as a negative factor for the defendant. One general comment about the PSR was that ‘a lot depends on the rapport between the defendant and the PO’. When asked if they were confident a RW can make an objective assessment of the defendant, the majority were only “occasionally confident”, “rarely confident” and “never confident” with

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<sup>71</sup> As at n 22.

<sup>72</sup> As at n 22.

only three of the 16 respondents feeling positive about objectivity saying they were “often confident”. When asked whether they had ever experienced bias in a PSR all 16 respondents answered and seven of those directly referenced the prior involvement as a means of causing bias against the defendant with comments such as ‘yes, especially where the RW knows the defendant for some years’ and ‘sometimes there are POs who have worked with that defendant on sentence and are also writing the report. I believe this should be a conflict of interest but it often happens’.

The prior relationship between the RW and the defendant is a feature of the content of the PSR – it provides a subjective and possibly biased opportunity for the RW to express a personal opinion about the defendant. This, as defence counsel have pointed out, is not a helpful aspect of the PSR in terms of the picture it paints of the defendant and the attempt to attain the least restrictive outcome for the defendant. Having prior knowledge of the defendant and actively using that as part of the PSR means that not all defendants are treated in the same way as each other: the rule of the law cannot, in that sense, possibly be being applied.

*Judges reinforce points made by Mandel<sup>73</sup>*

In Part A, 6 of this paper the ideas of Mandel<sup>74</sup> in regard to sentencing were introduced. Those ideas suggest that the application of credits to a defendant at sentencing based on his or her personal circumstances and ability to engage in rehabilitation (information presented in the PSR) mean that an inequitable society is reinforced. Mandel<sup>75</sup> says that those most likely to be in the criminal justice system are those who are least able to conform to the status quo. This is true of Maori as we have seen in their over-representation in the system, being the majority of defendants on defiance/breach offences and being disadvantaged by having to fit into culture which isn’t theirs. How will they

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<sup>73</sup> As at n 43.

<sup>74</sup> As at n 43.

<sup>75</sup> As at n 43.

earn credit at sentencing if they don't have the attributes required to uphold the status quo?

Through the observations and the answers of the judges, as well as the opinions of some of the defence lawyers, we can see that the very factors that Mandel<sup>76</sup> rejects on the basis that they create inequality, are prized in the sentencing process.

The DRAOR factors that are applied to defendants create the foundation for the reinforcement of disparity between defendants. The factors all demand a value judgement based on a person's ability to conform to the rules of society and to interact within them. We see from some of the comments listed in Part B at 1.1.2.5 which are taken from the PSRs that the RW has a lot of discretion as to what goes into the report, and in making these subjective statements, they contribute to painting a picture of the defendant as either a person who will conform to the status quo, or who won't. The comments in this section were chosen because they did not seem to have an evidential basis; they included things such as, he has a 'high likelihood of reoffending', he 'has little respect for the law and reacts negatively to authority', 'he appeared more regretful of the impact on him', 'he blurs the lines of monogamy' and then, 'he did not display any problematic behaviours during the interview' and she was a 'warm woman'. These types of value statements could have a strong, unconscious, influence on the reader's view of the defendant.

The personal circumstances and the reasons behind the offending, together with the likelihood of reoffending, seem to carry particular weight with the judges. Overall the judges had a positive view of PSRs and have commented that they are vital in the process and they provide the important background information about the defendant and the offending. One commented that at sentencing it is 'all to do with the why'. Others have commented that they want to know the background so they can consider what can be done about it, that

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<sup>76</sup> As at n 43.

‘snippets’ from an employer, for example, provides good insight. On the basis of what the majority of the judges have said, it seems that personal circumstances and background are very important and thus the problems with the approach to sentencing highlighted by Mandel<sup>77</sup> are present in the New Zealand criminal justice system, and that the PSR contributes to reinforcing those difficulties.

The defence lawyers were asked to rank the aspects of the PSR in order of importance to them (Part B, 2, 3.10). The rankings show that, for defence counsel, the factors which are most important are those which address the actual offending that the defendant is to be sentenced on – the ‘attitude towards the present offending’ and the recommendation were the aspects they were most concerned with. The aspects which focus on a defendant’s background and personal circumstances such as employment, relationships and prior engagement were seen as less important. This could be interpreted to mean that defence counsel instinctively are not so concerned with fitting defendants into society to support the status quo but are, rightly, more concerned about addressing the actual offences that have brought the defendant before the court. That is, they are more in line with Mandel’s view that sentencing should be for an offence and not of a person.

#### *Good reports and bad reports*

Both the judges and the defence lawyers were asked to identify what they considered to be the characteristics of good and bad reports.

The judges overwhelmingly thought that a good report was one which was balanced and objective and which linked the information presented to evidence, and one where there was a detailed analysis of the defendant’s background, motivation and rehabilitation prospects. Alongside objectivity, the judges are looking for the very things that Mandel has warned against.

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<sup>77</sup> As at n 43.

Defence lawyers, on the other hand, were looking for reports that were impartial and objective, but which also included positive comments and didn't just focus on negative aspects. Defence lawyers thought good reports would lack emotive language and would have appropriate recommendations that were related to the offending and not arrived at out of frustration from their prior knowledge of a defendant's performance on previous sentences.

Comments from the defence lawyers where they expressed they were happy with the PSR have included that the recommendation has been fair, that the PSR will be helpful in making an application for a discharge without conviction and the defendant has expressed remorse and his alcohol issues have been identified.

Characteristics of a bad report for the judges seemed to focus around unrealistic recommendations either because they don't match the offending or because it is unrealistic in terms of the defendant being able to do what is recommended. Reference was made to the language used in the report, saying that the language should be simpler for defendants to understand.

The defence lawyers were more forthcoming in what they considered to be the characteristics of a bad report. Lawyers highlighted negative comments, inaccuracies and a failure to be impartial making a bad PSR. Some biased or subjective comments made by RWs were seen to be inappropriate and one commented that defendants often deny they have said what is in the report. Too much opinion on the part of the RW was also seen to be a negative aspect of the PSR as was a tendency to have a pre-determined view of the defendant. One lawyer questioned 'who are they (RWs) to say'?

The characteristics of the bad report reflect again the difficulties with RWs being able to express opinions and to make subjective statements. The bad characteristics demonstrate a situation where the rule of law is not being applied, being biased and impartial means that defendants must be being

treated differently from each other based on one RWs view of the defendant versus another RWs view of a different defendant.

*The significance of remorse*

Remorse was referred to in 72% of the PSRs. This means this factor is one of the most significant in terms of information that is presented to the court and it is often the aspect that is looked for by the judge and by defence counsel. The problem with including sections on remorse, as with other aspects of the PSR, is that the assessment of remorse is a subjective one. The use of the words ‘appear’ and ‘appeared’ when used to describe the defendant’s projection of remorse (‘he appeared to show remorse’) reinforces the subjectivity of the inclusion of this aspect in the report. Similarly, on occasion remorse is reported to have been expressed but at times there have been qualifying statements which undermine the positivity of expressing remorse; for example, one defendant is said to have expressed remorse ‘but made no mention of risk driving posed to the public’ and another defendant showed remorse ‘but argued his reasons for non-compliance throughout the interview’.

Of the reports which mentioned remorse, 56.5% of defendants were said to have shown remorse and 43.5% did not show remorse. 57% of NZ Europeans were said to have expressed remorse compared to just 22.6% of Maori defendants; this suggests that the subjective assessment of Maori defendants tends to be harsher than for NZ Europeans and links back to the points made about misinterpreting behaviour and responses as a result of a cultural disconnect. It is not clear from the references to remorse how the assessment was reached as to whether the defendant is remorseful or not; it is sometimes simply stated that they did not assess the remorse as genuine (or they did assess the remorse as genuine) without any qualifying statement or evidence to support their position. As one defence lawyer said:

It is all too often the RW comments that the remorse appears to be superficial – they are not experts in truthfulness and often D’s have difficulty expressing themselves

Presenting a defendant as remorseful or not to the court plays a large part in the view the judges have of the defendant and how they should be treated. While remorse was mentioned on only a small number of occasions in the judges interviews, the record of what the judge has said at sentencing suggests that remorse plays a much larger role than the answers indicated. Remorse, of course, is tied into the personal circumstances of the offender, of which we have seen that the judges take significant notice of. In Part B, 2.2, ‘judges’ comments about the PSR during sentencing’, many of the records show that the judge has commented that they have read your PSR and have noted your remorse (where it has been expressed and accepted by the RW).

In the comments section, one case example raises real questions about the impact subjective statements by the RW about remorse can have. A Maori male was being sentenced on family violence offences. The defendant and the victim had attended a Restorative Justice (RJ) conference which was facilitated by trained experts, a report was written about the conference by the facilitators and this was presented to the court to assist at sentencing. The RJ conference had explored the issue of remorse and the report reported on it positively. The PSR, however, had commented that the RW did not assess the remorse as genuine. This led the sentencing judge to say that he had read the RJ report ‘but the PSR raises questions about the genuineness of your remorse’. In the observation notes of this sentencing the defendant has stated that he did not have a good rapport with the RW, this was explained to the judge by the defence lawyer in the plea of mitigation and the lawyer submitted that the judge could step back from the recommendation of CD combined with ISUP and sentence the defendant to ISUP only, based on the good RJ report. The judge did not accept the defence lawyer’s submission, or the RJ report and, because the RW’s opinion was that the defendant minimised the impact of his offending and questioned his remorse, the judge sentenced the defendant to three months’ CD and 15 months’ supervision. This is a very good example of how subjective information can have a huge impact on the defendant in a situation where the RW (who was also the defendant’s PO) and the defendant do not get along.

The defence lawyer's response to whether they thought it is appropriate for RWs to express their opinion in relation to remorse (and attitudes) suggests they are alive to the problems with RWs presenting such subjective information to the courts. Defence lawyers thought that remorse should be left to counsel to address at sentencing rather than it being presented in the PSR (Part B, 3, 3.11). Defence counsel have commented that a RW should understand that lack of remorse should be considered as neutral, because in an interview situation, often months after the offending, it might be difficult for a defendant to address the issue of remorse to a standard set for them by an organisation that might not walk in the defendant's shoes and might therefore fail to have an understanding that expressing remorse may not be a simple, or natural, exercise. One lawyer said they were concerned when defendants aren't asked about remorse at all by the RW but it is nonetheless recorded that they did not express remorse because they were concerned about the possible consequences for those defendants; another commented that the PSR should be fact-based only and that anything the defendant says should be recorded without commentary.

Defence counsel have addressed issues of remorse during their submissions to the court in order to try to redress any disadvantage the PSR may have for their client in respect of remorse. This was not always met with success meaning. The variance in what the RW may or may not say about the defendant, and the variance with which defence counsel submissions are received again highlights issues around the inconsistent application of the rule of law and the undermining of social justice which occurs due to the role the PSR plays in the sentencing process.

*Acceptance that reports are biased at times and not written without preconception*

One of the most striking outcomes of the study has been that 100% of defence lawyer respondents said they had experienced times when the PSR has been biased (Part B, 3, 3.20), and when asked if they considered the PSR to be

impartial the responses were overwhelmingly negative (Part B, 3, 3.4). This contrasts with the judges' answers where some 50% said they had not seen a report that they thought appeared to be biased. The comments of the judges could be described as dismissive and it is clear they have a great deal of faith in the RWs. One commented that the reports are vetted by the RWs supervisors and another said that sometimes a defendant 'thinks' the RW has it in for them. Although it is acknowledged that PSRs are vetted, it is apparent that often there is a lack of knowledge among those preparing the reports of what is appropriate to be presented to the court, and that often the reality of workload means they don't get thoroughly checked or there is lack of time to make changes.<sup>78</sup>

Defence counsel are quite certain that at times RWs bring their own personal views, perceptions and prejudices to the task of writing the report. One was of the view that a particular RW was a 'man-hater' which came through in the way the reports were written; others thought bias came through because of their prior relationship with the defendant or because they did not like the defendant; another has commented there is often bias against defendants with tattoos, which of course has no relevance to the offending whatsoever. A couple of the lawyers thought that RWs bring their own moral judgement to bear on the defendant and this was very apparent in the two sexual offending cases; the defendants themselves felt they had been judged by the RW before they had said anything, and that the RW was 'judge, jury and executioner'.

The fact that there is bias in the reports, and that it seems to be a frequent occurrence, reported on by defence counsel and noticed by defendants is of extreme concern. What is of equal concern is that the judges did not seem to recognise that this was happening; or perhaps they do recognise it and trust their own ability to apply the right criteria to their assessment of the PSR.

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<sup>78</sup> As at n 22.

If there is bias present, and consistently present, in PSRs it cannot possibly be that the PSR is without prejudice, nor that it upholds the principles of the rule of law.

*The danger of inaccuracy*

Nearly a third of defendants commented that there were inaccuracies in the PSRs. The kinds of inaccuracies which are in the reports can have an impact on the tone of the report and the way that the defendant is ultimately perceived. Reporting that a house is overcrowded and therefore not suitable for a sentence of home detention, based on the RW's misconception that there was another baby due, could mean the difference between time behind bars or time on a rehabilitative community-based sentence. Similarly, misinformation about alleged family harm incidents at an address making it, in the RWs opinion, unsuitable for home detention, sent the defendant to prison. In another instance, the PSR has mistakenly reported a rehabilitation facility as a 'boarding house'; it was only because the defence lawyer brought the manager of the rehabilitation facility to the sentencing to address the judge about the nature of the accommodation being proposed for the defendant to serve his sentence that the defendant did not receive a sentence of imprisonment. In line with the views of the defendants, nearly one third of the defence lawyers considered the reports to be inaccurate at times.

The study has shown that considerable weight is placed on PSRs at sentencing; if inaccurate material is being considered as part of the sentencing decision-making then the system is disadvantageous to the defendants who are the subjects of the proceedings.

*Number of occasions defence counsel and defendants not happy with report*

Defence counsel expressed unhappiness with the PSR for 39% of the PSRs included in the observation part of this study. The reasons for their unhappiness ranged from remorse not being canvassed by the RW when the defendant had expressed to the lawyer that they were remorseful and they wanted the court to know this, to the RW overstating the seriousness of the offending, to the RW

giving the defendant incorrect advice about the sentence outcome, particularly as the defendant had accepted a sentence indication from the judge, and with regard to comments made about the defendant's attitude.

Defence counsel found it necessary on occasion to counter such issues during their oral sentencing submissions. In one instance, counsel drew the judge's attention to the issue of remorse, explaining it had not been addressed in the PSR but that the defendant was remorseful and, because it wasn't covered in the PSR, had written a letter addressed to the judge expressing his remorse. In that case the judge did not mention the report or remorse when he gave his sentencing decision and the end sentence followed the recommendation in the PSR; given the amount of weight given to the PSR by the judges it is left open to speculation as to whether inclusion of the defendant's remorse in the PSR would have had an influence on the outcome: it may well have been taken into account as an aspect that could have earned the defendant credit towards a more favourable sentence.

In another instance, the lawyer made oral submissions to the judge regarding the prejudicial comments included in the PSR, but the judge has paid little or no heed to those submissions to the extent that after the sentencing the defence lawyer indicated they would appeal the sentence based on notice taken by the judge of prejudicial elements of the PSR which were pointed out by counsel. There is precedent for successful appeals of sentences which are based on prejudicial or incorrect PSRs; this paper will examine a recent judgment where an appeal on that basis successful in another section.<sup>79</sup>

The defendants themselves have also expressed unhappiness with their reports. Over one third (35%) of defendants said they were unhappy with some aspects

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<sup>79</sup> *Betteridge v R* [2019] NZCA 513.

of their reports. The reasons for their unhappiness varied, but the underlying cause seems to be that they felt they weren't listened to or they weren't heard.

One said he tried to explain that he had cut off his bracelet (on EM bail) because he was in an abusive environment and needed to get away - this was not recorded in the PSR and the defendant was disappointed that the judge would not be made aware of this; another says that the RW focussed on his past and did not listen to what he was saying. Others were disappointed with the sentence recommendation in the PSR and another that the address wasn't checked by the RW; two were angry that their interviews were conducted over the telephone; both of those were NZ European defendants.

One defendant was particularly upset by the fact the telephone interview only lasted ten minutes and again that the RW didn't listen to what was said; the RW did not believe the defendant's explanation about his offending which included handing in his patch – if the RW had taken the trouble to check out what the defendant said they would have discovered (through the police and information others could provide) that the defendant was telling the truth. Instead, the RW expressed an opinion about the veracity of what was said and described the defendant as 'intelligent and manipulative', recommending a sentence of imprisonment. It was left to the defendant's lawyer to submit to the judge the truth of what the defendant had said and invite the judge to step back from a sentence of imprisonment; fortunately the judge accepted the submissions of the lawyer.

The defendants who were before the court on sexual offences were extremely unhappy with their PSRs on the basis that the RW had a preconceived idea of them prior to conducting the interview. At a prior hearing for one of those defendants the judge ordered a PSR but without appendices, meaning the judge was not contemplating either an EM sentence or imprisonment. The PSR made much of the unsuitability, for either CD or HD, of the defendant's home address, painting a picture of a chaotic environment with antisocial (as opposed

to prosocial) occupants which was information perceived by both the defendant and his lawyer to be prejudicial and which was not relevant to his sentencing.

The second of the sexual offenders and his lawyer felt that the tone of the PSR was prejudicial against him, describing him as ‘patronising and misogynistic’ without any evidential basis. The defendant said he felt his words had been twisted by the RW.

Comments by RWs that remorse was not shown by defendants also left the defendants feeling upset with their PSRs. One said that he was remorseful for his behaviour but that the RW had not understood what he was trying to say. Another said that he thought he had expressed remorse, particularly as he had offered to make an emotional harm payment to the victim and by so doing was taking responsibility for his offending.

It is alarming that RWs can present information to the court which appears not to have any evidential foundation and which is disputed by the defendant. RWs tell the defendant at the interview that if they read the PSR prior to it being filed in court (which in practical terms never happens as the PSR is not provided to the defence lawyer until a day or two prior to sentencing) and notice any factual errors they are willing to correct it; they will not, however, make changes to the content of the report or any of the assessments made of the defendant<sup>80</sup> which suggests an attitude of superiority and distrust of the defendant. It is left to the defendant’s lawyer to try to correct any damage that is done by a poor PSR, and this often gets lost in the submissions, questioning by the judge and presentation of other important material, all of which can leave a defendant feeling upset and disillusioned.

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<sup>80</sup> As at n 22.

*Traversing the summary of facts*

16.6% of the reports (or 9 out of 54 or one-sixth ) said the defendant had disputed the summary of facts. Although it was not possible to ascertain detailed information for every one of those reports, the majority of them had recorded the incorrect charges or had referred to the wrong summary of facts. The charges and summary are provided to POs by the court registry and human error means that sometimes the POs do not have the most up to date information. Such errors can be costly to the defendant, though, because reporting that they disputed the summary and consequently displayed an uncooperative attitude towards authority or minimised the offending paints a poor picture of a defendant who is going to be judged and assessed on what is contained in the report. Given that the judges have indicated that they use the PSR to create a picture of the defendant as a person and to find information to explain the offending, any negative opinions expressed based on inaccurate information, are very unhelpful to getting both the least restrictive and most helpful outcome for the defendant.

This factor led to defence lawyers being questioned about the appropriateness or otherwise of the circumstances of the offending and the summary of facts being traversed with defendants by RWs, particularly bearing in mind this is one of the first thing a defence lawyer does when they meet with the defendant to discuss the charges. The majority of respondents (64%) said it was inappropriate with another 21.4% saying it was only sometimes appropriate and only 14% saying it was appropriate for this to be canvassed. Of those who thought it was inappropriate, the reasons they gave were largely that the circumstances of the offending and any dispute around what occurred is the domain of the defence lawyer and it is for the lawyer to present that information to the court – this is, after all, a legal aspect of the sentencing process.

*Must be an evidential basis for, and a connection between, the information contained in the report and the recommendation*

The judges have commented that they expect to see an evidential basis for the information contained in the PSRs and that they also expect that evidential basis to inform the recommendation. The section in Part A 1.1.2.5 is a collection of additional subjective comments which appeared in the PSRs and for which there was no supporting material. When the defendants who were the subject of the PSR were being sentenced, there was no mention made by the judge about the subjective nature of what had been presented to the court. It can only be hoped that the discretionary reasoning of the judge would have disregarded any such comments; it is feared, however, that the comments create an overall impression which is difficult to ignore.

*Disconnect between judge's view and that of defendant and lawyers*

The overall impression from the results obtained from the observations, the interviews with judges and the defence lawyer questionnaire is that there is a disconnect between the way the judges view the PSR and the way defence counsel (and defendants) view the PSR. Analysing the responses from the judges and the defence lawyers about what makes a good and a bad PSR shows that, whilst there is much common ground, there is also a disconnect between the impact of the reports from the defence perspective and the way the judges view the reports. One judge commented that they don't see many bad reports, but the defence lawyer responses tend to suggest that bad reports are a regular occurrence.

From a starting point where it is considered there are not many bad reports, despite defence counsel and defendants believing there are, of additional concern is some of the comments made by the judiciary about whether they accept the position put forward about bias, inaccuracies or incorrect information, are of additional concern. One judicial respondent said they do not always accept what defence counsel says; another said they are sceptical about what the defendant is saying and that they would believe the PO over defence and another commented that the defendant might not be being truthful to the

defence lawyer. Yet another said that they would not alter their view of the PSR if the defence lawyer made submissions. These comments suggest that the discourse of the POs and the RWs – that defendants are often manipulative and know how to play the system<sup>81</sup> has been accepted by the judiciary. The perspective of defence counsel is quite different and it seems that that discourse is not the one accepted by defence lawyers who are prepared to see the defendants as people who are battling a system in which they are the least advantaged players.

For 63% of the PSRs, defence counsel addressed the judge on the PSR. On a third of those occasions the lawyer accepted the report and supported the recommendation. On eight occasions the lawyer has drawn the attention of the judge to issues with the report; this is a low number of times given the number of times the defendant has expressed unhappiness with the PSR, has pointed out inaccuracies or it has been reported that they disputed the summary of facts. The judges tend to have a positive view of the defence counsel at Tauranga DC, notwithstanding the comments made about not accepting things that defence says. The judges, when asked, gave the impression that, on the whole, lawyers do their job adequately and make submissions about PSRs when it is appropriate and necessary. Perhaps defence counsel should be making more frequent and stronger submissions about the PSR in their submissions, even though they often feel they go unheard.

When defence lawyers were asked what they did to counter bias in a report most said they would raise it with the court and some said they would raise it with the PO. When asked if they thought they had been successful in getting that information across six (only 40%) said they had, two said they hadn't and the remainder (7) said only sometimes were they able to make a difference. This is consistent with the responses of the judges who indicated that, on the whole, they are sceptical about what defence says in relation to the content of the PSR.

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<sup>81</sup> As at n 22.

*Treatment of different 'types' of defendants:*

In Part B, 1, 'the observations', the paper broke down comments made in the PSRs according to the defendant's ethnic background, gender, whether they were employed or not and on the type of offences. A pattern began to emerge whereby Maori defendants had more negative and/or subjective PSRs than non-Maori. Those who were employed were viewed more favourably than those who were not employed and the defendants who were on sexual offending expressed a sense of being judged before they had an opportunity to say anything. The results show us that of those who expressed unhappiness with their reports, 63% were Maori and of those who expressed happiness, only 17% were Maori, with 83% of those happy being NZ European. The limitations of this study are again acknowledged, but in terms of the results of this study there is firm ground for asserting that Maori defendants appear to be presented to the court in a worse light than their NZ European counterparts and those who are part of the productive sector (ie. in employment) seem to have more favourable comments.

*Marx<sup>82</sup> conflict theory can become reality if Rawls' theory of social justice<sup>83</sup> is not applied*

The results have shown that 100% of defence lawyers have seen instances of bias in PSRs. We have also seen that nearly a third of defendants expressed that they thought there were inaccuracies in the PSRs and 35% (more than a third) of defendants said they were not happy with the PSR, it seems largely because they felt they were not listened to. The cumulative effect of these figures is that defendants are left feeling frustrated and helpless in regard to the information that is presented through the PSR to the court. This reflects the imbalance of power in the relationship between the defendant and the RW and how that imbalance can have a negative effect on the outcome for the defendant.

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<sup>82</sup>As at n 36.

<sup>83</sup>As at n 38.

Marx warned that in a situation where the power held by the ruling classes is used to the detriment of those in the base structure, revolution is likely to occur. This may seem a far cry in contemplating contemporary New Zealand and its criminal justice system, and the process by which PSRs are written. However, one has only to look at the events over the last days of 2020 and the first days of 2021 at Waikeria Prison<sup>84</sup> to recognise that that outcome may only be a whisker away. Sixteen Maori prisoners took it into their own hands to protest against the conditions in the prison in which they were serving their sentence, and against the denial of basic human rights. Their protest took the form of lighting fires, destroying buildings, setting up on the roof and throwing projectiles at Corrections Officers, Police and firefighters – a violent protest which, despite its relatively small scale, could be regarded as coming close to revolution. The prisoners were reacting to a system which reflects and facilitates the dominance of the ruling classes. They were pushed to a point where they felt they had no choice but to respond.

The system that runs the prisons, and puts people there, is a system which helps to legitimise the conflict state. It is the same system which calls for, produces and considers the PSR; the PSR can therefore be regarded as another manifestation of a system which maintains the base structure/superstructure divide, causing conflict, and which pays scant attention to the rule of law.

The events at Waikeria Prison make it imperative that Rawls' social justice principles are adhered to and become part of the consciousness of those in positions of power. RWs operate within the system which has led to this rebellion and they are in positions of power. This study has shown that, at times, RWs are not approaching their task of writing the PSR in an impartial and accurate way, free from preconceptions. Consequently, they reinforce the conflict state. An awareness of Rawls' view of social justice and the rule of law when approaching the exercise of writing the PSR from the original position

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<sup>84</sup> *Waikeria Uprising* New Zealand Herald, 1 January 2021  
<https://www.nzherald.co.nz/nz/waikeria-uprising-prisoner-who-surrendered-assaulted-by-fellow-inmates-corrections/WQNG7BGTMMASPAFVYAYZIGAPEI/> Retrieved 1 January 2021 at 1.42pm.

would create a process less likely to result in a state of conflict. If the original position could be adopted by RWs, reducing the impact of the imbalance of power in the relationship, it is likely we would not see the levels of partiality and inaccuracy that this study has uncovered. This study does not reveal RWs operating from behind the veil of ignorance (as desired by Robinson<sup>85</sup>), applying principles which will benefit the weakest person. Instead, reports are written from a position of power within the superstructure.

### *Case law*

It is always open to defendants to appeal the outcome of their sentencing hearing on a range of points of law or fact, which includes that the end sentence took into account incorrect or prejudicial information about the defendant which influenced the outcome. One lawyer and defendant in our study talked of considering appealing the sentence given on the basis that the judge cited incorrect information in the PSR (it is unknown whether the appeal went ahead). It is not a common occurrence for an appeal to be made against sentence on the basis of the PSR, but it can be done. A recent case, *Betteridge v R*<sup>86</sup> is an example of the issues that can be addressed. In that case, the defendant received a sentence of 21 months' imprisonment. She appealed her sentence on the grounds that there were numerous inaccuracies in her PSR that she did not have the opportunity to address (as the report was received by her counsel just prior to sentencing) and which influenced the judge's decision not to sentence her to HD. The appeal said that the information taken into account at sentencing was unfair and incorrect. Fresh evidence was presented to the court by way of an affidavits from both the defendant and the occupier of the proposed HD address countering the assertions made in the PSR. The appeal decision noted, at [26], with regard to the PSR interview that the defendant's

understanding of what such an interview entailed and of the potential relevance and importance of the interview in terms of sentencing outcome may well have been limited

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<sup>85</sup> As at n 41.

<sup>86</sup> As at n 79.

The decision also acknowledges (at [30]) the harm that can be done by the RW's perception of the defendant:

the interview unfairly got off to a bad start, in terms of the writer's perception of Ms Betteridge's general attitude.

The PSR had said that the defendant had not been interested in rehabilitation, the defendant disputed this in her affidavit and this was accepted by the appeal judge who said (at [39]):

The report writer's view that she had no motivation to address her drug addiction and presented as unwilling to participate in rehabilitation formed an important platform for her final recommendation of imprisonment and (as a consequence) for the Judge's refusal of home detention.

This again highlights the dangers of an incorrect picture of the defendant being painted for to the court by the RW. In this case the appeal judge 'formed the view that the PAC report was unfairly prejudicial'. The defendant's appeal was successful and her sentence of imprisonment was quashed and substituted with eight months' HD. If the RW had written the PSR with the principles of the rule of law in mind and without unsubstantiated preconceptions (from behind the veil of ignorance), the incorrect and negative views would not have been presented to the court. This study has highlighted how common it is for the RW's negative perception and/or inaccurate or incorrect information to be presented to the court; there are very few occasions that a defendant will appeal their sentence on that basis.

#### *A better way?*

This study has raised many issues with regard to the PSR and its role in the sentencing process. Judges and defence lawyers alike were asked if they considered there could be a better way than the PSR of presenting the kind of information which is of value to the sentencing process than the PSR. The judges as a cohort were generally satisfied with the PSR process. There were limited suggestions for improvement, though one respondent indicated a lack

of understanding of socio-economic issues as perhaps creating disparity even in this part of the sentencing process; there was a call for greater uniformity in the PSRs and for there to be a greater focus on cultural issues.

For defence counsel there was more of a sense that there needs to be a more impartial approach to the information about personal background that is being presented to the court; this is an acknowledgement that the lines are blurred around the RW also being a PO and, possibly, a prosecutor. A couple suggested that cultural reports might be a better guide and others thought counsel or other experts should be providing the relevant information. There was a sense, though, that in a system that is constrained by timetabling and resources, the PSR is adequate.

## **PART D**

### **Conclusions, themes, recommendations**

*Does the PSR (Pre-Sentence Report) process uphold the rule of law and promote social justice?*

An examination of the PSR and the thoughts and opinions of the judiciary, defence counsel and defendants shows that the PSR does not assist the process of sentencing to be carried out in an 'equitable and non-discriminatory way'. Many aspects of the PSR, both conceptual and procedural, from it being ordered in court by the judge, to the arrangement of a formal interview which must be attended, to the interview being conducted on the terms set by the RW (Report Writer) to elicit particular material, to the kind of information being presented to the court, to the fact that although in principle the Department of Corrections is intended to be an independent body when in reality those lines are blurred, sets up a classic conflict situation between the establishment and the defendant.

The defendant supposedly has a voice in this process which, again in principle, may be an attempt partially to counter and remedy this conflict situation. In

reality though, the defendant's voice is not properly heard. There is evidence of defendants saying they weren't listened to or that information presented is inaccurate or incorrect, and we have seen examples of bias or lack of partiality. RWs will not change the content of their reports, even if a defendant or their lawyer attempts to explain further the defendant's position; and we know that many of the defendants, particularly those from a Maori background, are ill-equipped to present themselves in the best possible or 'right' way at the interview. The only voice, then, is the voice of the defence lawyer, but even this voice gets lost in the process. There is information from defence counsel themselves that they do not feel confident their submissions to the court about bias or a bad relationship between the defendant and the RW make a difference; and the judges themselves have indicated they take these submissions with a degree of scepticism and they prefer to take notice of the PO (Probation Officer) rather than defence.

There appears to be little justice in this process for the defendant and this raises questions about the principles of the equity of the law being a sham:<sup>87</sup> the reality seems to be a system which does not allow for the defendant to be heard. The juridical system of the rule of law allows judges to use their discretion, but to achieve social justice, discretion must be exercised fairly. There is no question that judges intend to exercise their discretion to achieve the best and fairest outcome for the defendant but they are a product of a system which favours the establishment and they, therefore, unintentionally support that system.

This is further underlined when the background of the RWs is considered. The RWs tend to be university-educated and their role in the criminal justice system is as part of the establishment. They conduct the interviews, they make assessments and judgements, they express opinions and they make recommendations. They have very little in common with the defendants who are the subject of the reports and accordingly have very little understanding of

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<sup>87</sup> As at n 42.

them. Very few of the RWs are Maori which adds another layer of distance and difference between the RWs and the defendants. Coming from another world makes it even more important for RWs to view the defendant without prejudice and with as much insight as possible. This appears to be impossible for the RWs to do, however, because they actively use their prior knowledge of defendants to influence the recommendations they make to the court on sentencing; this in turn influences the tone of the PSR and the type of information, subjective comments and opinions that are included in the report.

The judges said they are particularly interested in the personal circumstances and backgrounds of the defendants, and in what made them do what they have done. This, then, plays a very large part in what information is thought to be appropriate in the PSR, with the RWs making statements about the defendants, their attitudes towards the offending, whether they are employed, remorseful, have addiction issues and so on. The interest in these factors and the focus on these aspects is undemocratic in Mandel's terms;<sup>88</sup> in a practical sense, then, this further reinforces the conflict between the establishment and the defendant as the defendant is being dealt with on the basis of their potential or ability to fulfil their role in the productive apparatus of society.

The PSR as a part of the sentencing process does not appear to uphold the rule of law or promote justice. It is a mechanism which further enhances a divide between the ruling classes and the dangerous classes<sup>89</sup> and which does not allow the dangerous classes to have a voice.

There was one comment made by a defence lawyer which, in many ways, sums up some of the findings of this paper and is worth repeating here:

...bad/shallowly written reports damage the integrity of the criminal justice system. For the system to be in any way effective each player within the system needs to have a good reputation to our clients. If our clients perceive that a report is a 10 minute conversation with a PO who is overworked, under-trained and not particularly

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<sup>88</sup> As at n 43.

<sup>89</sup> As at n 41.

engaged in helping them, followed by a three page cookie cutter document that only includes the worst things that the client said, which have been taken out of context and show no insight or empathy to the client's experience so that a judge can deal with them as quickly and impersonally as possible then there is absolutely no reason for our clients to engage in the process. Most of our clients will accept negative outcomes.. if they perceive they have been treated fairly and with respect by the system.

Although that lawyer did not address the issues in terms of the rule of law and social justice, the points made in their comment lie at the heart of the issues this study has exposed: the PSR is a tool that is supposed to assist in creating a just outcome, but it is a product of a divided society where the principles of the rule of law are not always at the fore and where social justice is difficult to achieve. Even the perception, let alone the reality, that there is fairness and respect would be beneficial to defendants in the criminal justice system.

### *Recommendations*

From a defence lawyer and a defendant's perspective, the PSR process needs re-examining because it plays such an important role and carries great influence at sentencing. The judges are content with the PSR system and are confident in their ability to set aside incorrect or prejudicial information, but in the famous words of Lord Hewart: 'justice must not only be done, but must also be seen to be done'.<sup>90</sup>

The problems with the PSR that have been identified by this study are bigger and wider than the PSR itself. However, the PSR should be revisited as part of the criminal justice review. The criminal justice review is an ideal opportunity to reconsider a system which has a sentence manager and prosecutor also writing reports and making recommendations to the court. While the prior knowledge of the RW seems to be valued by the judges, it is something which is of concern to defence counsel and defendants and an aspect of the PSR

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<sup>90</sup> *Rex v. Sussex Justices*, [1924] 1 KB 256.

which does not fit with Rawls' principles of social justice. Issues of bias and time and resource constraints also need to be addressed, and the type of information which is included in the report should be reconsidered to make it more democratic and more appropriate to, and consistent with, the rule of law. The following suggestions for review and reform could be considered on the basis of this study:

- A new, independent body is tasked with writing the PSR;
- A dedicated PSR team would ensure the reports are more thorough;
- The factors and information included are less subjective meaning there is less room for the writer's personal opinion to influence the outcome;
- Report writers are more representative of the background of the defendants they are reporting on;
- Interviews are conducted in a setting and in a manner that makes the defendant more comfortable;
- Prior knowledge of the defendant should be avoided; and
- Full and directed training should be provided to report writers in Te Ao Maori and to ensure they write dispassionately and without preconceptions.

#### *Scope for further study*

Once again, the limitations of this study are acknowledged but, there is enough important information unearthed during the course of this study to justify further exploration of the PSR as it is used across New Zealand. If the themes that have come through in this study were reinforced by a larger study, or several more small studies, the recommendations above would carry even more force than they do on the strength of this study.

#### **Conclusion**

This was a curiosity-driven examination of the PSR and the role it plays in the sentencing process. It exposed the PSR for not upholding the principles of the rule of law. The study is limited in its scope and size but, nonetheless, there

was significant participation by the players engaged in the criminal justice process at the Tauranga DC to make the results and conclusions meaningful. There are clear issues about fair and equal treatment and the type of information that is included, and the possibility that reports can be sabotaged by individual RWs with particular views of individual defendants based on their prior knowledge of them or of their 'type'. The PSR clearly plays a significant part in the sentencing process and is given significant weight by judges. Further research could be conducted to see if there is a way that background information can be included in a way that does not reinforce supposed "inside knowledge" or unwelcome preconceptions. This study sets up the landscape for further exploration of the issue of the PSR.

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**APPENDIX ONE – OBSERVATION TEMPLATE**

**Date of sentencing:**

**Gender:**

**Ethnicity:**

**Age:**

**Offence(s):**

**Appendices:**

**History:**

**On bail/EM bail:**

**Recommendation:**

**Defendant's view of PSR (fair, relationship with probation officer, content accurate):**

**Defence lawyer's view of PSR (fair, accurate, tone):**

**Judge:**

**Defence lawyer's submissions (with reference to PSR and sentence sought):**

<b>Judge's comments (re: PSR and defence lawyer's submissions):</b>
<b>Outcome:</b>
<b>In line with PSR?:</b>
<b>What does it say about remorse:</b>

**APPENDIX TWO – JUDGE’S QUESTIONS**

*Lawyer Helen Gould is conducting an empirical study into the weight given to, and the role played by, the Pre Sentence Report (PSR) in the sentencing process. The working title of the study, which is subject to change, is*

*'An examination of the role of the Pre Sentence Report: provided for by section 26 of the Sentencing Act 2002, what is the actual role of the Pre Sentence Report in the sentencing process? Do the reports fill a need or could the process be improved?'*

*A valuable part of the study is ascertaining the views of the judiciary by questioning individual Judges.*

*The questionnaire, conducted either by face to face interview (which would be more fulsome) or by written response to questions, will gather information that will assist in creating a picture of the value of the PSR and any concerns there may be about the PSR's role in sentencing.*

*Alongside interviewing Judges, the research will involve reading PSRs, interviewing defendants and defence lawyers and recording observations of sentencings.*

*While no individual Judge, defendant or lawyer will be named or identified, the information gathered will be used both quantitatively and qualitatively.*

*Responses may be paraphrased and direct quotations may be used, but they will not be attributed to any individual.*

## **Questions**

1. Section 26 of the Sentencing Act 2002 provides for the preparation of PSRs. What is your general view of the PSR?
2. As provided for by section 26, do you consider the PSR carries value beyond the technical feasibility checking of proposed addresses for EM sentences?

3. The PSR is a vehicle for providing information to the Court about a defendant's personal, social and cultural background, employment and family, and factors contributing to the offending. The same information is often advanced by the defendant's lawyer in their submissions. What is your view about this apparent doubling up of information provided to the court?
4. Do you consider the information provided for by section 26 might be better provided by the defendant's lawyer or an alternative independent body?
5. Do you agree the information that can be gathered (as per s26) is subjective in nature and is therefore subject to interpretation by the information gatherer/report writer?
6. How much weight would you say you place on the PSR in the sentencing process?
7. Do you take most notice of the narrative of the report (the information provided about the defendant) or the recommendation?
8. Does that change depending on whether appendices were ordered or not?
9. Do you consider there to be a variance in the quality of PSRs from one report to the next?
10. If yes, what is the cause of the variance? (for example, presentation, grammar, omitting relevant information, focusing on irrelevant considerations?)
11. If there is a variance in quality, has this influenced how much weight you give to the content and recommendations of a PSR?
12. Do you think there is a variance in the kinds of recommendations made depending on factors such as the ethnicity, gender and age of the defendant? Expand
13. Have you ever seen a PSR which you have thought appears to be biased in any way?
14. If yes, would you say that is a common occurrence?

15. If you detect bias in a report, does it change how you view the report/the weight you give to the report?
16. What is your general view of how defence lawyers approach the PSR at sentencing?
17. Is your view of a PSR altered if a defence lawyer takes issue on the defendant's behalf with the quality or accuracy of the report?
18. Have you had experience of a defence lawyer explaining there is an issue around the relationship between the report writer and the defendant?
19. If yes, do you take heed of such a submission?
20. Does the type of offence influence how you read the PSR and how much weight you give to the content and recommendation of the report?
21. Have you noticed whether report writers take a different approach to defendants who are being sentenced on Department of Corrections offences as opposed to Crown or Police offences?
22. If yes, do you think the reports and their recommendations for Corrections offences are harsher or more understanding?
23. Do you think prior involvement with the defendant on the part of the report writer and their department is appropriate when making recommendations to the Court about sentence outcomes?
24. What proportion of the time would you consider the PSR is appropriate in its sentence recommendation? Give a percentage.
25. Since the case of *Solicitor General v Heta* [2018] NZHC 2453, section 27 cultural reports are playing a larger role in the sentencing process as there are significant discounts available to defendants. What is your overall impression of the cultural report?
26. Do you consider it to be a valuable tool in the sentencing process?
27. Do you think it is necessary to have both PSRs and cultural reports? – can you imagine a better system?

**APPENDIX THREE – PERMISSION FORM**

**Permission for lawyer Helen Gould to read Pre Sentence Report**

I understand that Helen Gould, a lawyer with the PDS, is undertaking a research study about Pre Sentence Reports.

She has requested to read the Pre Sentence Report prepared for my sentencing so that she can meaningfully observe my sentencing in Court and use her observations in her study.

I understand Helen may ask me questions about my views of my Pre Sentence Report.

I understand that Helen will not record my name or any personal or identifying information (such as my address). My personal details will remain confidential and will not be recorded in her study. My views and/or comments may be used in her study but they will not be attributed to me.

I agree to allow Helen Gould access to my Pre Sentence Report and to include it and my sentencing in her study, without using my name or any other information that would identify me.

Signed:

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Date:

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**APPENDIX FOUR – DEFENCE COUNSEL QUESTIONNAIRE**

**Questions for defence counsel**

1. What is your general view of the Pre-Sentence Report?
  
2. Do you think there is value in the PSR beyond the technical assessments for electronically monitored sentencing (yes/no)?

**For the following questions, please use the following scale: 1 = never; 2 = rarely; 3 = occasionally; 4 = often; 5 = always**

3. The pre-sentence reports are well written and easy to understand

<b>1</b>	2	3	4	5
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4. The pre-sentence report is impartial

<b>1</b>	2	3	4	5
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5. The assessments, opinions and recommendations in pre-sentence reports carry significant weight in the sentencing process

<b>1</b>	2	3	4	5
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6. The assessments, opinions and recommendations in pre-sentence reports are supported by facts and information contained in the report

<b>1</b>	2	3	4	5
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**For the following questions, please use the following scale: 1 = never confident; 2= rarely confident; 3 = occasionally confident; 4 = often confident; 5 = always confident**

7. How confident are you in the ability of the report writer to make an objective assessment of the defendant?

<b>1</b>	2	3	4	5
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8. How confident are you in the ability of the report writer to make an appropriate recommendation?

1	2	3	4	5
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9. Do you consider elements of the PSR to be a duplication of material that is, or could be, presented by defence counsel (yes/no)?

10. In your experience, what is the most important aspect of the pre-sentence report (please rank in order of most important to least important):

- (1) Prior engagement with probation services (relating to ability to comply)
- (2) Domestic and Cultural background
- (3) Relationships
- (4) Employment
- (5) Addiction issues
- (6) Remorse
- (7) Likelihood of reoffending
- (8) Attitude towards the present offending
- (9) Recommendation

11. Of the above numbered aspects of the report, which do you think are more appropriate for defence counsel to present to the Court (if any)?

12. What do you consider makes a good PSR?

13. What do you consider makes a bad PSR?

14. What proportion of the time do you think the PSR is accurate (as a %)?

15. What proportion of the time do you support the recommendation made (as a %)?

16. Have you experienced occasions when the recommendation was inappropriate (yes/no)?

17. If yes, was the recommendation too punitive or too lenient?

18. What did you do to address the inappropriate recommendation?

19. Have there been occasions when you or your client disagreed with the content of the report in terms of its accuracy (yes/no)?

20. If yes, what have you done to address that?
21. Do you think you were successful in getting across the correct information (yes/no)?
22. Have you ever considered there to be bias on the part of the report writer? Expand
23. Do you think it is appropriate for report writers to express their opinion; for example in relation to a defendant's remorse or attitudes?
24. Do you have a view about the appropriateness of the Pre-Sentence Report traversing the circumstances of the offending and recording the defendant's comments in relation to the circumstances? Expand
25. Do you think the PSR is a fair way of presenting information to the Court?
26. Can you imagine an improved or better system for providing the Court with the type of background information in the PSR? Expand