MINISTRY OF JUSTICE

Speaking about cultural background at sentencing

Section 16 of the Criminal Justice Act 1985

Alison Chetwin
Tony Waldegrave
Kiri Simonsen

with

Strategic Training and Development Services
&
The Family Centre Social Policy Research Unit

First published in November 2000 by the
Ministry of Justice
PO Box 180
Wellington
New Zealand

ISBN 0-478-20155-9 (Printed)

Foreword

The Criminal Justice Act, which came into force on 1 October 1985, brought about a number of significant changes in the law relating to criminal justice. It was developed in the light of widely expressed concerns about issues such as biculturalism, community involvement in the criminal justice system, the victims of crime, and violent crime.

One of the newly introduced provisions relating specifically to court procedures was section 16 which provided for an offender who appears before any court for sentencing to call a witness to speak on his or her behalf on cultural matters that could be relevant to sentencing considerations. The person called to speak may talk about the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects it may have in helping to avoid further offending. The court must hear the person unless for some special reason, such as the penalty for the offence being fixed by law, it is satisfied that it would not be of any assistance to the case. The section provides the only opportunity for a lay person not under oath to address the court.

Section 16 was designed essentially with the Māori community in mind, although it was worded broadly enough to have a general application to all offenders. It allowed representatives of the offender the opportunity to participate at a stage in a case where they would normally in the past have been excluded. It was intended to encourage iwi, hapū, and whānau support or community group representation for the offender, place cultural aspects of an offender's background before the court in a positive light to show how re-offending may be reduced, and, where appropriate, lead to a community-based sentence where cultural attributes could be built upon for possible rehabilitative purposes.

A monitoring exercise of several provisions including section 16 conducted over a six month period in 1986/87 and involving eight District Courts showed that only two of the courts recorded instances of the section's use. It was only invoked on 19 occasions (involving 14 Māori, four Samoan, and one European offender). The use by Māori and Pacific Peoples offenders represented only 0.25% of cases where Māori and Pacific Peoples offenders were convicted.

Anecdotal evidence suggested that section 16 continued to be used rarely throughout the 1990s and that there was a general lack of awareness of the availability of the provision despite there being a pamphlet in five languages available in the courts about the section. There was however no extensive information about the application of the section. It therefore was appropriate to look into the use of the section in more detail. This report is the result of research conducted by the Ministry of Justice in 1999 and 2000 which investigated the purposes of section 16, the use and the effects of using section 16, and possible reasons for a lack of use. The study also sought to identify any improvements that could be made to the legislation or to the way the legislation was being implemented.

The research involved 11 case studies of situations where section 16 was used and a national postal survey of judges, lawyers, community probation service staff, and community organisations. Nine of the 11 case studies (six involving Māori offenders and three involving Pacific Peoples offenders) were completed under contract to the

Ministry by suitably qualified external researchers able to relate to the cultural values of the offenders and their families being interviewed. An advisory group drawn from several government agencies, the community, and the judiciary was established to assess proposal documents, receive progress reports, advise researchers and comment on draft reports.

The research does indicate a very low utilisation, and a low level of awareness, of section 16 in the court system. However the case studies also clearly show that when the section is called upon it can enhance both the content and the process of sentencing. Some lack of clarity in the current wording has been identified by practitioners involved in the research and the report has made some practical suggestions on this matter as well as on some matters relating to court procedures that could assist use of a section 16 type provision.

The sentencing provisions of the Criminal Justice Act have now been in effect for 15 years and are currently the subject of a major review. This makes this research report particularly timely and able to contribute to the policy development process with up-to-date information on one aspect of the sentencing process. The report itself will also assist in making section 16 more widely known and provides examples in detail of its application in a variety of cases that should be of practical value to professionals and community organisations involved in court procedures.

Matthew Palmer
Acting Secretary for Justice

Acknowledgements

Tihei mauri ora
Kia hiwa rā kia hiwa rā
Kia hiwa rā i tēnei tuku
Kia hiwa rā i tēnā tuku
Kia hiwa rā

Tēnei te mihi atu ki ngā tāngata tae atu ki ō rātou whānau nā rātou i whakaae kia puta ake ō rātou ake whakaaro i roto i tēnei pukapuka. Kei te mihi atu mo ō koutou pūmau ki te kaupapa me te mōhio hoki i ngā mamaetanga me ngā uauatanga e pā nei ki a koutou i roto i ngā rā. Nō reira tēnā koutou, tēnā koutou, tēnā koutou katoa.

We wish to pay tribute to the people and their families whose cases were studied for this report. We are grateful for your generosity in sharing your thoughts and experiences, at the same time appreciating the pain and difficulties that you have experienced along the way.

We wish to acknowledge many others who helped us to find cases and contact the people involved, and who agreed to be interviewed. Without your participation, this part of the research would not have been possible.

We would also like to thank the following people for their contribution to the research:

The judges, lawyers, Community Probation Service staff and community organisations who responded to the survey; and the Court Managers, District Law Societies, Māori Law Society, and staff of the Community Probation Service and the Department for Courts who helped us find the survey recipients;

Our advisory group – Manu Tawhai, Helen Quin, Loudeen Parsons, Judge James Rota, Angela Cook, Angela Lee, Juan Tauri, John Clarke, Mai Malaulau, and Geoff Dunn;

The members, past and present, of the Māori and Pacific Peoples Focus Groups for the Ministry of Justice;

Our reviewers – John Clarke, Wendy Searle, Geoff Dunn, and Ministry of Justice colleagues who gave their advice and support.

Kia ora koutou katoa

Alison Chetwin, Tony Waldegrave and Kiri Simonsen
Di Pitama
Kiwi Tamasese, Peter King and Charles Waldegrave

Contents

Tables

Executive Summary

Section 16 of the Criminal Justice Act 1995 allows an offender's supporter to present information at sentencing about an offender's ethnic or cultural background, the way that may relate to the offending, and the way that may help in avoiding future offending.

This research has investigated the purposes of section 16, the use and the effects of using section 16, and possible reasons for a lack of use. The study has also sought to identify any improvements that could be made to the legislation, or to the way the legislation is implemented.

The research draws information from eleven case studies of situations in which section 16 has been used. Six of these case studies involved offenders who were Māori, three involved offenders who were Pacific People, one involved a Japanese offender and one a New Zealand European offender. Further information was gathered from a national postal survey of judges, lawyers, Community Probation Service staff, and community organisations.

The extent to which section 16 has been used

- Section 16 has been used mostly by Māori offenders and offenders who are Pacific Peoples.

- The person making the section 16 submission was most commonly a member of the whānau or family, while community groups and kaumātua were also frequently spokespeople.

- Section 16 is used predominantly in cases involving violent offences.

- The sentence imposed in the cases reported was most likely to be imprisonment (45% of cases), although in one third of those cases the imprisonment was suspended. Community-based sentences were imposed in about a quarter of cases.

- Lawyers were most likely to organise the section 16 submission, while the offender organised the submission in a small proportion of cases.

- There are still significant numbers of professionals and community groups working within the criminal justice system who have never been involved in cases using section 16.

The survey results confirm that section 16 is under-utilised. Only 14% of survey respondents perceived that section 16 was used as frequently as it could be. The main reasons given were a general lack of awareness of the availability of the provision, and resistance on the part of some of those working within the system to the use of section 16.

The original purpose of Section 16

When the Criminal Justice Act was introduced, section 16 was linked with the aim of reducing the level of imprisonment by encouraging the use of community-based sentences. Section 16 was seen as a means of involving peoples of different cultures in finding alternatives to imprisonment for offenders from their communities. It was developed particularly with a view to involving Māori whānau (families) and communities in alternative sentencing, although it was available to any offender, regardless of cultural background.

The research has found that although community-based sentences are imposed in a substantial minority of cases where section 16 has been used, a direct link to the section 16 submission can be established only rarely. When community programmes are proposed by means of section 16, there are frequently factors which override a community-based sentence. These factors include a presumption in favour of imprisonment for some offences, and a lack of availability of suitable programmes. It is clear that the original aim of section 16 has largely been unrealised in its implementation.

Current purposes of Section 16

Section 16 has been used for a much broader range of purposes than were originally envisaged.

Participation in the sentencing process

The case studies and the survey reflect that families frequently use section 16 as a means of participation in the sentencing process. Section 16 was used to this end with varying levels of effectiveness. For some of the families their participation resulted in a sense of ownership of the outcome. For others, a number of factors resulted in their dissatisfaction with their participation. The survey findings show that, although section 16 is being used to enhance participation by offenders' families, this purpose is not widely acknowledged by those working within the system.

Provision of information at sentencing

The majority of survey respondents believed the main purpose of section 16 was to assist the court by providing further information at sentencing. An analysis of the information in section 16 submissions shows that a broad interpretation is being given to what constitute 'cultural' factors. These include factors such as family background, contribution to the community, employment, early life disadvantage, age, and church or gang involvement. Very specific cultural factors were presented in only a small proportion of cases.

The survey revealed a divergence in opinion about how the 'ethnic or cultural background' should be interpreted. One group believed that the section should allow for the presentation of any relevant information on the background of the offender or the offence. Another group held that there were few cases in which culture or ethnicity were a factor in offending, and that by and large section 16 was being misused when 'collateral issues' were presented.

Formal closure to restorative processes

In some of the cases studied, section 16 was a means of expressing formal closure to restorative processes between victim and offender, which had taken place prior to the sentencing hearing. In these cases, although the submissions may have had little influence on the sentence, they expressed remorse, forgiveness, and reconciliation and in the judge's and the families' view, brought a just resolution to the situation. Section 16 is being used in this way in only a small number of cases, but as restorative processes become more accepted, is likely to be used increasingly for this purpose.

The effects of using section 16

The use of section 16 was perceived to have had at least some impact on the sentence in approximately half of the cases reported, and to have resulted in a reduced sentence in more than one third of cases. Examples of reductions in sentences included suspension of sentences of imprisonment, reductions in the length of imprisonment or the amounts of fines, or receiving a community-based sentence when imprisonment was expected.

The case studies show that the use of section 16 can have positive or negative effects on participants in the case. An important positive effect is a family's public expression of support and involvement in the rehabilitation of their family member who has offended. The use of section 16 results in family alienation when the system and those acting within it lack the responsiveness and flexibility needed to incorporate culturally safe and appropriate processes. Many of the negative effects could be ameliorated through improving the practice surrounding the use of section 16.

Suggested improvements to the implementation of section 16

Enhance cultural competencies: section 16 implies and encourages the participation of peoples of a range of different cultures in the sentencing process. It is important, therefore, that the professional groups who work within the system are adequately prepared to respond respectfully and sensitively. The survey findings strongly supported further educational programmes in this area for lawyers, judges and Community Probation Service staff. Increasing the number of judges and lawyers from different cultural backgrounds was also seen as a way of enhancing cultural competency within the system.

Raise awareness of section 16: survey respondents suggested displaying information about section 16 in court waiting areas and ensuring that the pamphlet produced by the Department for Courts was distributed widely.

Enhance cultural responsiveness and flexibility in court processes: several of the case studies involving Māori offenders and their whānau in particular reflected a high level of discomfort with practices within the court setting which they found culturally insensitive. The physical environment, unfamiliar language and process, and clear imbalance of system knowledge and power combined to create an environment in which few of the whānau felt that they were able to participate freely. In particular, it was suggested that courts could: be more flexible in time frames for section 16 submissions; allow for more than one speaker; provide for the presenter to speak in Māori; provide

the opportunity for the offender to acknowledge the speaker; and allow for closure through physical contact.

Enhance resourcing for section 16: there was strong support for increasing resourcing within the system to better accommodate section 16. It was suggested that section 16 would be more effective if resourcing were increased for the legal aid regime; the Community Probation Service; community-based programmes; and court time.

Improve professional practice: ways in which lawyers' and probation officers' professional practice could be improved included: notifying the judge and court manager in advance that a section 16 submission is to be made; effective provision of information about section 16 to offenders and their families; and allowing time for planning and discussion with families, particularly to ensure that they have realistic expectations about the outcome.

Judges are key to the acceptance of section 16 as part of the sentencing process. They can create a climate of acceptance by taking a broad interpretation of the legislation, managing case flows to allow time for section 16, and making enquiries as appropriate at sentencing.

Should the legislation be changed?

There was substantial support for clarifying the purpose of section 16. It is clear that section 16 has the potential to enhance both content and process at sentencing. The legislation could be improved to reflect these purposes.

There is a need to clarify the type of content allowable in section 16 submissions. Because of confusion over the terms 'ethnic' and 'cultural', there was substantial support for allowing any information on the background of the offender to be covered in a section 16 submission.

It was also suggested that the section should clearly state that submissions can relate to: understanding the background to the offending and the culpability of the offender; sentences that could be applied to the offender; and information about restorative processes. The legislation should also clarify that more than one person may stand to speak.

And the legislation could reflect a stronger expectation that the court will hear the submission, regardless of the fact that the penalty for the offence is fixed by law, or for any other reason. The research findings indicate that these changes would help to encourage an atmosphere of partnership in the sentencing process.

1 Introduction

This report presents the findings of research on section 16 of the Criminal Justice Act 1985. Section 16 allows an offender who is before court for sentencing to request the court to hear a person speak on their behalf. The person may speak about the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects it may have in helping to avoid further offending.

The interest of the Ministry of Justice in undertaking research on section 16 arose from work on responding to offending by Māori. Officials were directed to review the use of section 16, its effect on sentence outcomes for offenders, and whether the purpose of section 16 needed clarifying. This research will contribute to a review of sentencing being undertaken by the Ministry. More generally, the Ministry is concerned with encouraging greater positive participation by Māori and other cultural groups in the justice system.

1.1 Section 16

Section 16 of the Criminal Justice Act 1985 states:

Criminal Justice Act 1985

S 16 Offender may call witness as to cultural and family background-

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

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

In its discussion of this section of the Criminal Justice Act (1985), Hall's Sentencing[1] states that

> *'…this may assist the Court in determining whether cultural attributes of the offender could be developed for rehabilitative purposes through the imposition of a community-based sentence.*
>
> *The intention of the section is to permit information relevant to sentence to be presented to the Court in an informal manner…. Iwi (tribe), hapū (section of large tribe) and whānau support or mātua whāngai representation for the Māori offender was envisaged….*
>
> *The Court must allow a person to speak on behalf of the offender unless it is satisfied that this course would not be of assistance. This may be because the sentence is fixed by law…or*

[1] Hall, G. *Hall's Sentencing.* Butterworths, Wellington. Pp D/181, D182.

for "any other special reason". This expression is not defined in the Act, but would presumably extend to matters such as the gravity of the offence or the particular circumstances in which it was committed. The expression may also allow the Court, where necessary, to limit the number of persons speaking on behalf of the individual.'

1.2 The origins of section 16

The Criminal Justice Act 1985 brought about a number of significant changes to the law relating to criminal justice. The new legislation was a response to concerns about matters such as community involvement in the justice system, the victims of crime, and violent crime. Some indications of the origins of section 16 can be found in the submissions made by the Department of Justice to the Statutes Revision Committee on the Criminal Justice Bill in 1985[2]. The provision had not been in the original Bill introduced in 1983, nor the subsequent Bill when it was re-introduced in 1984. The 1985 submission states:

'One of the striking features which emerges from a consideration of the imprisonment statistics is the high rate of imprisonment of Māoris (ten times that of the general population). The disparity between the Māori and non-Māori imprisonment rates remains marked even when a comparison is drawn between persons of similar socio-economic status…. Although Māori offending (measured in convictions) is markedly higher than that of the general population, we think that part of the answer to the problem is to place more emphasis on the use of alternatives to imprisonment for Māori offenders. This in fact is one of the major motivations behind the new sentences of community care[3]… It is also proposed that Māori offenders appearing before the Court for sentence should be entitled to have a person who is familiar with the case advise the Court on the offender's family circumstances and cultural background and on other such matters as the Court considers relevant. Such a right would be in addition to the right for legal representation. A further provision should be added indicating the Court has power to allow <u>any</u> offender to call a person to advise the Court on the offender's family circumstances and cultural background and any other matter considered relevant to the Court. This would help to counter any argument that the proposed change discriminates unduly in favour of Māori offenders in comparison with offenders from other racial groups. In our view these provisions would greatly assist to secure the co-operation of Māori people seeking ways to find alternatives to imprisonment. Further consideration will need to be given to this issue before the details of a draft clause can be settled, if the Committee agrees with the approach advocated here.' (Emphasis added)

This extract suggests three things about the intentions of those who developed the policy in relation to section 16 of the Criminal Justice Act (1985):

- Section 16 was clearly linked with the wider aim of the Criminal Justice Act to reduce the use of imprisonment by encouraging the use of community-based sentences.

[2] Quoted in Wells v Police [1987] 2 NZLR 560.

[3] A type of community-based sentence in which an offender undergoes a programme agreed by the court and provided by any person or agency. The sentence was renamed 'community programme' in 1993.

- Those who developed the policy understood that both family and cultural background would be intertwined in the content of section 16 submissions.

- The provision was developed particularly with the Māori community in mind, although it would be available to any offender, regardless of cultural background.

When the Bill was reported back to the House the inclusion of the provision was one of the important changes. The then Minister of Justice, the Honourable Geoffrey Palmer referred specifically to Clause 14A (which was to become section 16 of the Criminal Justice Act).

> *'…The purpose of the new provision is to secure the co-operation of ethnic minorities that at present experience high rates of imprisonment in seeking ways of finding alternatives to imprisonment. Clause 14A has been framed to apply generally to persons of all races to avoid any argument that it favours some racial groups at the expense of others.'*

1.3 Early information about the use of section 16

The first documented feedback about how section 16 was being used appears in Moana Jackson's report 'The Māori and the Criminal Justice System: A new perspective: He Whaipānga Hou'[4]. He stated that 'the sentence imposed on a Māori offender is so often perceived to be the final systemic act in a series of culturally-insensitive or biased steps'. He believed that the Criminal Justice Act 1985 was initially seen by Māori people as an effective way in which they could participate in the process of sentencing. However, in practice the Act had been found to have shortcomings.

Jackson identified two problems with section 16. One was that many Māori people were unaware of the provision and that it needed to be more widely publicised. The other was that the legislation itself had a 'cultural flaw' in that it limited the right to call witnesses if 'for any special reason' it would not be of assistance to hear them. This was reported to be seen by Māori people as unclear and an unnecessary barrier to their right to contribute cultural insights into the conduct of their young and the sanction they should face. The report recommended that this restriction be removed.

In response to Moana Jackson's report, the Courts Consultative Committee made several recommendations about section 16[5]. They recommended that the section be used more frequently, and that a brochure explaining section 16 be prepared and distributed widely. Other recommendations were:

- that the Probation Service should adopt a standard practice of informing defendants and their families of the provision;

- that the Court be advised in advance when a section 16 statement is to be made;

- that the legal profession be instructed in the use and advantages of the section.

---

[4] Jackson, Moana. The Māori and the Criminal Justice System. A New Perspective: He Whaipānga Hou. Department of Justice, 1988.

[5] Report of the Courts Consultative Committee on He Whaipānga Hou. Department of Justice, 1991.

The Department for Courts subsequently produced a pamphlet on Section 16 in five languages, entitled 'How to tell the Court about your cultural background before Sentencing'. The content of the pamphlet is reproduced in English and Māori in the appendices (Appendix one). As well as explaining what section 16 covers, how to use section 16 and what to do during the Court hearing, the pamphlet lists relevant cultural factors that might be included in section 16 submissions. The factors listed are heritage, ethnicity, culture, community ties, Mātua Whāngai, religious beliefs, and community resources.

Further information on the extent to which section 16 was being used appears in a 1989 Department of Justice report[6]. In a study of eight district courts over a six month period, section 16 was found to have been used in only 19 cases, or on average, in one in every 399 cases in which a Māori or Pacific Islander was sentenced. What little use there was of the provision appeared to be concentrated in a few courts. There has been little information collected about the use and effect of section 16 since this study.

1.4 Interpretation of section 16

A judgement of the Appeal Court in 1987[7] has provided significant interpretation of section 16. In the District Court, the appellant had applied under section 16 for members of Mātua Whāngai to be able to address the Court. The District Court Judge had held that the section did not envisage the giving of submissions without taking the oath in the Court by anyone other than the Judge, counsel and the parties to the hearing. The Appeal Court held that section 16 was intended to grant the right to interested parties to speak in Court without the need to go under oath. Section 16 was recognised as having brought about a major change in procedure, where previously only counsel and the accused had a right to an audience in the Court. This case confirms that this section would allow information relevant to sentencing to be presented to the Court informally. It is a means by which families, whānau, and community leaders can have direct access to the sentencing judge. It also recognises that at times a submission by an offender's supporter can add to what can be conveyed in a lawyer's submissions or a probation officer's pre-sentence report.

1.5 The exploratory study

Prior to the research that is the basis of this report, Ministry researchers conducted an exploratory study to identify sources of information, sampling issues and research questions. The study involved discussions with a selection of judges, court staff, lawyers, Community Probation Service staff and community organisation representatives in three North Island Districts. Respondents provided observations of how section 16 was used, perceptions of the usefulness of the provision and sources of information for the main study.

The study found that most use of section 16, in the districts visited, was made by Māori and Pacific Peoples. Section 16 submissions were both oral and written. Where written submissions were made someone was usually available to address the court if called.

[6] Monitoring the Innovations of the Criminal Justice Act (1985). Department of Justice, 1989.
[7] Wells v Police [1987] 2 NZLR 560.

Supporters of the offender and professional advocates made the submissions. Sometimes a lawyer or probation officer informed the judge that someone had been prepared to speak on the offender's behalf. On other occasions, people made submissions without significant preparation, sometimes when invited to do so by the judge.

Respondents generally agreed that use of the provision was not as frequent, or as effective, as it could be. Some respondents felt the scope for its effectiveness, particularly in the High Court, was limited. Some felt that restrictions on time and resources explained the lack of use of section 16. Other reasons for non-use included lack of awareness and lack of understanding of the provision.

Respondents reported that use of section 16 would usually not be identifiable in case or sentencing documents. This indicated to researchers that research based on written documentation would not be feasible. Case studies and surveys were suggested options for further research.

1.6 The report

This report begins with a description of the objectives and methodology for the research. A series of eleven case studies of the use of section 16 are presented. In six of these cases the people sentenced were Māori, in three cases Pacific People, in one case a New Zealand European and in one case a Japanese. The case studies are followed by the findings of a survey of professional and community groups. The report concludes with an overview of the findings and conclusions from all sources of information.

2 Methodology

2.1 Background

Design

The overarching objective for this research was to investigate the use and perceptions of section 16. A two-component structure based on exploratory study findings was used for the research. These components were:

- Case Studies – Eleven in-depth studies of cases where section 16 was used. External researchers were contracted to conduct six case studies focusing on use of section 16 with Māori offenders and three case studies focusing on the use of section 16 with Pacific Peoples offenders. Ministry researchers conducted two further case studies, one focusing on the use by a New Zealand European offender and one focusing on use by a Japanese offender.

- National postal survey – Ministry researchers surveyed criminal justice professionals and community organisations about their use and perceptions of section 16.

A combination of qualitative and quantitative data collection methods were used. It was anticipated that the reliability and validity of research would be enhanced if information was gathered from different sources and by using different methods (triangulation). If diverse kinds of data lead to the same conclusions then more confidence can be placed in the validity of those conclusions[8].

Advisory Group

The advisory group for the section 16 project was established prior to the commencement of the exploratory study. The responsibilities of the group were to assess proposal documents, receive progress reports, advise researchers and comment on draft reports. Initially the group was composed of the Research and Evaluation Manager from the Department for Courts and three policy advisers from the Ministry of Justice (including the Ministry's Māori and Pacific Peoples advisers). The group was expanded at the completion of the exploratory study to also include a District Court Judge, a team manager from the Department for Courts, and representatives from the Community Probation Service, Te Puni Kōkiri, and Mātua Whāngai.

Māori and Pacific Peoples focus groups

During the early stages of the project, consultation was undertaken with the Ministry of Justice Māori and Pacific Peoples focus groups. Both groups provided advice about

[8] See, for example, Chetwin, Knaggs & Young, 1999, p.5.

research with Māori and Pacific Peoples, advice about the focus of the survey questionnaire and access to networks of Māori and Pacific Peoples working in the criminal justice field.

2.2 Case studies

The objectives of the case studies were:

- to present, for a range of cases in which section 16 was used, how and to what effects the provision was used;

- to collect, from people involved in cases in which section 16 was used, perceptions of possible improvements to the provision.

Exploratory study respondents had reported that use of section 16 was usually not well documented. These respondents did however refer to cases where it was clear that section 16 had been used. These observations, and other information about the range of ways that section 16 was used, provided the rationale for using case studies. Eleven case studies were completed.

The exploratory study also found that Māori and Pacific Peoples were the most frequent users of the provision. This needed to be represented in the selection of cases. Therefore, six of the case studies focused on use of section 16 by Māori, three on use of section 16 by Pacific Peoples, one on use of section 16 by a New Zealand European, and one on use of section 16 by a Japanese.

The key informants for the case studies were:

- the offender
- the person who spoke on behalf of the offender
- the defence lawyer
- the judge
- Community Probation Service staff (where applicable)
- community group representatives (where applicable)
- offender's family members and/or supporters (where applicable)
- kaumātua (where applicable)
- victim (where they had taken part in the sentencing process).

A suggested case study structure including questions to guide the case study interviews was developed (Appendix two).

Selecting researchers

The researcher's ability to recognise the significance of the cultural values of the offender and their families was an important consideration for the case study researchers. One reason for this was that offenders and their families were expected to discuss issues that were particularly significant in terms of their cultural values. The researchers therefore needed to be conscious of the cultural values of offenders and their

families. It was decided that, where possible, researchers who were of the same ethnicity as the offender and who had research experience within their communities and the criminal justice system, would be contracted to complete the case studies.

The Ministry of Justice project team sought expressions of interest for the case study research from suitably-qualified researchers. Interested researchers were sent a research brief. Strategic Training and Development Services of Hamilton were contracted to complete the case studies involving Māori. The Family Centre of Lower Hutt was contracted to undertake the Pacific Peoples case studies.

Identification of cases

The second-to-last question of the postal survey to lawyers was "would you agree to our contacting you about the possibility of including a case of section 16 use that you have been involved in, in our case study research?" Respondents who reported recent cases, and agreed to be contacted, were contacted by Ministry researchers. Following this initial contact from the Ministry, contact information for cases involving Māori or Pacific Peoples was passed on to the appropriate contract researchers.

Each team of researchers used a different methodology and for this reason their methods are described separately as introductions to their case studies.

2.3 Postal survey

The objectives of the postal survey were to examine the perceptions of professionals and community groups about:

- the purpose and value of section 16
- the use and effects of section16
- reasons for non-use of section 16
- potential improvements to the use of section 16.

Sampling and access issues

Researchers selected survey respondent groups based on the likelihood that they would have had experience in using or being involved in cases where section 16 had been used. The four types of respondents selected for the survey were:

- lawyers - practising criminal law
- Community Probation Service staff - who worked in court servicing roles
- judges - working in the criminal area
- community organisations - who worked with offenders in court.

Researchers sought regions to survey based on the locations and case-flows of District Courts. The overall sample of courts was selected to represent a range of characteristics including: metropolitan, provincial and rural locations; high and low case loads of Pākehā, Māori and Pacific Peoples; North and South Island locations; and locations with

a High Court. Case monitoring data[9] and population data[10] were used to determine which courts were selected to take part in the research. The final sample of courts was: Auckland (including Auckland Central and Otahuhu), Hamilton, Whakatane, Gisborne, Hastings, New Plymouth, Wellington (including Porirua), Christchurch, and Invercargill.

Identifying potential respondents within the selected regions was a complicated task. As a first step, researchers obtained approvals to survey professionals in each area from the Chief Justice, the Chief District Court Judge, and Community Probation Service head office.

The Department for Courts provided the names of judges servicing District Courts in each survey region. The judges who serviced Whakatane, Hastings and Porirua courts were based in larger centres. Five High Court judges also volunteered to participate.

The names of the Community Probation staff working in court servicing in each of the survey regions were provided by the Community Probation Service head office.

Initially District Courts were asked to supply contact details for judges, community organisations and lawyers who practised criminal law in their courts. However, responses to this request indicated that each court's records differed. Due to inconsistencies in this data researchers sought more consistent and reliable information.

Researchers requested lists of lawyers registered to practise criminal law from the presidents of local district law societies in each area. The information provided was cross-checked with information previously received from courts and a database of potential respondents compiled.

District Court staff and Community Probation Service staff identified community organisations that appeared in their courts on behalf of offenders on criminal matters.

Survey design

A core in-depth questionnaire was developed around the objectives of the survey and drawing on exploratory study experience. The main questionnaire was tailored so each respondent group received a questionnaire that reflected their role. The surveys were then sent to the advisory group for comment.

An early version of the survey was piloted in Papakura. The purpose of the pilot was to obtain an indication of the potential response rate from different groups and to test the questionnaire. The pilot was sent out in September 1999. A response rate of 64% was achieved. Respondents were asked to complete and return the questionnaires within two weeks. Those who did not respond to the survey were contacted to ascertain reasons for their non-responses. The main reasons given were pressure of work and lack of experience with section 16.

[9] Case monitoring data were extracted from the Law Enforcement System (LES).
[10] Population data were extracted from the Statistics New Zealand software package, Supermap.

Following analysis of completed pilot questionnaires, appropriate changes were made. The major post-pilot changes and the reasons for the changes were as follows:

- a different coloured paper for each region to be used to aid survey administration and analysis
- several close-ended questions changed to open-ended questions to reduce the amount of reading required to complete the questionnaire, and to allow more flexibility in responses
- two questions added to the end of the questionnaire to help identify cases where section 16 had been used, for the case study research and
- respondent information requested on the final page of the survey to avoid respondents receiving follow-up letters or phone calls.

A copy of the survey used for the main study is attached as Appendix three.

Main study

Questionnaires for the main study were sent out to the different respondent groups in November 1999. Respondents were asked to complete and return questionnaires within three weeks of receiving them. Respondent details were recorded as completed questionnaires were received. To boost the response rate, non-respondents received a follow-up letter and phone call, two and four weeks respectively, after the first cut-off date. Information on response rates is presented at the beginning of chapter six.

Survey analysis

Researchers developed codes for the open-ended questions, and coded the surveys when approximately fifty percent of the questionnaires had been returned. Data entry was undertaken with SAS FS EDIT[11].

The final question of the survey asked respondents for any further comments they had about the use of section 16. These responses were transcribed, then analysed using a qualitative data analysis programme called Nud*ist[12].

[11] FS Edit is a part of the SAS (statistical analysis software) package and used to manage data entry and database formation.
[12] NUD*IST (an acronym for Non-numerical Unstructured Data – Indexing, Searching, Theorising) is software used for managing and analysing textual data.

3 Use of section 16 by Māori: case studies one to six

Di Pitama
Strategic Training and Development Services

3.1 Introduction

This chapter presents methodology, six case studies of Māori experience of section 16, and a discussion of the findings.

The methodology section focuses firstly on some of the philosophical and ethical issues involved in Māori researchers carrying out research with Māori participants within the constraints and conventions of state-commissioned research. Particular ethical issues in relation to consent processes and whānau expectations are discussed. This is followed by a description of the methods used that were specific to these case studies.

A number of themes emerged from the case studies, and these themes are discussed in some detail after the case studies themselves. These include themes related to the use of section 16 in its current form, as well as consideration of broader issues around the purpose of section 16 in relation to Māori aspirations and expectations.

The case studies exploring the use of section 16 where the offenders were Māori were carried out in several different geographical locations, with whānau located in rural, small town, and urban settings. While the majority of offences were violent offences, they varied both in the seriousness of the charge and type of sentence, with both custodial and community-based options as sentencing outcomes. The ages of the offenders at the time of the offence being committed ranged from eighteen to thirty-two, and five of the six offenders were male. During the course of identifying appropriate cases and carrying out the subsequent studies, more than thirty counsel and community groups were contacted. The interviews that followed took place in locations as diverse as a meat works, a prison, and the back of a fish and chip shop, as well as family homes and judges' chambers. The diversity of locations was matched by a diversity of concerns and expectations on the part of those who took part in the case study research.

In some ways each case study stands alone as the compilation of the experiences and thoughts of those directly involved in the sentencing process, despite the fact that the same key questions about the use of section 16 were explored with all participants. The expectation for each case study was that the researcher would interview the offender, the person who made the section 16 submission, counsel, and the sentencing judge. As the more detailed description of the methods used in these case studies explains, this expectation was not always met. Whānau roles and dynamics were very significant in determining who the appropriate people were to speak with, and how that speaking would take place. This was also a major consideration in terms of interactions around consent processes.

All case studies with the exception of case study two focus on one section 16 submission being made in relation to one set of charges and one sentencing occasion. In case study two the offender had a long offending history, and a long-term involvement with a community worker who made section 16 submissions on her behalf on more than one occasion. For this case study, counsel who had represented the offender more than once and the judge who sentenced her at her most recent court appearance were interviewed, as representative of the other occasions. This is also the only case where the person who made the submission on the part of the offender was not Māori, and where there was no other whānau involvement evident.

The final case study is illustrative of the complexities and difficulties whānau face when engaging with both the justice and mental health systems. In this case the offender's mother made contact with the researcher after counsel had passed the research information for whānau on to her. She wished to meet with the researcher before discussing the issue of taking part in the research with her son, who is currently in custody. She lives in a small and isolated rural town, and the researcher came to her home, and spoke with her, a close whānau friend, and the kaumatua who had supported both women and their sons. This was a meeting that provided some significant insights about the use of section 16, and about the interface between the justice and mental health systems. On the basis of this meeting and further discussions, both whānau and researcher agreed that it would be inappropriate to try and engage the young offender in the case study research, due to his precarious mental health status. For this reason, consent to discuss the case with counsel, and to gain access to pre-sentence reports was not sought, and neither counsel nor judge was interviewed. The interview has been included with the active support of those who did meet with the researcher, as they are keen to ensure that their experiences and insights are not disregarded.

It should be noted that all the whānau who took part in the case studies were whānau who were proactive in their approach to counsel, and who had sought ways of supporting the person who was appearing in court.

3.2 Methodology

Questions about selection of appropriate methodology for research that will inform public policy have frequently focused on the distinction between qualitative and quantitative methods. The selection of particular research tools and methods is largely determined by dominant views and values as to what is real (and important), and how we can find out about it. The privileging of the touchable, measurable, and countable in state-sponsored research has been tempered by the increasing acknowledgement of the value of methods able to provide *'richly textured data'*,[13] such as case studies. In Aotearoa/New Zealand the development of kaupapa Māori research (research with a Māori values base) methodology has presented significant challenges to those involved in commissioning and carrying out research.

Although the terms *'research methods'* and *'research methodology'* are often used interchangeably, those working in the field of kaupapa Māori research are increasingly adopting a useful distinction between these terms made by Sandra Harding. Harding

[13] Morris J 1999:268.

describes methodology as '*a theory and analysis of how research does or should proceed',* and a method as '*a technique for (or way of proceeding in) gathering evidence'.*[14]

Following this distinction, our values, beliefs and ethics as Māori researchers form the basis of our analytical framework, or methodology. It is that methodology that determines ways of working with Māori research participants in a manner which is minimally intrusive, and which allows participants the opportunity to question, critique, or decide on the processes used to gather information.

Kaupapa Māori methodology

The challenges of kaupapa Māori research methodology cannot be met simply by contracting Māori researchers, nor is this sufficient to ensure that Māori needs and interests are protected. Teariki et al contend that research has frequently been used as the 'means of organising and justifying policies which in the case of Māori are used to undermine matters of importance such as mana Māori motuhake' (the independence and autonomy of Māori). A review of the literature about kaupapa Māori research indicates that a key feature of kaupapa Māori research models is discussion and description of Māori concepts of ethicality. These concepts of ethicality raise issues of ethics and relationships with research participants beyond 'social or cultural sensitivity', which is frequently the rationale for using Māori interviewers in mainstream research projects. Codes of ethical practice, whether in research or provision of professional service cannot be seen as neutral. Aroha Durie asserts that *'notions of ethicality can be assumed to be drawn from respective cultural bases rather than being universally applicable'* [15].

Codes of ethics from universities or from professional bodies are largely based in protecting the rights of the individual. Researchers therefore engage in a number of processes designed to protect themselves and provide evidence that they have protected the rights of individual research participants. This provokes the production of a flood of written material – information to prospective participants, privacy statements, consent forms and the like.

This focus on the individual, and privileging of written documents over oral statements, does not adequately address principles of ethicality for Māori, and may at times prove to be invasive and unsafe for whānau. A Māori ethicality framework encompasses the protection of the interests of both groups and individuals. This requires the researcher to take great care when working with whānau and individuals, in order to balance individual and group rights and perspectives[16]. It requires focused listening and observation before speaking or acting. It also demands the allowance of appropriate time frames to meet with prospective research participants kanohi ki te kanohi (face to face), and to be questioned as a researcher about your own interests and positioning in the work you are carrying out. Māori whānau and individuals are diverse[17], and the cultural competence of the researcher rests on being able to meet and respond to this diversity with aroha (love) and respect. There is also a need for participants to be given a clear understanding of the purpose of the research, and of its likely benefits. A key question asked by almost all prospective Māori participants for the section 16 case

[14] Harding S, cited in Smith L, 1998:19.
[15] Durie, A. 1998:257.
[16] Ibid, 261.
[17] Durie, M. 1995:15.

studies was – *'how will this research help Māori?'* Most also answered this question for themselves, in their discussions about how unlikely it was that people involved in making policies or laws would understand Māori experience of *'the system'*. They saw this understanding as necessary if any change at all was to occur within this *'system'*.

As whānau and individuals, most also expressed satisfaction with the process of telling their stories, as a way of helping them reflect on and make sense of their experience. This kōrero (talk or discussion) was by no means confined to the use of section 16, as some had questions about their experiences from the time of arrest to imprisonment that they wished to explore with the researcher.

In the course of carrying out these case studies the boundaries of whānau and individual rights were constantly negotiated, which required some flexibility in the processes of contact and consent of participants. In some cases it was clear that the offender was prepared to participate in the research, but that the decision about participation was to be made at the whānau level. In other cases the offender played a peripheral role in decision-making about the research, but agreed to participate after whānau had met with the researcher. The steps taken to protect the integrity of these whānau and individuals, and the research process are outlined below.

Research methods

- Identification of cases
- Communication, contact, consent
- Interviews and follow up

Identification of cases

Due to the preliminary work carried out by the Ministry of Justice, a number of possible cases had already been identified as suitable for case studies, with counsel as the initial point of contact. This presented some difficulties, as it positioned counsel between the researcher and prospective participants, and meant that counsel had a key role in the process of engagement. The Ministry also provided the names of a number of community organisations and organisations working with Māori offenders, which were followed up by the researcher. Primary difficulties in case identification were:

Lack of clarity around what constituted a section 16 submission

Community groups in particular did not have a clear view of what constitutes a section 16 submission. Some cases they suggested involved speaking for the person in court at times other than sentencing. Community organisations and some counsel also confused section 16 with providing information for the pre-sentence report. Several organisations heavily involved in court work worked primarily with cases that resulted in either diversion or a section 19 discharge without conviction. These cases were not eligible for consideration, although they involved a spokesperson in the court on some occasions.

Lack of recording

Very few written records confirming that a section 16 submission was made are accessible. Frequently people address the court in support of whānau members without ever hearing of section 16, and neither counsel nor judge may consider this informal speaking as a true section 16 submission. This often occurs without planning or preparation – one judge indicating that if no one has spoken for the offender she asks if there is anyone there who wishes to do so. Counsel may simply note that someone spoke for their client, but the content appears to be rarely recorded.

Aged cases

A number of the cases suggested took place more than five years ago. This meant that counsel and organisations rarely had current contact details for offenders or whānau. Files that counsel had were archived, and few if any records could be obtained for older cases. In the few where contact could be established, memory of the events was minimal, particularly on the part of counsel.

Communication, contact and consent

Communication

In order to provide counsel and/or community organisations with background material about the research, an information set was prepared, and either faxed or mailed after preliminary phone contact had been established. This included a letter outlining the assistance required from counsel in making contact with offenders, Ministry of Justice information, and information for whānau and offenders.

The information prepared for whānau and offenders was in two parts. The first – He panui mō ngā kaiwhakauru (information for participants) – gave information about the purpose of the research, who the researchers were, and how to contact the researchers (Appendix four). The second – Ngā pātai (questions) – took the form of brief questions and answers about the research process (Appendix five).

Both whānau and those who had been sentenced were referred to as kaiwhakauru (participants). The label 'offender' should not be used to denote the whole identity of an individual, and in this instance we were seeking participation of individuals who had stories and experience that were relevant to our study.

Single page information sheets were also prepared for judges, counsel, and victims advisers.

Contact

Contact methods varied from case to case. Some counsel were only prepared to mail out information to their clients and await a response. Only one response was forthcoming that way. Other counsel and the community groups made telephone contact with their client, or with the whānau member who had taken the most active role in supporting the client. In most instances these were Māori women, the mothers or aunts of the client. Counsel or community group members offered the background

information, and asked for permission for the researcher to make contact and explain further about the research. Prospective participants were told that this meeting would be an opportunity for them to meet the researcher and gain further information so they could decide whether they wished to take part in the research. In some instances the level of interest was such that they rang the researcher themselves. Others agreed to be contacted by the researcher, and some declined to participate at this point.

Consent

Although consent forms were part of the information set made available, issues of consent were discussed in person with each whānau and offender. Verbal permission from the offender was deemed sufficient for the researcher to meet with the whānau and/or the person who made the section 16 submission on their behalf. The written consent forms (Appendix six) were used to confirm that the offender agreed for the researcher to interview their lawyer, and for the researcher to obtain a copy of their pre-sentence report if available. Whānau and offenders taking part in the research decided the time and place of each meeting with the researcher, and could decide who they wished to have present.

Interviews

In the initial research design and proposal, key informants were identified as:

- the offender
- the person who made the section 16 submission on their behalf
- the lawyer
- the judge.

In all cases, with the exception of case study two, other whānau members were also spoken with. A narrative inquiry method was used with offenders, whānau, and those who made the section 16 submissions, with participants being invited to tell their stories. This kōrero was taped with the permission of participants to allow the researcher to capture all the kōrero, and to focus on the person telling their story.[18] Karakia (prayers), kai (food), and cups of tea were all part of the process of telling the stories, as were laughter and tears. Strong feelings were expressed, and many stories were told with evident pain.

The offender was interviewed in all cases except for case study six[19]. These interviews took place in a prison, a mental health support house, a meat works, a school, and in a whānau home. In four of the six case studies the offender played a peripheral role in the preparation of the section 16 submission, with older whānau members making the decisions about how this would be carried out.

In five of the six cases the person who actually made the section 16 submission was a kaumatua (elder), with whakapapa (genealogy) connections to the whānau. However it was clear that other whānau members played significant roles in the development of the

[18] One interview with an offender was carried out at his work place, at his request. We did not tape this kōrero, as we were clearly visible to his work mates, although the discussion could not be overheard.
[19] See case study six. Whānau participated, but counsel and judge were not interviewed.

section 16 submission. The women in each whānau carried out most of the networking and organising involved in bringing people together and communicating with counsel. These mothers, aunts, sisters and sisters-in-law expressed a number of concerns about their experience of the justice system.

In case study one and case study five the kaumatua who made the submission was not interviewed. In case study one the offender was in custody, and his parents invited the researcher to meet with them and 'some of the whānau'. As our whānau hui (family meeting) developed it became clear that the whānau had decided prior to my arrival that they wished to meet with the researcher without the kaumatua, so they could express their dissatisfaction with the way the submission had been made. They would not have felt free to do this in his presence, as to do so would have been to takahia (trample) on him, and what had been his genuine desire to help and support the whānau. In case study five, almost four years had elapsed since the sentencing, and the whānau did not wish there to be a demand placed on the kaumatua. They were happy that he had fulfilled his role on the day, but believed they could convey all the relevant details. In both of these cases the wishes of the whānau were respected, and both whānau were generous in the time and thought they gave to describing their experiences.

Counsel and judges

Counsel were interviewed after written consent had been obtained from their clients. A list of guide questions was sent to both counsel and judges to allow them to prepare for the interviews and check relevant records. A semi-structured interview format was followed.

Follow–up

Interview transcripts were made available to all whānau and offenders, and to those counsel and judges who requested transcripts. The draft case studies were also sent to whānau for feedback, and to check that no identifying details remained. Participants were told that the tapes would be returned to whānau or destroyed, depending on the preference of the participants. All those who took part were informed that they would receive a copy of the final report.

3.3 Case study one

W was charged with aggravated robbery following the armed robbery of a bank in a small North Island town. A co-offender was also involved. W was 24 years old at the time, and worked some hours, as needed, in the family business. W comes from a close whānau, held in high regard in their local community. W has a partner and child. W also has gang affiliations. He has a history of minor offending, but no previous convictions of a serious nature. Despite these previous offences and his gang affiliation, his whānau described W as well respected in his local community.

> *…because W you know his reputation amongst the young people around here, and even the old, even when he goes out to work with his father and that, how would you put it – they all respect him. He's a guy that can relate to anybody. Even the police know him and they can talk to him. A couple of instances he got involved with the police – he went straight down and apologised to them.* (Whānau Hui)

W entered an early guilty plea to the aggravated robbery charge. He was sentenced to 5 years and 9 months imprisonment, and is currently in prison.

Initiating section 16

W was assigned counsel under legal aid, and it was counsel who informed the whānau that someone from the whānau should speak at the time of sentencing. Counsel met with W's parents and partner on more than one occasion to discuss this and other matters. Counsel told the whānau that only one speaker would be required, which was a source of some concern to W's parents, given the number of people who wished to speak for W, and their concern that the judge receive full information. There was substantial whānau support for W, with whānau including several kaumātua filling the public gallery of the courtroom for sentencing.

> *I must say there was more than one who were willing to stand up that day … there were a lot, there were kaumātua that day who were more than willing to say something on behalf of W …But I get an impression you've got a time limit and let's move onto the next case sort of thing.* (Counsel)

> *It wasn't about getting him off, because we knew what he did, and he knew what he did, but it was about making sure that the information we were giving and the information that W or his lawyer needed was clear. And we were getting it to them.* (Whānau Hui)

Whānau and hapū structure and relationships determined which of the many people willing to speak actually made the section 16 submission. The kaumatua who spoke had some experience in an advisory capacity with the Community Probation Service, and ran a marae-based programme suitable for offenders. However, discussion with the whānau indicated that the primary factor resulting in him being the speaker was:

> *More because he is classed as <u>the</u> kaumatua. In seniority he is the older one.* (Whānau Hui)

There is a close whakapapa relationship between W and the kaumatua who spoke for him. Counsel spoke with the kaumatua briefly about the sort of information that would be useful for a section 16 submission.

The use of section 16

The trial and sentencing were carried out in a small court about thirty minutes away from W's home town. His whānau and hapū supporters mostly lived rurally in the surrounding district. Sentencing was abandoned on the first sentencing date because the pre-sentence report had not been done. The whānau found this particularly stressful.

> *You know you work yourself up to these things. I guess you go along expecting the worst I suppose and then to be told it's not going to be – because they haven't got their papers together and then you have to come back in another 2 weeks time! It's quite an exercise as I say getting the older people together for a specific day you know. We have to understand a lot of our old kaumātua today are committed in a lot of areas, some of our rangatahi too. It's trying to work in I guess for like a court appearance and to get them there for a designated time. You get them to the court and then they say 'look because this hasn't happened can you come back next week or whenever'.* (Whānau Hui – Father)

When sentencing did occur, the section 16 submission was made following the defence submissions. It was during the course of the defence submission that the judge found out a section 16 submission would be made.

The speaker introduced the whānau in Māori, and then spoke in English. The whānau and the offender were unhappy with the submission, because they felt that the information they wanted the judge to hear was not adequately presented. They felt that their options were limited by only having one speaker.

> *The kaumatua could have stood up and spoken about the family, because he is part of the family. But he didn't even. No character reference about the family.*
>
> *But I think being in court, you know in that unfamiliar surroundings might have thrown him off. But you could say that might have been a reason why he wasn't focused on speaking about what we thought he should have been speaking about.* (Whānau Hui)

Both whānau and counsel believed after the event that the speaker would have been more comfortable speaking in te reo (Māori language), with the support of an interpreter.

The effect of section 16

Key informants had differing views as to the effect of the submission on the sentencing outcome. Both whānau and offender clearly hoped that the submission would lead the judge to consider a shorter sentence, or a short period of imprisonment followed by some sort of community programme. The whānau also felt very strongly that W was disadvantaged by his guilty plea – in that the Crown's description of events then went unchallenged, and W ended up *'wearing all sorts of stuff that wasn't even his'.*

Offender's view

Factors limiting the effectiveness of the submission:

- quality of the submission itself
- only one person to speak for him
- legal aid representation

W believed that the submission had some effect on the sentence outcome, in that he was expecting up to seven years imprisonment, and he received five years nine months. He was disappointed however that alternative options to imprisonment were not clearly described by the kaumatua who spoke and that the submission lacked focus:

> *He was talking about something that wasn't really to the point or could have an effect on the judge. He wrote up a proposal for that marae-based programme, but when it went to the judge, like he never said anything, he never explained it. It still wasn't convincing even to me, so if it wasn't convincing to me it wouldn't have been to the judge either.*
>
> *I think the problem like with all Māori is that they have a problem in talking to authority eh, you know like judges and that, and that's where a lot of Māori fail in the system in that they can't speak what they want to say.*
>
> *What would I have wanted? I would have been happy to do like two years jail and then another year back on the marae based under conditions, and that was part of what I was hoping Uncle would put across.* (W)

W felt that other kaumātua and whānau members could have been more *'to the point'*, although he was thankful for the efforts of the speaker on his behalf, and for the support he received generally. He wrote letters of thanks to those who came to support him in court.

He felt that counsel showed little enthusiasm for the marae-based option, and that the counsel should have explained to the judge that there were more whānau who wanted to speak.

> *Well probably because he was only getting the legal aid wage he didn't want to go full out for me, which was quite **** really. He should be there to help our people.* (W)

Despite not gaining the outcome he sought, W believes in the value of section 16, and of kaumātua and whānau involvement at sentencing.

> *I already knew that my charge was a serious charge and I knew that I was going to be doing time. But for other people with different cases it's a good thing to have a kaumatua standing up like for drink driving or for m.a.f.[20], it's good to have kaumātua to stand up for them. Because really those sort of things – you don't have to do time for them, your people can sort you out.* (W)

[20] Male assaults female.

Whānau view

Although the focus of the whānau hui was the section 16 submission, whānau discussion ranged across their experience of the justice system in general. The hui for the research was marked by the deep pain they continued to experience as a whānau. They were disappointed with the submission that was made, and the kaumatua who actually made the submission did not attend the hui, so that they could speak freely about this.

Key issues in relation to the effect of the section 16 submission and sentencing were:

- unfamiliarity with the court process
- time constraints and limitation to one speaker
- the way speaking rights within whānau, hapū and marae may impact on who speaks, particularly where the number of speakers is limited
- offender could not verbally respond or acknowledge speaker or support
- closure through physical contact
- the impact of the guilty plea.

A repeated theme in the whānau hui was unfamiliarity with the court process, including the making of the section 16 submission. The whānau did not receive the Department for Court's pamphlet about section 16.

> *I guess another area is how fast things happen, and not knowing your rights or what you should do.*
>
> *Well not being familiar with the court procedures you don't know if you can ask the lawyer.* (Whānau hui)

Whānau felt that the limitation to one speaker was a real disadvantage.

> *What I'm saying is to be fair to him they should have decided if it took all day so be it, but I feel because of the way the system's set up . . I knew there were another 3 or 4 who would like to have stood up that day but (counsel) advised us just to let the one speak in support of W and that's what happened. I just feel they were denied the opportunity to speak on his behalf.* (Whānau hui)

There was considerable discussion of the impact that being limited to one speaker had in the context of whānau and hapū relationships.

> *On the day we were given the option to have one speaker. Which would mean in some areas you have – this is the one it will be – and it may not be the choice the family would want.* (Whānau hui)

The view was clearly expressed that a whānau tightly integrated into wider whānau and hapū relationships would not 'takahia' (trample) on kaumātua in the interest of putting forward a younger speaker or one more articulate in English. The strength of kaumātua support in itself gives a message about the offender and his whānau, and the level of support available to them.

> *So it may take three or four speakers before you get to the one the family feels comfortable with. And I don't think the system allows for that, like they say they want to be appropriate and sensitive and all these things, but I don't think they actually accept the whole concept.*
>
> *Of course there will have to be a limit – like maybe to the time of speaking or things like that, but just to enable the different people to be able to live out their culture. And if it's got to be in an unfamiliar setting at least let them take their culture with them into the unfamiliar setting, or their process with them.* (Whānau hui)

In keeping with this the whānau would also have appreciated W being able to speak briefly to acknowledge the support of the speaker and others in the court. The whānau were also hurt by not knowing how to respond once the sentence had been pronounced:

> *You didn't know if you could say something to him just to let him know you were there, not even afterwards you know. He just walked out and the courthouse emptied.*
>
> *F(mother) broke down outside the court and I'm sure she would have liked to have hugged him. I'm pretty sure we would all like to have, before he walked out that door given him a hug.*
>
> *It's important that because life goes on for the rest of us. With that sentence he's got life planned out for him, but for the rest of us … We didn't get the opportunity to say or do something, and the loss…* (Whānau hui)

W's guilty plea was seen as denying the opportunity for the judge to hear a different description of the offence from that offered by the prosecution, and the family found it particularly painful that matters of fact or detail raised at sentencing could not be contested. They felt that the guilty plea to the charge had meant his role in the offence was exaggerated, and that this had a detrimental effect at sentencing that was evidenced in the significant difference between the prison terms imposed on W and on the co-offender.

Counsel's view

Counsel believed the judge heard the submissions 'respectfully and politely'. Counsel in this case was Māori, and keenly aware of the time it would have taken to develop a consultative process that would satisfy whānau aspirations.

Counsel's recall of the key points made in the submission was:

- that the whānau did not condone what had been done
- what the whānau and hapū could offer in terms of work and supervision
- programmes and role models available to W.

On reflection, Counsel felt that the kaumatua would have been more comfortable and persuasive speaking in te reo.

> *If I had spent more time with K (kaumatua) and assessed him closely, I would have taken the opportunity to have a court-appointed interpreter present, and had him refrain from speaking English, and possibly had further members of the actual whānau speak in English to complement what K was offering from the whānau and hapū.* (Counsel)

Counsel believed that the effectiveness of section 16 submissions was limited by a lack of resources.

> *Time, money, particularly speaking with Māori because you spend a lot of time. In some respects you're disadvantaged once again if you're a Māori and you want to make those submissions because we aren't resourced.* (Counsel)

Although Counsel stated that he reserves his use of section 16 for the more serious cases, he also indicated awareness that for more serious offences it was also more difficult to achieve any flexibility in sentencing. Contrary to the whānau view, counsel believed that the early guilty plea was helpful in achieving a sentence of less than six years.

> *I think that's what, if anything, cranked it down, was his early plea, and his co-operation with the police. I don't think the judge gave any credit for those section 16 submissions which I found disappointing.* (Counsel)

Counsel also felt that the whānau was disappointed 'that what they offered to the courts was effectively ignored'.

Judge's view

The judge was of the view that a section 16 submission always gives more information for sentencing. He has a particular interest in hearing about family background, and what alternatives to prison options the whānau can offer. He stated that the effectiveness of any section 16 submission is always enhanced by giving the bench prior warning that a submission will be made. That was not done in this case:

> *It can be quite un-nerving as a judge … and the first time that you are aware that someone is going to make a section 16 submission is partway through the defence counsel's submissions to you. You don't get advised in advance, the court staff don't tell you because quite often they don't know – and bingo! Daunting is not the right word, but you feel that you can't give adequate consideration to what people are saying because you actually have to make a decision there and then. Sometimes you can stand the matter down and think about it, but you do have time restraints. I certainly think there are major advantages if the judge can get the material in advance, always.* (Judge)

The judge also indicated that there is virtually a 'stratified sentencing pattern' for serious offences such as aggravated robbery and rape, that is largely determined by the stance of the Court of Appeal. In this case an early guilty plea, the family factor, and the section 16 factor were all given consideration, although the judge was clearly of the view that there is very little flexibility possible.

> *You can't really depart terribly much from the guidelines or one side or another is going to have a go at you. And this has an inhibiting effect in terms of saying, well these people know the offender far better than I do and therefore you should take a good deal of notice of what they've got to say and reflect it in your sentence. The Court of Appeal said 'well that's all very well BUT…' (*Judge)

The judge also would have been prepared to hear more than one speaker, with the proviso that the submissions be co-ordinated by either whānau or counsel. He suggested that in cases such as this, counsel should, where possible, inform the judge prior to sentencing that section 16 will be used, and outline the form that this will take. If it is likely that section 16 submissions will be lengthy then the court should be informed so this can be allowed for in scheduling. In relation to the offender acknowledging support speakers, again he would allow it, with certain conditions.

> *If the protocol is the person responds, the person responds, but that will not mean that I want a political speech from the dock, and it doesn't mean that I want a second set of submissions to me, it's doing what you tell me it should be doing.* (Judge)

The judge was clearly receptive to whānau being allowed to express their views in relation to the offender, but also pointed out that in some cases the description of the offender presented by the whānau is difficult to reconcile with the offender and their crime. He emphasised that whānau needs and interests in the outcome for the offender need to be balanced with the public interest, particularly for crimes where 'the public is the victim'.

He also commented on the difficulty that many kaumātua and whānau have in speaking in a court environment where the surroundings may be intimidating for them.

The five years nine months sentence imposed was at the lower end of the sentencing parameters for aggravated robbery. A non-custodial sentence could not be considered in this case.

Conclusion

The perception of both whānau and offender in this case was that *'things could have gone better'* at sentencing if they had been able to afford private legal representation. To some extent this perception was supported by counsel's comments regarding lack of resourcing and time to spend on preparing the section 16 submissions.

Although the judge had very little latitude in deciding on an appropriate sentence, he was clearly of the view that section 16 submissions can best be granted proper consideration where the judge knows submissions will be made in advance.

It was apparent that inexperience of court processes for the offender and his whānau meant that they were frequently confused and worried about their experience of the justice system, from the time W was arrested and charged to the time of sentencing and imprisonment. As a result the whānau in particular suffered many hurts and humiliations in trying to do their best for their son. Some of this hurt could have been spared if whānau and offender had been given a clear explanation of the issues surrounding sentencing for aggravated robbery. The presentation of the marae-based programme as an alternative to a period of imprisonment was unrealistic in the current sentencing climate.

Clearly resourcing is an issue here. Although, as the judge in this case suggested, *'section 16 submissions don't happen every day'* it is true that preparation of a submission with a whānau may be extremely time consuming. This may be particularly the case when the

lawyer is Māori, as whānau expectations of counsel's involvement with whānau will be high. More time spent with the whānau would have allowed them to explore their options for making the section 16 submission more fully. This may have allowed them to feel that all their issues were expressed at the time of sentencing. For a respected working family the section 16 submission time was one that also represented an opportunity to publicly show that their son didn't come from a family of *'down and outers'*. For them sentencing also marked the time when the loss of a son and brother for a significant time period was determined, and there was little sense of closure for them in the way that sentencing operated.

3.4 Case study two

Special note

This case study involved several section 16 submissions made by the same person, over a significant time period. The person making the submissions was not Māori, but has extensive networks in the Māori community. She has worked in her local community for many years, and her work is held in high regard across different sectors of the community. In the preliminary stages of exploring case options for this research, people from different sectors said – 'Oh – you should talk to A'. When we did talk to A she consulted with S, the subject of this case study, and once both A and S had the opportunity to discuss the research fully, they agreed to take part. As A had made more than one submission on S's behalf, we agreed to focus on the most recent submission. Counsel involved had represented S through legal aid on more than one occasion. The judge interviewed was the sentencing judge for S's most recent sentencing, and S had appeared before her several times.

S is thirty years old with an offending history spanning a ten year period. During this time she made over twenty-five court appearances for a range of offences, including drug, driving, and dishonesty offences. S has three dependant children, the youngest of whom is disabled. She was subject to violence and abuse as a child and left home at fourteen. During her teenage years and over the period of her offending S was heavily involved in gang life, and a regular victim of domestic violence. A feature of S's contact with the justice system is that she has never received a custodial sentence, despite her persistent offending.

Section 16 submissions were made on S's behalf on several occasions. On each occasion the submission was made by the same person. A has appeared in court with S on numerous occasions. A and S met through S's son. A was the medical social worker assigned to visit gang headquarters and establish contact with S and her partner to ensure that their son received the care he needed.

> *We met because I taught her multi-impaired son. Because when he was born the specialist said he was profoundly deaf, totally blind, club foot and a very delicate premature born at 26 weeks. And S was in a gang situation and these young women were very badly treated.* (A)

Over the years a close trust relationship has developed between S and A. Due to her family background, S had limited contact with her whānau, and they were rarely available to offer support. A was also one of the few 'professionals' who could break through to S, and who was able to work within the gang setting.

> *I got on well with the guys and that. For being a Pākehā I wasn't afraid to go into the gang. I had done criminal psychiatric work with patients in Attica Prison, and lived and worked in the Bronx for some time. So I wasn't afraid of these young men and they respected me for that. You know – make A a cup of tea!* (A)

A and S developed a lasting trust relationship:

> *I thought people come and go – but she never left. It was only her job to come out and see our boy and then she got closer and closer...*

I really don't like going to anybody else. I always go to her – but now I try not to trouble her. (S)

In addition to her paid work A has worked extensively in her community with gang members and young offenders, setting up and managing support and rehabilitation programmes.

Initiating section 16

A and S were in regular contact due to S's son's ongoing needs. Whenever S had to appear before the court, A would go with her.

I'd speak if I could to the lawyer and the probation officers – they all knew me. We worked together as a team. And I learnt a lot. I became an expert at helping people, and made it my business to find out what was there for them. (A)

On some occasions counsel would arrange for A to speak for S. On others the submission occurred in a less planned fashion.

If the judge asked was there anybody to speak on behalf of me – and I'd say A – and then she'd stand up and give her background and say where she's from, and that my child was at -----. And I was lucky I had her behind me or otherwise I would have done a jail term. (S)

The judge interviewed regarding S's court appearances indicated that she frequently checks to ensure that anyone in the court who wishes to speak on behalf of an offender has been given the opportunity to do so. She was very open to hearing from A because of what she described as her 'proven track record in dealing effectively with people'. She considers family and community input as a vital means of providing a judge with information that might not otherwise be heard –

They can say things that counsel can't or won't – and that the person can't say for themselves. (Judge)

Several of S's pre-sentence reports during this period describe her as 'emotionally fragile' and 'under pressure'. S herself felt unable to explain her situation to her lawyers, or to a judge where given the opportunity.

I suppose she (A) knew what to say. I didn't know what to say. Sometimes I broke down in court and I've ended up in Carrington having a rest. It's just when my past is brought up. (S)

A's presence when S was required to talk to counsel or Community Corrections was clearly beneficial. Counsel described A's role as a 'bridge role' between him and S, adding this was vital due to S's general mistrust of anyone who was part of 'the system'. A's experience of the court system and her ability to speak freely meant that she did not need counsel to spend time with her preparing a submission.

A did not prepare written statements or notes, but spoke out of her knowledge of S and her circumstances.

The use of section 16

A's key concern was always the welfare of S's children, and this was a feature of the section 16 submissions she made on S's behalf. She also believed that S had the capacity to change, given appropriate support. A was also confident in the courtroom.

> *I didn't want her to be put away for her children's sake. They needed their mum because their life was very insecure, you know, living in a gang situation. And I just had a lot of aroha for her …*
>
> *She came right out with me – you know – out of the dock. She had a very sad young life, such a sad life – oh it just went on and on, and I could always see the goodness in her – that one day she would make it.* (A)

A was able to provide a sentencing judge with details of the community programme and supervision she was able to provide for S, and describe how this would ensure ongoing care and contact for the children. The community programme included a range of life skills, including parenting skills and budgeting. It also provided driver's licence education which helped S obtain her licence. S's partner was in prison for seven years, and A was determined that the children would not lose both parents.

The judge recalls discussing programme possibilities with A at the time of sentencing, and welcomed the opportunity to gain an insight into S's circumstances. She described her views regarding this as follows:

> *I'm always mindful that many, if not most of the people we see come from backgrounds and worlds very different to our own. How can we possibly understand what has brought them to this point if we don't seek to hear from people close to them? They can offer a different quality of information to that offered by counsel. A's officers of the court [and] counsel, have certain responsibilities to their clients, but usually they don't have the knowledge of or commitment to a person that a family member or member of the community may have.* (Judge)

A also had insight into the dynamics of gang life, and the limited control S had over her actions and decision-making.

> *She knew about being gang-affiliated and what comes with the gang. You do as you're told otherwise you're going to get it – I got a hiding anyway whether I done good or bad, I still got it. She'd tell me there's better – there's better, but I didn't know any better – and I was living in fear, and I didn't know how to start again.* (S)

These were factors that S would have been unable to discuss either with her lawyer, or in open court if given an opportunity, as this would have further jeopardised her safety.

According to A, her style of addressing the court was *'impulsive and from the heart'*. Both counsel and S felt that A was able to convey a considerable amount of relevant information about S's background without embarrassing her. The judge concerned was open to receiving section 16 submissions without prior or formal notice, and considers that emotion has a real place in court proceedings.

Justice is not conducted in a vacuum – and not in an emotional vacuum. People need to be heard and deserve to be heard. (Judge)

The effect of section 16

Given S's extensive offending history, and the nature of her offending, a period of imprisonment was very possible. One of several pre-sentence reports for 1996 indicates this:

It is evident that S is a product of her turbulent environment. As such she has been provided [with] sufficient opportunities to address her behavioural problems. Despite this, she continues to be implicated in criminal/traffic offences. I believe S is at a juncture in her offending where imprisonment would not be an inappropriate sentence. (Pre-sentence report, August 1996)

The report goes on to propose a suspended sentence. Despite offending several times subsequently, this sentence was never activated.

S is of the view that without A's ongoing support she would have done a jail term 'on a few cases'. She also enjoyed and believed she benefited from the programmes and counselling A worked to put in place for her.

She stuck me on a few programmes like LEAP[21] and counselling – I did a lot of counselling – she just more or less gave the information to me about people that she knew would be able to help me, and being in my situation that they'd be easy to talk to. (S)

Counsel suggested that it was not the actual use of section 16 and the content that had the most effect, but that *'A added credibility'*. In counsel's opinion it was this credibility and her ability to outline the LEAP programme and potential programme benefits for A and her children that made her submissions so effective. Parenting skills was a component of the programme 'which was of particular interest to the judge.'

The judge was clearly of the view that both A and S's counsel were known and respected in the wider community as people of integrity. She acknowledged that this strengthened her confidence that the programme option would be followed through on. She was also clearly of the opinion that wherever possible non-custodial sentences are preferable to imprisonment.

Frankly I will avoid imprisonment wherever possible, as I don't believe it helps. There are many times of course when it is unavoidable due to the seriousness of an offence, and in order to fulfil a need for deterrence to be seen publicly. (Judge)

[21] LEAP was a community programme offering life skills, parenting skills, budgeting, driver education, and the opportunity to build community networks.

Pre-sentence reports show A's ongoing support in ensuring that court-ordered sentences were complied with worked in S's favour. It meant that the court could have some confidence that S was prepared to take up the help offered to her.

Reflections

Counsel considered that A's ongoing support for S was the deciding factor in preventing her from receiving a custodial sentence during the period of her offending. He also indicated that he did not use section 16 very regularly as frequently there is no whānau support.

> *If there are no whānau there's very little to say. Someone like A is fairly rare. Often whānau don't have the knowledge or confidence, and the supports aren't available to make it work.* (Counsel)

The long-term effect of the submissions was that S stayed out of prison and was there for her children. The programmes also taught her new skills and ways of thinking. S is no longer with the father of her children or a victim of domestic violence. She gained her first job recently, at the age of 30. She has not re-offended for 2 years. A is officially retired but maintains close contact with S and her children.

In S's words –

> *It's all done, all gone, and it's behind me, and I wouldn't wish that life on anyone, especially my daughter.* (S)

3.5 Case study three

> *M has a mental, a medical, and a substance abuse problem. At this point in time his main problem is his substance abuse dependence. Controlling his psychotic and aggressive behaviour has been difficult because he is unable to stop his use of marijuana.* (Psychiatric report)

M appeared before the court on several charges related to the same incident. He was charged with assault on a child, threatening to kill, and intentional damage. He was in his early 30's at the time of the offence, with an offending history including excess blood alcohol, wilful damage, and disorderly behaviour. M also has a lengthy history of involvement with the mental health system, with more than 30 hospitalisation episodes. He has been diagnosed as suffering from schizo-affective disorder, and uses cannabis extensively.

Counsel described the circumstances of the offending as *'almost bizarre'*.

> *In other words his criminal culpability was at a minimal point. In that he was psychiatrically ill, he was drunk, he'd been off his medication, he was letting 'normal' people know there was a problem, that he had these feelings of doing harm and he wanted to get to the hospital.* (Counsel)

While in this state, M was caring for eight children. He ended up violently shoving a two-year old child in the back, screaming aggressively, and smashing a door. M had to be restrained with the use of pepper spray.

Initiating section 16

Counsel was contacted by M's mother and step-father who expressed dissatisfaction with *'the system'*, and with the mental health system in particular. The family also approached community corrections and the local kaumātua council to try and arrange a treatment programme for M. A kaumatua with extensive experience of both court and mental health systems was part of a conference at court, and agreed to speak for the whānau. The kaumatua involved had known M since he was 14 years old, and had been his softball coach for several years when M was a teenager. Prior to sentencing, several programme options were explored with the Community Probation Service.

M's mother felt that it would be *'too upsetting to talk ourselves',* so was grateful for the support of a kaumatua who had known M and the whānau for many years. She was anxious for her son to receive treatment rather than return to prison. M was unwell and heavily medicated at the time of sentencing. He has little recall of events surrounding his court appearance for these offences.

> *At that time I didn't really know (counsel) that well – like he was somebody just to fill in sort of thing – but I never explained myself or the things that were in my mind which I needed to talk to someone about. I didn't know what was going to happen to me eh – hang me?* (M)

The kaumatua who spoke for the whānau was very concerned, believing that M wasn't in a position to make decisions, and that both M and the whānau needed help to express themselves when speaking with the lawyer.

> *Our people don't understand the system or the processes – they get confused and upset. I don't think the lawyer fully understood it.* (Kaumatua)

The use of section 16

The section 16 submission was made orally after defence counsel had made his submissions. The focus of the submission was the whānau preference for a treatment programme rather than imprisonment. The kaumātua kaunihera (council of elders) could not offer a treatment programme themselves.

> *We didn't think we could monitor his medication and his drug-taking, but we were prepared to find him treatment or a placement outside of prison. We were looking like for Hanmer Springs or the Bridge – they need to be somewhere where people respect them for what they are.* (Kaumātua kaunihera)

The kaumatua also emphasised the level of whānau support there was for M, and talked about his earlier life and outstanding sporting ability.

The pre-sentence report indicated the difficulty of finding inpatient treatment to deal with M's cannabis addiction as *'many drug treatment centres do not accept clients who have a psychiatric condition'*. Both the pre-sentence report and psychiatric report described M's unwillingness to accept that his cannabis use was a problem.

The effect of section 16

At the time of his sentencing M was considered well enough to be sentenced, and was not subject to a compulsory treatment order. He was sentenced to six months imprisonment and twelve months supervision. The judge made little reference to the section 16 submission in his sentencing judgement, referring primarily to the psychiatric report.

> *You are entitled to early credit for your guilty plea… You suffer from schizo-affective disorder. Your main problem, however, is substance abuse. You smoke about 12 joints a day. Counsel alerts me to the difficulties you experience. You get some credit for that. You also offer apologies. You feel that cannabis helps your psychiatric condition. I note that you are an excellent sportsman, however I have concern for the safety of the community, and as I see it, you represent a danger to the safety of the community. I cannot be satisfied that if you were offered a community programme, people could stop you from using cannabis.* (Judge's sentencing notes)

Both counsel and the kaumatua who made the submission believed that it had very little effect on the judge. Counsel felt that the pre-sentence report raised questions as to the effectiveness of whānau support in reducing M's cannabis use, and emphasised his unwillingness to give up cannabis. Counsel was also disappointed that in his view the judge failed to recognise the relationship between M's mental health status and the

offences committed. In the time prior to the offences being committed, M had asked for help and the crisis team had been contacted. Despite this, the other adults present left M with the children.

The kaumatua who made the submission believed that counsel did not outline M's issues enough and 'didn't talk enough to sway the judge'. He did not think the judge understood M's condition.

The judge concerned has clear views about the parameters of section 16 submissions, and believes that most submissions he receives do not focus on specifically cultural matters.

> *Maybe I've got the wrong impression of what it's intended for, but given that it says it's there to enable essentially cultural matters of relevance to be put forward, I would put these in a box separate from the family circumstances – that's not cultural, but that's what you get.* (Judge)

Sentencing took place in mid-1998, so the judge did not recall the specific circumstances. He did however have comments to make about the use of section 16 in relation to mental health status.

> *You see I don't regard that as section 16. I can entirely understand why in that situation the information should be brought before the court about the mental situation and so forth because there are more and more people coming through on that basis and falling between the mental health and the justice system. I will expect that information to come from counsel or in the probation report.*
>
> *What's cultural about that? If and I have had a situation where the overlay has been a distinctly cultural thing – that's a section 16 - telling me what I don't know much about – the Māori spirituality thing and the Māori perspective on it.* (Judge)

In this sense the section 16 submission made on M's behalf repeated information the judge believed he already had, and offered nothing new. Sentencing options were also limited by the lack of a readily-available programme designed for dual diagnosis clients, and M's unwillingness to concede that he had a substance abuse problem.

Reflections

M served three months of his six-month sentence, and returned home to his whānau on release. The whānau relationship has broken down to some degree since his release, and M is now subject to a compulsory treatment order and resident in a community mental health facility. His mother considers that he deteriorated and changed during his time in prison. M and counsel confirm that he had ready access to cannabis while in prison. M was a vulnerable inmate, and received no assistance while in prison to manage his drug or mental health issues. He said:

> *When guys find out what you're up for – to do with little kids or anything like that they just kill you. They gave me it hard and they segregated me from the rest.* (M)

Counsel expressed concern about the lack of remuneration involved in preparing effectively for a section 16 submission, and representing clients with mental health issues. His representation of M involved two interviews with M, two with the whānau, one with the kaumatua, and four court appearances. He argued that:

> *We have a system that pays the minimum for representation but will pay for imprisonment with no support or change. There's huge wastage. What assistance did he get in prison?* (Counsel)

Counsel and the judge had different views as to the scope of section 16. Counsel believed that information about M's whānau background, his illness, and the level of whānau concern were all factors that could be discussed by the kaumatua who spoke on M's behalf. The judge saw this as repetition of information he already had. He did not consider that it fell properly within the scope of a section 16 submission.

The kaumatua who spoke for M did so out of a long involvement with legal and mental health issues, saying that he and his wife were *'driven to it through our own whānau experience. Helping others has eased our pain'*. M's mother continues to grieve, and believes that it is unlikely that M will ever receive the help he needs.

3.6 Case study four

T is an eighteen-year-old process worker who lives in a small rural town, close to a regional city. T was charged with assault with intent to injure following an attack on a disabled man in the city street which occurred when T was drunk. T has no previous history of violent offending, previous offences being few and minor. The attack received widespread media attention including two front-page newspaper stories accompanied by T's photograph.

T lives with his mother and younger siblings close to other whānau. T's father died when he was nine, and his paternal grandmother who played a major role in T's upbringing has also passed away. T and his mother work together and have a close relationship.

Due to the publicity surrounding the case, the nature of the offence, and public support for the victim, T's mother had some difficulty gaining him legal representation. Eventually counsel was assigned through legal aid. Bail was initially denied, despite T's age and the fact that this was the first time he had been charged with a violent offence.

T was sentenced to six months imprisonment suspended for nine months, and nine months supervision to include treatment for his drug and alcohol problem.

Initiating section 16

T's whānau had no previous experience of engaging with the justice system. They were shocked and grieved by the seriousness of the offence, and subject to public shame and attention. Counsel provided them with a copy of the Department for Courts pamphlet about section 16 and explained it to T and his mother.

> *We didn't know anything. The thing from the offence through was all scary for us and to me. Even bail conditions or anything about court – totally scary, and how we got on to that section was through the lawyer. She said to me 'are you aware of this?' and I said 'no' and I had a read of it. And then it had that you could have a member of the family stand up and speak on behalf of T, and then voice out loud what we wanted the judge to hear about T in this case.* (T's mother)

Counsel and T's mother's original intention was to ask T's counsellor to make the submission. The whānau organised an alcohol assessment and counselling for him soon after the offence to help understand what had occurred. This assessment was made available to counsel and to the court, but T's counsellor was unable to attend the sentencing.

T's mother was not greatly concerned about who would actually speak on his behalf.

> *I had no worries or concerns about any of our whānau members standing up for T- only good positive things to say – so it didn't really matter.* (T's mother)

The oral and public nature of the section 16 submission was important to her. When asked what she hoped would be achieved by the submission her response was:

> *Just what I told you, that he could be heard. You know like you can write a hundred pages down on paper but I don't know if they really see it. And it's public, it's done in public. I guess that's another thing too – it's a chance for the whānau because all they've had so far is the media.* (T's mother)

A relative on T's father's side made the oral submission, and he and his wife prepared for it with care.

> *About the night before the hearing she (T's mother) rung me up again and asked if we would be there, and I said we would, and I asked if there was anything we could do. She said to me 'could Uncle speak'. So that's where it stemmed from. So then we sat down and tried to work out what he was going to say.*
>
> *And for me it was like saying something that would get to the judge, and of course we had these headings… we made notes and said well we'll do this and we'll do that, and that's history!* (T's Aunt)

Sentencing was preceded by a restorative justice meeting held at counsel's chambers with T and his whānau, the victim, and the victim's adviser. The restorative justice meeting was organised by T's counsel. At the request of the victim, the content of this meeting cannot be disclosed.

T's uncle and counsel spoke briefly over the phone about the submission, but not in great detail. Uncle and Auntie had some previous experience of working with offenders in the youth court, and felt they had a reasonable idea of what was expected.

The use of section 16

Counsel advised the judge in writing the day before sentencing that a section 16 submission would be made. She saw this as an essential element in ensuring the judge would allow and consider the submission. The judge was adamant that notification should be given to the court in advance.

> *It's essential from my perspective. Not that I actually care if I know in advance but because of the time that it takes. The court really needs to know because the lists are not constructed in a way that will allow that without advance notice.* (Judge)

The submission was made orally. Counsel recollects a key point as being T's strong whānau involvement, the effect of his father's death on the family, and that the whānau wanted to take the responsibility of bringing him back on track. T's whānau spent some time discussing issues they believed were significant prior to sentencing day, and trying to understand themselves why the offence had occurred.

> *I knew the boy had spent a lot of time on the marae and I just felt with the teaching from his mother and grandparents there had to be a lot of spirituality behind everything. I thought well the judge is not going to get that from anybody, and if uncle could speak on those things ... And when you think about it – why did he do it? When you think about the crime how do you match up all this stuff with the terrible crime that this boy had committed? Which brought me back to the alcohol. He was just out of it with alcohol – very remorseful for it afterwards.* (T's Aunt)

Despite the planning, T's uncle did not feel that he had been able to express things the way he wanted to or had planned to. This was partly due to the strong emotions the whānau experienced while in the courtroom. He found it difficult to define exactly what specific matters raised by counsel caused him to change the focus of what he had planned to say.

> *Sitting there in court and listening just before I got up – it wasn't – not confusing me – but it sort of wasn't what we planned the kōrero that was going on – and cos was I standing up to get T off – or was I standing up just to please the judge and have him listen to what I've got to say? And I suppose that's why I carried on differently.* (T's uncle)

As T's uncle listened to the judge sum up, he was sure that T was going to receive a term of imprisonment. When the judge mentioned his submission as 'something to count' he began to feel more hopeful. T's mother does not recall the content of the submission due to her distressed state.

> *Everything was quite a blur to me. A solid two months of not sleeping properly – not even being able to concentrate on anybody in my family. I was still breastfeeding my baby and I couldn't even have him. I think it could have been along the lines of how the family was behind him, it was totally out of character sort of thing.* (T's mother)

Having been forewarned that a section 16 submission would be made, the court was able to accommodate this without any changes to normal process. The judge did not recall the details of the submission, describing the things the whānau wanted to put in place as *'relatively general'*.

> *They didn't seem to me to be particularly culturally-specific, but I don't have a clear recollection. I recall his uncle standing up and making an impassioned plea on behalf of the family saying – well, you know, he's got out of control and these are the things we might do.* (Judge)

The effect of section 16

T received a six-month prison sentence suspended for nine months, as well as nine months supervision including drug and alcohol treatment. The whānau was overjoyed at the sentence, and very grateful to the victim. The whānau believed that the forgiving attitude of the victim and the outcome of the restorative justice meeting had a major impact on the judge. Counsel referred to the restorative justice meeting in her closing submission, and the victim was present in court for sentencing. The whānau also felt that the high level of media attention had been a severe form of punishment, and that the judge took this into account. They were satisfied that the section 16 provision had allowed them as whānau to speak directly to the judge, and believed that the strength of whānau support for T was also something the judge took into account.

Counsel believed that the whānau presence in the courtroom and the submission itself were important in giving the judge a fuller picture of T and his circumstances.

The sentence was generally consistent with the recommendations made in the pre-sentence report, which recommended supervision, periodic detention and alcohol and

drug counselling. T's positive response to the restorative justice process, and the wish of the victim that T not be sent to prison were a feature of the report.

The judge acknowledged that the submission had an effect, but saw the submission as part of a well co-ordinated approach by counsel. Counsel had provided the judge with a list of bullet points regarding special circumstances for consideration at sentencing, and had put considerable effort into ensuring that clear and concise information was available to the judge regarding each point.

> *It was a very well done job as a package by counsel. It would be the best plea in mitigation that I've heard collectively. There had been the restorative justice meeting, there had been an agreement reached at that, it had been implemented, the victim adviser had confirmed that. These things had been put in place – counselling etcetera. The family had rallied round. All of those things I knew anyway. There was also what the uncle said, which was really a lay plea and a repetitive one to the extent that I knew… But the package as a whole was a very well done mixture. So yes, it had an effect but probably not a very significant effect in view of it being part of a very well done package.* (Judge)

He was clear that the single most important factor he considered in sentencing T was the restorative justice conference and the victim's satisfaction with this. The judge also noted T's relatively clear record prior to this offence and his obvious remorse. He considered that there was an opportunity for some flexibility in sentencing that was less possible with more serious violent offences.

Reflections

In the view of both the whānau and the judge, counsel played a key role in preparing meticulously for sentencing. For her part, counsel valued the whānau presence and contribution. She expressed concern that there was little financial incentive for counsel to put time into facilitating restorative justice processes or preparing for section 16 submissions. She believed that section 16 needed to be used for *'relatively serious cases'*, and that preparation was a key to an effective submission. Her brief discussion with T's uncle lead her to think that he would be comfortable with his role, and it is possible that a fuller discussion would have allowed him to understand the relationship between defence submissions overall and the section 16 submission.

T has continued with his programme of counselling, and he has been supported by his whānau to develop strategies to alter his previous patterns of socialising. T's mother has been disappointed and frustrated by what she described as ineffective support from the Community Probation Service, and has continued to take the full responsibility for organising T's counselling and drug and alcohol treatment.

Despite being open to allow section 16 use with prior notice, the judge concerned does not consider that he has ever received a submission that he believes satisfies the intention of section 16. In his view the section 16 provision is to allow for specific cultural factors that would not normally be considered or known by a judge, such as those to do with spirituality or a specific cultural practice. In his view section 16 is intended to allow new or particular matters of content to be put before the bench. He does not consider family background, or a desire by whānau, hapū or iwi to deal with offenders as clear section 16 issues.

> *Maybe because I have a more inclusive view of the legislation that I don't see that as exclusive to Māori, to one particular group. Why should that 'we can look after him at home with the family, this is what we can do' be something which is only available to be put before the court by Māori under section 16 rather than by Chinese, Pākehā or Samoan or anybody else? I suppose you can say that they can do that under section 16 as well, but from my perspective none of that needs to be heard under section 16.* (Judge)

Although clearly satisfied by the outcome, the whānau found the court process and the circumstances surrounding the offence very traumatic. For them the section 16 submission was not just about T, but about the whānau as well. It was their opportunity to describe T's whānau circumstances in a public forum, and for the remorse T felt to be seen and acknowledged. As for other whānau spoken to, section 16 allowed them to feel that they had done everything they possibly could for T.

> *I just thought, well you've got that opportunity to kōrero and you can only do your best, and for all of us it was – please God, don't let that young boy get sent away.* (T's Aunt)

3.7 Case study five

Special note

This case involved five co-offenders. Four appeared in the District Court, and one in the Youth Court. Those who appeared in the District Court were only just past Youth Court age. As the offence occurred more than four years ago it was not possible to locate and speak to all the offenders. Counsel suggested that one whānau in particular had played the leading role in facilitating whānau processes. This case study proceeded with the consent of their son W, one of the offenders. He was willing to take part in the case study, but freely acknowledged that due to his age and the fact that he was remanded in custody prior to sentencing, he had little knowledge of the section 16 process.

W and four others were charged with assault with intent to injure after a serious violent attack on another young man. The assault was recorded on security video. All the offenders and the victim had been drinking very heavily, and W has limited recall of the circumstances leading to the offence. He was surprised and disgusted by his actions when he viewed the video of the assault. W had no previous convictions, and was described in his pre-sentence report as:

> *…a bright and intelligent young man who was at a loss to rationalise his and his co-offenders behaviour. He is remorseful for both his actions and the impact those have had on his family.* (Pre-sentence report)

All the offenders including W were remanded in custody due to the seriousness of the offence, and were assigned legal aid. On the advice of another family member, W's parents sought private legal representation for their son, and found counsel who was willing not only to represent W but also the other three boys involved. Two of the other co-offenders were brothers, and all of the families were on limited incomes. The whānau involved continue to be grateful for the representation they received, and that counsel waived payment of a substantial portion of the legal costs.

A number of whānau hui were held, the first being at W's grandparents' home. Although the families involved had some knowledge of each other, it was at this meeting that W's grandmother and the grandfather of the two brothers involved were able to establish the historical links between the whānau.

> *So it was good – everyone brought something for kai and we started off with karakia … we had meetings at homes and we took minutes, and everybody had to go away and access character witnesses for each of the boys. So there was no problem with that.* (W's Mother)

Initiating section 16

Counsel attended the second whānau hui in order to meet all the whānau involved, and to go over everything with them. It was counsel who initiated the idea of a section 16 submission with them.

I said to the family that in a case like this one they could do what section 16 allows them to do. Initially, although it was certainly my idea, they would be people who would be wondering – is there some process we can follow? I give them credit for raising that with me. (Counsel)

The original sentencing day was a list day, so counsel contacted the registrar of the court in order to have sentencing rescheduled, explaining that extra time would be needed for sentencing in order to accommodate a section 16 submission. A date was found which allowed a whole morning for sentencing. The judge was amenable to this, having indicated that he wished to take more time to read the file and written material he had received from whānau.

The whānau were focused on preparing character references and preparing themselves for sentencing. They understood that all the boys involved would receive custodial sentences, so did not have an expectation that having someone speak for the whānau would change that. The involvement of a kaumatua as spokesperson for whānau in any occasion of significance was natural for those involved. They also wished to express their thanks for the time the court had allowed to consider the future of their boys.

At the time we didn't see it as a Māori process – we just happened to be Māori and we had this opportunity to meet and kōrero, which just happened to be like a Māori hui, but we didn't label it as a Māori process. We were the offenders' whānau and our boys were going through this process and they were the players and we accepted that we were a bit powerless and we had to play their game. So however we could play that game easier we would co-operate. We didn't perceive it as a Māori way of doing it – it seemed like a practical way to do it, and we happened to be Māori. It's only now when we talk about section 16 and its application that I can see that, but at that time we were willing to do anything we could to help our case.

We happened to have a kaumatua, and so basically when he knew that was going to be his role, then the fact that he spoke was normal for us. I think it had something to do with the sentencing date had been delayed, and we all saw that in respect to us. Because the judge said the file was that big that he felt compelled to go through it before sentencing … I think the older people wanted to acknowledge that respect. (W's Mother)

The boys themselves had no involvement with the preparation for the section 16 submission. All in custody and deeply ashamed of their actions, they didn't want their wider whānau to see them in court. W was especially concerned that his grandparents not be exposed to the court process, and see their mokopuna (grandchildren) in the dock.

The use of section 16

Counsel's expectation was that there would be one, possibly two speakers making a clearly defined section 16 submission. However, the dynamic of the situation turned out to be very different.

My approach initially was – I'll go along and do my bit, and we'll have this extra bit. What in fact was 'the extra bit' became more dominant. It was an extraordinary feeling because I felt honoured to be part of this quite incredible process. I did my job, feeling very

> *European – I was surrounded with Māori. I think the only Europeans left in the court were the police officers, and the court was full of Māori whānau.* (Counsel)

The whānau gathered outside the court house on the lawn for karakia and himene (hymns) prior to court beginning, and were waiting when the boys arrived. The mood was very sombre, and was almost overwhelming for the boys. When the judge entered the courtroom, A's grandmother, a renowned kuia (female elder) stood to karanga (welcome call). In her karanga she acknowledged the judge and his whakapapa connections to the place where sentencing was held, and the issues that had brought them all to the court on this occasion. This was unexpected by other whānau members, and had a powerful impact on all those in the courthouse.

The judge explained his approach to hearing the whānau as follows:

> *I don't think I set out to do anything different from what I would normally do, except that I knew these were young people who hadn't been to prison before … so there was pressure on the court given the seriousness of the offence to be very careful about what we did. Knowing on the one hand that the seriousness of the offence demanded serious sanction but on the other hand a family, obviously there in numbers bringing along their grief and anxiety about what might happen. In their hearts they didn't want their kids to go to jail, but knowing they'd committed a serious offence, and wanted to tell the court not to be purely influenced by the offence, but this is what our kids are like. And I guess the court rarely sees what the real person is like or what other attributes that the person has. I just let them speak and tell me, and I was interested in that because I wanted to do the right thing. I didn't deliberately think about section 16 and the jurisdiction it offered. It was just that I was interested in knowing the full stories so I could deal with it fully.* (Judge)

Uncle B, the grandfather of two of W's co-offenders addressed the court in both te reo and English. He made no excuses for the offending, indicating rather that they were prepared for the outcome.

> *I think what he was saying is – we're prepared. We accept the justice system, we accept these guys did ill and the consequences of that are going to jail. I don't think it was about – 'oh they're really, really lovely boys!'* (W's Mother)

In his sentencing remarks, the judge addressed the young men and reminded them that they were young men with supportive whānau, who had the responsibility to make better choices about their behaviour. He also expressed concern about the level of youth drinking and offending in the local community.

The effect of section 16

In this case the effect of section 16 can be considered both in terms of the effect of the whānau involvement and the section 16 submission on the actual sentencing, and the effect of the process on the participants. W was sentenced to nine months imprisonment to be followed by twelve months supervision. This was consistent with the sentences imposed on the other offenders, and with the recommendations of the pre-sentence report. While not keen to spend more time in jail, W was relieved that the sentence was not longer. Counsel had prepared the boys and their whānau for sentences

of up to two years, so they were very pleased with the outcome. In counsel's view the effectiveness was:

> *Not so much that the sentence was reduced but that they left the court entirely happy with the process. As far as all four guys going away – their families were content with what happened – now that's not something you get normally. They went away and they thought it was done in a way that was fair and they were content. You get where people are very unhappy, Māori are so unhappy with it all – white justice sucks!* (Counsel)

An indicator of that satisfaction was that the whānau asked to meet with the judge afterwards in chambers to thank him for the way he had dealt with it. Counsel arranged for a small representative group of the whānau to do this. The judge was willing to meet with them, and stated his concern that the community as a whole make efforts to address local offending patterns.

Due to the period the boys had spent remanded in custody, and the preparation work put in by counsel, the whānau had processed their feelings before sentencing, and felt ready to accept the outcome.

> *Nobody cried. We didn't collapse and go – Oh! We'd done that initially and we'd worked that through.* (W's Mother)

In the judge's view the submission did not make reference to any specific point of tikanga (custom) in relation to the offending or the appropriate sentencing outcome. Rather it was:

> *Understanding the depths of their feeling – the depth of their love for their kids. And I honestly believe the kids were better than that. Certainly it influences the court. It gives the court some confidence that these kids can come back from this. Because they've got a family that cares that much. So you temper the outrage…* (Judge)

He believes that whānau involvement in the court process has a significant effect on the offender, and that this is part of the value of it.

> *These kids come and they lose sight of the fact that their family loves them – they lose sight of the fact that what they did really impacts in a far wider sphere than just their little sphere of operation. And when Nanny starts to karanga in court it does something. It puts their life back into perspective for them. There's no more powerful image …* (Judge)

W has served his prison term, is now in fulltime employment, and four years later has not re-offended. His life is still deeply marked by the shame of his experience, and how his actions involved his whole whānau in a painful and protracted court process.

Reflections

In this case several whānau worked together, using processes that were familiar to them in order to help their boys, in an environment that was unfamiliar. As the whānau worked together their roles became established through consensus, the kuia, the kaumātua, W's parents who facilitated communication with counsel, those who gave kai and koha (gift or donation), and those who brought humour to the times of deep grief.

They were able to work towards sentencing and accept the outcome of the court process with a sense that they had done all they could, and that they had been heard.

Counsel was prepared to meet with them within the dynamic of the whānau hui process, and gave considerable time to preparing the whānau both for the court process and for the full range of possible sentencing outcomes. His involvement in this case had a deep impact on him, and he is of the view that the scope of section 16 should be broadened to allow wider whānau participation in the court process. He believes it is not often initiated because of the narrow scope.

> *I've raised section 16 with Māori offenders quite often and they don't always want it. It's quite restricted in what it's about. Sometimes they're not very interested and they want to know – what's the difference between that and you talking on our behalf? It's availability could be advertised more but it's a hard one. It's not just a Māori having a say – it's is there cultural significance attached to the offending, what factors are there? To restrict people to that is often difficult.* (Counsel)

The sentencing judge was strongly of the view that section 16 should be given its widest possible interpretation, and that it should therefore take into account Māori processes, not just narrowly defined Māori content. He described his view as follows:

> *If it is the parliamentary intent to use section 16 to regulate court proceedings in order to save time, save money and only allow a certain amount of information to come to court then that's for them. But if they're interested in doing justice, there shouldn't be such a narrow gateway for the cultural part of life to influence the way the court does justice. They must open the gate and give the widest discretion to the court, and real emphasis must be placed on teaching the judge about what it is that culture is … there are a whole lot of things which the court may not recognise as cultural that are very, very cultural despite the fact that they might be expressed in English.* (Judge)

W's whānau continue to be grateful for the responsiveness of counsel and the judge to all the whānau involved, a response that allowed them to be themselves within the confines of the court process.

3.8 Case study six

In the course of identifying suitable cases for study, a number of counsel and whānau were spoken to. In two particular situations whānau interviews took place where whānau wished to discuss their experiences[22]. In these situations the offenders were young men with offending histories and histories of mental illness. Whānau involved were deeply concerned by their experiences of a lack of co-ordination between the justice and mental health systems. The issues and concerns they raised were also evident in case study three that also involved an offender with a history of mental illness.

In one of these cases, the researcher met with offender's mother (H), the kaumatua who spoke for him at sentencing, and a close whānau friend. The offender (M) was serving his sentence at the time of this meeting. He was unwell and had attempted to harm himself. Clearly it would have been inappropriate to pursue the matter of consent to take part in the research process with him. Without his consent, counsel could not be interviewed; however the whānau were willing to have their views and experiences included in this report, and they were able to clearly articulate their issues and concerns.

> *We seek the healing first, that's addressing the mamae (hurt or pain) that leads to the offending. So if we address the mamae then that person's not going to be doing it anymore.* (Mother)

H's son (M) is currently serving a term of imprisonment for armed robbery. H believes that his previous experiences of drug use[23] and imprisonment for less serious charges have contributed to his mental health problems. I met with H, the kaumatua who had supported her whānau throughout their experiences, and a whānau friend whose son is also currently in prison. H and the whānau friend had a number of issues they wished to discuss in relation to the operation of the justice system. The kaumatua present had considerable experience of court processes, having worked both as a court aid worker for many years, and as an advocate for whānau.

Initiating section 16

When H's son was arrested she asked an experienced local kaumatua for help. He was very willing to do so. As he explained:

> *I said to H and them – no problem, I'll go up and speak, no problem. Any of my whānau around here or whatever. They just need to ring me up and I'm there. It's a duty that I know about, I offer what I can.* (Kaumatua)

Based on his previous experience of the court system, he was able to advise H about the possibility of a section 16 submission. While counsel, in H's words, *'encouraged it'*, she was not happy that counsel advised them to *'keep to the point'*.

---

[22] A full description of the issues surrounding gaining access to offenders and consent processes can be found in the methodology section.

[23] After M's drink was spiked with a hallucinogenic drug he had to be admitted to the psychiatric ward of the local hospital. He was arrested while under the influence of the hallucinogen, and continues to suffer from the effects of this experience.

> *I didn't like restrictions. When we get someone to speak for us then we get someone to speak in the way that we can understand and we know that however he's saying it is how we want it to be said, from the heart in other words. When you start putting restrictions on then it puts a damper on the true feelings.* (Mother)

Prior to sentencing, H and the kaumatua met with counsel, because the kaumatua wanted to know the details of the offence. The kaumatua was aware that counsel would raise privacy issues, but argues that in situations where he is going to speak for people he needs to know the full background, 'so you can get the feeling and you know what you're on the stand for'.

H's main concern was that the judge understood the extent of her son's illness, and that he receive treatment for his drug and mental health problems before being punished. She describes this concern as follows:

> *It was mainly to get across under section 16 the damage that the medication or drugs had done and how it affected him. To come up into the dock he looked normal because of the rehab prior to that, but I still wanted to make it clear that he was subject to a relapse. We wanted him to treat it first and then the punishment after.* (Mother)

Her son's previous prison experience and the negative outcome of this heightened her concern. She had been disappointed that he had received a custodial sentence, for car conversion offences that were drug related, when the iwi was willing to fund and organise treatment for him at Hanmer Springs. During this nine-month sentence, her son was moved backwards and forwards between prison and a mental health facility as a result of suicide attempts.

> *He just wasn't strong enough in himself to cope with the environment of the prison. Finally it was release date and they couldn't wait to get rid of him quick enough, with no support. He came home which made it twice as hard because we weren't dealing with the son that we used to have before that.* (Mother)

H did not want to see this happen again. While she accepted that a serious charge like armed robbery would result in a custodial sentence, she wanted her son to receive treatment before returning to prison.

The use of section 16

Counsel did not inform the judge that a section 16 submission would be made prior to sentencing. H considers that this *'might have just put a little damper on it'*. The judge told them that it was his right to allow or disallow the submission because he had not been told beforehand. The kaumatua did make the submission, but H and the other whānau support people felt that time factors and the judge's reluctance to allow the submission restricted him. They also expressed concern about the lack of status accorded to kaumātua who participated in court processes, and the imbalance of power between kaumātua, and those who have formal or legally sanctioned roles like counsel and judges. As the whānau friend explained:

To me I would like to see policy changes so that when our kaumātua get up to speak they are alongside the judge in that system. They're not out on their own speaking – they're sitting alongside the judge saying 'here's an alternative'. (Whānau friend)

The kaumatua outlined whānau concern about the offender's medical and drug problems and also made reference to the kind of person H's son had been before these problems occurred. He described:

… what he had achieved prior … what he had achieved before that. At one time he'd won the iwi rugby cup. He was sport oriented, he was very helpful, he was a boy you could tell to do this and that. (Kaumatua)

It was very important to H and her whānau that their boy be seen as a person, not just as an offender, and that the court understand that they were not a family for whom illegal behaviour was the norm. They wanted the judge to understand:

…the environment he'd been brought up with – and it certainly wasn't the 'once were warriors lifestyle'. We wanted to let them know that this was where we were coming from too, and also that these things had been picked up outside our gate. (Mother)

The iwi had agreed to fund residential rehabilitation at Hanmer Springs in the treatment programme designed for Māori, and the whānau wanted the young man concerned to go to Hanmer first, and then to complete his custodial sentence.

There was a definite feeling that the court process did not operate in a way that allowed them to comfortably express all of their concerns. They were extremely grateful that the kaumatua who spoke had extensive court experience and understanding, and felt that he had represented their interests as well as possible within the constraints of the circumstances.

The effect of section 16

H's son was sentenced to a three-year period of imprisonment, which he is now serving in the mainstream prison system, with little mental health support or care apart from medication. While the judge acknowledged that there was a need for treatment, he explained that the nature of the crime required a custodial sentence, and that this sentence had to fit within certain sentencing parameters. The whānau was very unhappy with the outcome, particularly as they had received conflicting information from mental health services which assured them that even if their boy received a custodial sentence he could be returned to a secure mental health facility for further treatment.

They were dissatisfied with the lack of real impact on sentencing outcomes that could be achieved through the use of section 16.

Our kaumatua got up and spoke and it was excellent, and the judge heard what he said but could not change a procedure that's already been put in place. So to my way of thinking – what's the point of section 16 then if it's not going to be taken into account? It's fine having section 16 but there's got to be more to it than that. They have a procedure and sentencing to follow for each case. They have a basic sentencing to follow for each case, and that needs to be changed to accommodate section 16. (Whānau friend)

Reflections

Supported by whānau, friends and her kaumātua, H has continued to struggle to try and ensure that her son receives treatment, and that his condition does not deteriorate. This has a high emotional, time, and financial cost. A ready access to drugs within the prison concerns her greatly, as does the lack of appropriate services within the prison.

> *Many times I've been told – if he doesn't behave himself he'll get sent to X (a prison further away from his home area). And I'm thinking, well get some programmes in here. I don't really think it's my job … so we did. We went out to the mental health and asked them to see him, the drug and alcohol which is the iwi too if they could work with him while he's in prison. And they have, they work very well, but once again they come across bureaucrats.* (Mother)

H is concerned about a lack of co-ordination between justice and mental health services, and the negative impact this has on offenders with mental health problems and their whānau. She and her whānau are concerned that in this context a section 16 submission is largely ineffective because of the inflexible nature of sentencing procedures. They would advocate for a shift in focus that allows for addressing the mamae that causes the offending, so that the offending cycle can be broken.

> *The idea is good, but for it to be put into practice it's also got to change further down the line. You read about cases in the paper and think why has the judge done that? But he doesn't look further than the crime to what's caused it … and doesn't look at how it could be stopped again. That to me is the whole complex of it. Section 16 is excellent, but it's only part of it, it has to be a bigger circle than one piece of the pie for it to be very effective. And utilise our kaumātua with their wealth of expertise and he can help change and turn people around.* (Whānau Friend)

In their view there needs to be comprehensive changes to allow kaumātua and whānau views to be heard and acted on, and that the role of iwi in support of whānau and offenders needs to be recognised. They see change to the court system as an urgent priority, in order to prevent the continuation of cycles of mamae and offending.

As the kaumatua expressed:

> *The immediate whānau are really affected by it. Pākehā don't know this – Māori people are really affected and it doesn't hurt one, it hurts the whole lot.*

3.9 Discussion

Contextual issues

As suggested in the introduction to this report, the section 16 provision was:

> *developed particularly with the Māori community in mind, but was to be made available to offenders of any cultural background*[24].

The special status of Māori in terms of this provision, and in relation to the administration of justice stems from the relationship between Māori and the Crown, and from the Treaty relationship. Moana Jackson has consistently argued that the institutional racism of the criminal justice system precludes effective consideration of the cultural norms and justice philosophies of Māori. He argues for the construction of a Māori justice system which allows Māori autonomy in administering justice according to customary practice. Located as it is within the wider debate about Māori sovereignty, the call for Māori autonomy in the administration of justice will be the subject of prolonged debate. Māori aspirations in terms of significant changes in the justice system will continue to be negotiated within the parameters of current constitutional arrangements. Tauri suggests that:

> *The reality appears to be that Māori are reliant on the goodwill of the state to empower them and their communities when it concerns criminal justice.*[25]

At present the *'goodwill of the state'* is evidenced in attempts by state agencies and other organisations to apply the 'principles of the Treaty' in their policy and practice. These principles have been defined in the context of the Waitangi Tribunal and the Court of Appeal. The Law Commission Report 'Justice – The Experiences of Māori Women'[26] highlights the significance of the principles of the Treaty to Māori experience of the Justice system. The key principles identified in this report are:

i. the principle of partnership
ii. the principle of participation
iii. the principle of options.

Section 16 clearly offers Māori offenders and their whānau the *option* of having someone speak about the cultural background of the offender, and the relationship between the cultural background to both offending and possible strategies for reducing that offending. A key issue for the evaluation of section 16 use is whether or not this option can be effectively utilised by Māori if there are other significant barriers to meaningful Māori *participation* in the court process. In the Law Commission report cited above, *'cultural disregard'*, a lack of understanding and acknowledgement of Māori values and culture, was described as a salient feature of Māori women's encounters with the justice system. This description is congruent with the experiences described by Māori whānau and offenders who took part in the case studies. This impacted directly on the nature of communication between whānau and counsel, as well as on their level of comfort in the court itself. The physical environment, unfamiliar language and process, and a clear

[24] Introduction, p2.
[25] Tauri, 1996:212.
[26] Law Commission, R53:3-5.

imbalance of system knowledge and power combined to create an environment in which few of the whānau felt that they were able to participate freely.

The power to define what constitutes *'the cultural background of the offender'* rests with the court, as does the power to decide how any information presented in section 16 submissions is regarded. In this sense, few of the whānau involved in these case studies would consider that there was any degree of *partnership* involved in the sentencing process. This led some to question the point of having section 16 at all, and to question the intent of the provision. Whatever the intent of section 16, its availability raises a number of expectations on the part of Māori that may not have been adequately considered.

Whānau aspirations and expectations

Whānau and offenders saw section 16 as an opportunity to give the court a range of information. Few expected that this giving of information would result in a major change in sentencing outcome. The day of sentencing was for most the culmination of weeks and months of stress, pain, and, in some instances public embarrassment. The opportunity to have someone speak was viewed not just as a chance to talk about the offender, but to talk about the whānau. This was clearly important to those who felt that the whānau and the offender would be judged solely on the description of the offence itself. This feeling was best summed up by the mother who stated that the environment her son was brought up in *'certainly wasn't the once were warriors lifestyle'*, and that she wanted the judge to know that. Alongside this was a wish to let the judge know that they as whānau did not condone the offending.

This desire to talk about *'family background'* was seen by whānau as being of primary importance, with *'family background'* and *'cultural background'* being seen as intrinsically linked. There was a divergence of judicial opinion about whether family background was a section 16 matter, with one judge being of the view that there was *'nothing cultural about that'*. Another judge suggested however that some matters which are clearly cultural will be spoken about in English, and that those less familiar with Māori values and whānau patterns may find it difficult to see the cultural significance of what is being discussed.

While most expected that imprisonment was a likely consequence of the offending, whānau also sought the opportunity to offer alternatives to imprisonment. Most were of the view there was a relationship between the offence and the offender experiencing mamae of some kind. If this mamae could be adequately addressed, then the offending could be stopped. Those who had experience of their whānau members being imprisoned previously, or while on remand, were firmly of the view that prison created more mamae, and exposed the offender to further violence, and to ready drug access. Some whānau and offenders were disappointed that the alternatives they offered received little consideration because the sentencing parameters for serious offences such as aggravated robbery are already established. They described this as a real flaw in the section 16 process, particularly where kaumātua expert opinion was perceived as having been disregarded. Where there were clear mental health or drug and alcohol issues involved in the offending, whānau were disturbed that there was no provision for treatment or healing to take place.

There was also a whānau expectation that any process which invited Māori participation, should not be limited by rigid timeframes or bureaucratic process. A number of discomforts with culturally-insensitive practices were expressed, particularly in relation to time frames, and injunctions to *'keep to the point'*. Wherever Māori meet to discuss matters of importance, there are appropriate processes of encounter and acknowledgement to be carried out before attention turns to the 'take' (issue) of the day. When respect is paid to these processes it is easier for whānau and individuals to accept the outcome of a sentencing decision, as was evident in Case Study five.

Where whānau aspirations and expectations were unmet they were unlikely to see section 16 as a meaningful option for Māori. Some of the difficulties they experienced can be further understood in considering the barriers to actual and effective use of section 16 that are discussed below.

Perceived barriers to the use of section 16

A number of barriers to both the actual and effective use of section 16 were identified during the course of carrying out the case studies. Most of these were raised as issues by counsel, including counsel who were contacted in order to identify cases, but who were not involved in the actual case studies. It is also likely that some of the issues whānau raised, particularly in relation to communication with counsel, may result in offenders and their whānau declining to use a section 16 provision, even if it is offered. The factors described as barriers included:

- lack of clear and consistent interpretation as to what matters can be raised within the parameters of Section 16
- lack of information
- time and cost constraints
- concerns about risk to the offender or to the whānau
- unwillingness on the part of the offender.

Lack of consistent interpretation

During the course of carrying out the case studies it became clear that interpretations of what could be allowed under section 16, or perhaps more importantly what was being allowed, varied considerably. Judicial views ranged from a *'narrow'* interpretation which allows for specific cultural information related directly to the commission of the offence to a *'broad'* interpretation which allows for whānau to raise any matters they believe are relevant. In most instances this process of interpretation rests on what the definition of *'cultural'* held by counsel or the judge is. Those from the dominant cultural group may seek signifiers such as the use of key words or phrases such as 'mate Māori' ('Māori spirituality*)* to decide whether a matter is cultural or not, and may dismiss other information as *'just general family background'*. The variations in interpretation by different judges or courts has contributed to confusion on the part of many counsel as to what they should or should not advise clients to do. Where counsel feel unsure about section 16, they are not well placed to give clear information to offenders and whānau about this provision, and are not likely to suggest that a submission be made.

Lack of Information

Only one of the participant whānau recalled being provided with the Department for Courts pamphlet which outlines the section 16 provision. Very few counsel were aware that the pamphlet was available. Information of any kind about section 16 was not displayed at any of the courts or criminal counters visited by the researcher during the course of the research. Few of the Māori community service organisations contacted could identify what section 16 provided for, although they recognised several different points at which it could be possible for whānau or support people to address the court. These included the sentencing stage, and at the time of making bail applications.

Communication difficulties

There was considerable dissatisfaction on the part of some whānau about the level of communication with counsel and others involved in the administration of justice. This was not only in relation to the use of section 16, but also in relation to their experience of the justice system in general. The specialist language of the court system created confusion and anxiety, and exacerbated already high stress levels. Lack of system knowledge meant that whānau were unsure of the sequence of events from arrest to sentencing, and found it difficult to organise their work and personal lives around it. Some whānau felt that there was an expectation that as Māori they would be familiar with the justice system, and wouldn't need guidance. One mother commented:

> *It was almost as if people expected – Oh well, they're Māori, they'll have been there done that. They must know their way around the court system. Not even!* (Mother)

While it was clear that most counsel made some effort to communicate with whānau, it appears that there needs to be further attention paid to enhancing communication, and recognising that people under severe emotional strain may need to be given information more than once. Where cases were assigned under legal aid there was also a perception on the part of some whānau and offenders that if they had been able to pay for legal representation they would have received more time from counsel.

Time and cost constraints

The majority of counsel spoken to raised the issue of resourcing in relation to preparing an effective section 16 submission. Most felt that current legal aid provisions did not allow for the time to communicate effectively with whānau, and that it was difficult enough to work with the offender and carry out their basic duties for the offender. All counsel involved in the case studies indicated that they had spent more time in preparation for sentencing than they would normally, with most being involved in more than one meeting with whānau. Several suggested that this was a disincentive to counsel suggesting the possibility of a section 16 to offenders.

Court time was also another factor, as counsel expressed concern about trying to make a section 16 submission within limited timeframes. The view of all the judges involved in the case studies was that time could be made, but that it was preferable to advise the court in advance of a section 16 submission. Two judges also commented on the pressure there is on all those involved in the court process to do more in less time. Some whānau commented that they found counsel directives to *'keep to the point'* and not

take up too much time something of a disincentive. This was particularly the case if the whānau wished to have more than one speaker. It is likely that in some instances, when an offender or whānau are offered the option of making a section 16 submission, they may decline to do so because of the constraints placed around making the submission.

Perceptions of risk to the offender or whānau

Some counsel were of the view that a section 16 submission could be risky to the offender, as it could alienate a judge if the submission was not made in a clearly-focused way. Some of this perception of risk was related to the lack of clarity about what could or should be covered under section 16. Other counsel recounted instances of whānau inadvertently disclosing information about other offending, or about drug and alcohol use of the offender that was prejudicial. In one location, one or two counsel suggested that section 16 use had diminished as a result of what they described as *'political high-jacking'*. They believed that section 16 had been used by *'activists'* to address the court at length about land and Treaty issues, with little reference to the offender.

A small number of counsel spoken to in the course of identifying possible cases said that they would rarely use section 16 because they had witnessed comments and attitudes from some members of the judiciary that they believed were offensive and racist. They were reluctant to put whānau through this process, particularly where they believed a custodial sentence was inevitable.

Unwillingness of the offender

Most counsel involved in the case studies said that they frequently offered section 16 as a possibility to clients, but that many were *'simply not interested'*. Some counsel frequently had clients with no telephones or fixed place of residence who rarely kept appointments. These clients were most likely to say that they had no-one to speak for them. Counsel in both provincial and large urban areas commented on the number of young Māori offenders they see who attend court without any whānau support.

Other offenders and whānau decline because they indicate a preference for counsel to speak for them, due to their discomfort in the court setting. It is of some significance that for each of the cases in the case study, whānau had become involved with the case at an early stage, and had sought counsel out to see what they could do, or to ask questions about the progress of the case.

Issues for counsel under current section 16 provision

A number of issues for counsel became evident in the course of carrying out the case studies. Most of these related to *'best practice'* in making effective section 16 submissions.

There are two underlying and fundamental issues that need to be addressed before issues of best practice can be adequately considered. Firstly, defining the relationship between counsel, offender and whānau. Secondly, issues of cost in a legal aid environment.

On one level the relationship between counsel and client is clear. As an officer of the court, counsel has a legally and ethically-defined relationship with a client. Matters in relation to the case should not be discussed with other parties without the consent of the

client, and counsel takes instructions from the client. The relationship between counsel and whānau is much less clear. Any number of whānau members, related in varying ways with the offender will take a direct interest in a case. While Māori whānau are diverse, it is likely that many people well past youth court age will expect to be directed and advised by whānau members, and may be used to having whānau speak on their behalf in interactions with health, education, and justice services. With the exception of case study two, where the offender was somewhat estranged from her whānau, the section 16 submissions were arranged with minimal input from the offender. Established whānau roles and leadership patterns are applied to the challenge of the court case, and to some extent the wishes of the offender become almost secondary. In case study five, what the offender wished least of all to happen took place – his grandparents became involved in the court case, to the extent that his nanny did her karanga while he stood in the dock. In case study four, the young offender was unaware who would speak for him, but his mother was confident that there were a number of people within the whānau who could speak.

This presents some challenges for counsel. While the offender may provide written or verbal consent for counsel to speak with individual whānau members, this does not resolve the issue of who is instructing counsel. It also does not address the issue of whānau expectation of counsel availability, and the time required for counsel to meet with whānau. This has a direct bearing on cost, as engagement with whānau processes may not necessarily occur within the confines of chambers or working hours.

Best practice issues

Best practice issues have been grouped as follows:

- pre-warning the judge and court manager that a section 16 submission will occur
- effective provision of information regarding section 16 to offenders and whānau
- allowing time for planning and discussion, and communicating realistic sentencing options with whānau.

Pre-warning judge and court manager

All judges who participated in the case studies preferred to be notified in advance of a section 16 submission. This was both for logistical reasons, and in order for the submission to be given adequate consideration. Pre-warning allows time to be scheduled for sentencing that takes the section 16 submission into account. This is particularly important where sentencing may occur on a list day when the court is very full. Judges are conscious of time pressure, and of the needs of all users of the court, both offenders and support people. This means balancing the needs of all participants. This is difficult to do if a fifteen-minute matter suddenly becomes a one-hour matter. Pre-warning is particularly important if more than one speaker is wanted by the whānau.

This also has a direct relationship to the ability of the judge to make a considered response to the submission in sentencing, allowing the judge to give whānau and the person making the submission full and focused attention. If written material is to be placed before the judge to support the submission, this should be made available prior to sentencing, so it can be considered along with other material in the file. This should be accompanied by a note indicating that this material will be spoken to at sentencing, and is part of a section 16 submission. In these circumstances, the judge is able to ask questions in relation to the submission if this is desired, and is not required to make an

immediate ad hoc response. It is also possible that without pre-warning, a judge may indicate displeasure to counsel about the process, which raises anxiety for whānau or family, and creates a feeling that the submission will not be given full consideration.

Effective provision of information to offenders and whānau

Counsel should work to clarify their own understanding and expectation of section 16 before communicating with the offender or whānau. Wherever possible, copies of the Department for Courts pamphlet should be made available. This allows offenders and whānau more information, and information that is accessible for discussion when counsel is not readily available. Explanation, and the offer, of a section 16 submission should be repeated, as in times of emotional stress and information overload people do not process information well.

Allowing time for planning and discussion with whānau

This time is necessary in order for whānau to make informed decisions about who should speak, and what matters should be raised in the submission. It can also help counsel and whānau to identify a need for more than one speaker in some circumstances. This is also a key time for communicating realistic sentencing options to whānau. As described in the case studies, whānau have a number of different reasons for wanting to have someone speak for them in court. Most are hopeful that making a submission may result in a shorter custodial sentence, or in a community-based sentence. In some instances whānau will focus on the development of a community-based sentencing option in circumstances where the nature of the offence precludes this. Whānau who are well-informed about the sentencing parameters for a particular type of offence are less likely to develop unrealistic expectations, and subsequently be disappointed by the sentencing outcome.

Section 16 – Māori content or Māori process

A feature of the interviews with both judges and counsel was that most suggested that the scope of section 16 should be broadened. Section 16 was frequently described as a *'narrow gateway'*, which allowed an entry point for cultural matters to be considered. Those who favoured a broader approach were of the view that section 16 and the sentencing process presented the court with two types of opportunity.

The first opportunity was the opportunity to gain a fuller picture of the offender and the offender's circumstances in order to carry out the sentencing with full and due consideration of a range of factors. While some of these factors do not appear to fit a narrow definition of *'cultural'*, counsel and judges who subscribed to this approach were content to allow members of a cultural group, in this instance Māori, to define what matters were of cultural significance. They also tended to interpret *'culture'* as dynamic and evolving, rather than seeing *'Māori culture'* as a collection of fixed views and beliefs.

The second opportunity was the opportunity for the court to facilitate a context for Māori to participate in the justice process in a way that would result in a shared view that the outcome of court processes was truly just. Those who value this opportunity are also cognisant of the *'ripple effect'* that occurs when those close to the offender leave the court with the sense that they observed true justice. Where whānau leave the court

believing they have been dealt with justly, individual whānau members were less likely to carry residual bitterness and anger against *'the system'*. For younger whānau members this may be particularly important in influencing attitudes and behaviours, and creates the potential for a more positive view of the relationship between Māori and the justice sector.

This second level of opportunity requires an acceptance that section 16 should encompass the possibility of allowing for alternative processes, as well as additional content to be presented at sentencing. It would require the presence of skilled and culturally-competent counsel and judiciary, and a political willingness to provide adequate resources for this to happen. It should be noted that most whānau and offenders made suggestions about the alteration of court process which emphasised increased flexibility and responsiveness to whānau needs. These suggestions included more flexible timeframes, the use of more than one speaker, and allowing the offender to acknowledge those who had come in support.

Clarification of the parameters of section 16 should result in more consistent interpretation of this section than currently occurs, and may allow counsel, offenders, and whānau to make informed decisions about section 16 use. Alteration to section 16 in isolation will not address all of the issues and concerns raised by Māori who took part in the case studies. For those who expressed concern that section 16 was *'just one part of the picture'*, attention also needs to be focused on the operation of the prison system, and on meaningful community-based sentencing options. A commitment to effective Māori participation in the administration of justice requires continued focus on the cultural safety of all users of the justice system, including the whānau of offenders.

Finally, it needs to be understood that any adaptation of the current section 16 provision cannot be expected to result in greatly reduced offending. As Tauri rightly points out:

> *…changing the face or form of justice practice will not necessarily change the face of the community or the problems facing certain sectors of Māoridom.* [27]

Clearly however, information made available to the courts through the use of section 16, even with its current limitations can result, in some cases, in shorter custodial sentences or greater use of community-based sentencing options. This may result in a shorter offending 'career' on the part of individual offenders if it is accompanied by appropriate whānau support, and if these whānau receive the support they need from health and social service agencies.

[27] Tauri, 1996:215

4 Use of section 16 by Pacific Peoples: case studies seven to nine

Kiwi Tamasese, Peter King and Charles Waldegrave
Family Centre Social Policy Research Unit

4.1 Introduction

This research was carried out under contract to the Ministry of Justice to provide three case studies of the use of section 16 of the Criminal Justice Act by Pacific Island offenders. These case studies, together with six case studies of section 16 use by Māori offenders, and two of its use by those of other ethnicity, were to contribute to this larger report on the use of section 16 being prepared by the Ministry of Justice. The parameters of the research were established in the Ministry of Justice tender document, and the methods employed were determined by a combination of those parameters, the nature of the information to be obtained, and the time constraints under which the Ministry was working to produce the larger report.

This discussion of the methods used to produce the three Pacific Island case studies will cover the following areas: primary sources of information; recruitment; interviews; and data analysis.

Primary sources of information

The project brief specified that the primary sources of information for each case study were to be the following key informants:

- the offender;
- the person called to speak on behalf of the offender;
- the person who called someone to speak on the offender's behalf; and
- the sentencing judge.

Recruitment

The identification and recruitment of cases of section 16 use by Pacific Island offenders was carried out by the researchers in consultation with the Ministry of Justice research team. Initially, the Ministry team provided a list of potential cases as well as a list of lawyers who had indicated, in their responses to the survey carried out by the Ministry of

Justice, that they had worked with clients who had used section 16 in their cases, and were open to assisting with further research. In addition, the researchers drew upon assistance from Pacific groups that worked with Pacific offenders and the Community Probation Service. These sources of support will be discussed, in turn, below.

Lawyers

The list of cases provided by the Ministry of Justice included a number which had occurred a long time ago, and it was decided to concentrate on the six cases which had been held during the previous five years. The lawyers for these cases were contacted, but of these, four did not respond to the researchers' enquiries. The lawyer for another case replied, but the offender had left the country. The other lawyer who replied offered to contact the offender, who agreed to be contacted by the researchers. Interviews were conducted with the lawyer, offender, cultural support person, and judge. However this case was not able to be used because the judge considered that section 16 had not been used because the cultural evidence had actually been introduced during the trial and only re-stated prior to sentencing. In the end, however, one of the cases used in this study was identified with the assistance of a lawyer.

Pacific community groups

Following this disappointing start, the researchers contacted Pacific Island community groups in Auckland and Wellington to seek their assistance in identifying cases. While one of the groups contacted had worked with section 16 cases, the worker who had done so had since migrated and was not available to assist. While the other groups generally had pamphlets about section 16 on their premises, uncertainty about the specific provisions of section 16 made it unclear whether any of their clients had actually used it in their cases. This uncertainty was exacerbated by the lengths of time which had elapsed since many of the potential cases had been heard. Most groups reported that in cases they had been associated with, any cultural evidence or submissions had been presented by probation officers in their probation reports. No suitable cases were identified from these sources.

Probation Officers

At the same time, probation offices in Auckland, Wellington and the Hutt Valley were asked to assist with the identification of cases. From the perspective of the members of the Community Probation Service spoken to, section 16 was not often used because cultural evidence was often submitted by probation officers in their pre-sentencing reports, instead. However, one of the cases presented in this study was identified and recruited with the assistance of the Community Probation Service, and their assistance in contacting offenders, cultural support people, victims and victim support people was invaluable.

The cases

In the end, three cases were identified and successfully completed. One of these, case study three, was suggested by the lawyer who had been involved in the case, mentioned earlier, which had been ruled out. One of them, case study one, was identified by the Ministry of Justice team after the earlier cases they had suggested were not able to be

pursued. One, case study two, was identified with the assistance of the Community Probation Service.

Once cases had been identified, judges were approached to confirm that each case was in fact one in which section 16 had been used, and to seek their consent to participate in the study. The lawyers involved in these cases were approached by the researchers and asked to facilitate meetings with offenders and their families. Initial contact with offenders and their families was by phone, followed, in two cases by several face to face meetings between them and the principal researcher, prior to meeting for the interview. Probation officers were also approached and they facilitated contact with the families of victims in case studies seven and eight.

The recruitment of offenders was conducted with the importance of familial relationships, both consanguineal and affinal, for Pacific people kept firmly in mind. While these relationships have significance among all cultures, they are of particular significance for Pacific people. By comparison, dominant Pakeha/European frameworks tend to place significance upon forms of social solidarity which are not based upon descent or marriage. In view of this, it was considered essential that the consent and co-operation of offenders' extended family be obtained, and this was achieved in each of the three cases studied. Obtaining this co-operation involved the interviewer providing detailed information about the research, verbally. Each offender was interviewed in the company of members of his or her family. All participants signed a consent form before being interviewed (Appendix seven). The consent form contained a written summary of the information about the research which had been provided verbally by the interviewer. In consenting to take part, participants acknowledged that they:

- had read the information provided;
- had had the opportunity to discuss the research and been satisfied with the answers provided;
- understood that taking part was voluntary, and that they could withdraw at any time; and
- understood that the information they provided was confidential and that no material that could identify them directly would be used in any reports on the research.

Interviews

With two exceptions, all interviews were conducted by a Pacific Island researcher. The two exceptions were a judge and a cultural support person, who were interviewed by a Pakeha member of the research team who had research fieldwork experience in the Pacific.

Interview schedules were developed which incorporated the research questions suggested in the project brief. A separate interview schedule was developed for each of the four types of key informant, to ensure that the research questions were investigated in ways that were appropriate to the particular roles each played in the court process and the use of section 16. Question lines were piloted before being applied in the field.

In view of the sensitive and complex nature of much of the information being sought, it was decided that in-depth interviews with open-ended questions would be more suitable

than a structured, closed-question survey instrument. The question lines were semi-structured in that they contained a series of set questions organised around the research questions, but allowed the interviewer freedom to probe within each question. Questions were open-ended and responses were recorded on audio-tape.

Data analysis

Interviews were audio-recorded and transcribed for analysis. The transcripts for each case study were analysed separately. Transcripts were coded using a coding scheme which reflected the case study research questions. Excerpts of transcripts were extracted and grouped with the assistance of a database programme[28]. For each case study, the material from all participants relating to each research question was analysed and the views, experiences and perceptions of each participant are presented and discussed in each case study report and a final discussion of results.

[28] Microsoft Access

4.2 Case study seven

Introduction

In this case, interviews were conducted with the offender, the judge, the defence lawyer, the probation officer, the person who made submissions on behalf of the offender, and the person who made submissions on behalf of the victim's family.

The circumstances of the offence

Background information about the offender

The offender in this case was a young man from Kiribati in the Central Pacific. The offender lived with his sister and brother-in-law and worked in a market garden. According to all parties interviewed, this was his first offence in New Zealand, although his lawyer thought that he had been convicted of a minor traffic offence in Kiribati.

Details of the offence

The offender was charged with, and convicted of, the offence of careless driving causing death. The case was heard in a District Court. The offender had been awake for a long period as a result of having attended a family social gathering and working extended hours before falling asleep at the wheel of a vehicle he was driving. As a result of his falling asleep, the vehicle left the road and struck the victim, a mother who was walking with two of her five children. The victim and her family were Māori. The victim was killed and her two sons injured, although not seriously. The offender, who was an unlicensed driver, had not been drinking and the incident was attributed solely to his tiredness.

Initiating section 16

Arranging the submission

According to the judge, defence lawyer, and probation officer, section 16 was not specifically referred to during the hearing of this case. However, the judge considered that the submissions made before sentencing by the victim's husband and father were consistent with submissions made under section 16 because of their cultural content.

The presentation of these submissions followed an intensive process of mediation between the families of the offender and the victim, which was facilitated by the probation officer responsible for preparing the emotional harm reparation report for the court. This mediation was suggested by the court which adjourned the case to allow time for it to take place. The probation officer involved in this case was also involved in case study eight.

Initially, the whānau of the victim had not wanted to meet personally with the offender, for several reasons. The first was associated with the difficulty in arranging for close whānau, who had attended court hearings, to return home from elsewhere in New

Zealand. Secondly, aspects of the offender's demeanour in court had given members of the victim's whānau the impression that he was unconcerned by the effects of his actions. Finally, there were fears that the anger felt by some of the victim's whānau was such that their actions, during a mediated meeting between the two whānau, might have caused problems. Because of this, the probation officer embarked upon a process of what he termed *'shuttle mediation'* between the two whānau.

Through this process, the victim's whānau was able to convey to the offender the severity of the impact of the victim's death upon them and in particular her husband and children. Briefly, her husband was an invalid, who had been forced into being a sole parent for his children. His oldest son, aged 22, was extremely angry towards the offender. His second son, aged seventeen, had been unable to come to terms with his mother's death and had made three attempts on his life, requiring him to be admitted to a treatment centre. The impact upon the younger sons was not as visibly great, but the fact that they were all with their mother when she died meant that they had experienced severe trauma. The victim's whānau were also able to convey to the offender and his whānau that they had interpreted his body language in court to mean that he was uncaring and unrepentant.

Finally, the offender was informed that, despite his tragic loss, the victim's husband had no wish for the offender to be imprisoned because that would not bring back his wife. However, he was strongly of the view that there should be reparation to assist with costs associated with the tangi (funeral), the unveiling, raising the victim's sons, and travel and marae visit costs to be borne by the victim's husband as he assumed some of his wife's duties. Although the offender did not have the means to undertake such reparations, the victim's husband considered that the offender's extended family should make payments, because the offender's brother-in-law had allowed him to drive as a weary and unlicensed driver.

A significant degree of mutual cultural understanding was achieved at these meetings and areas of cultural misunderstanding resolved. The probation officer made it clear that resolving these issues was instrumental in clearing the way for the families of the victim and the offender to meet. It was the elucidation of four particular cultural factors that the probation officer considered vital to obtaining the victim's family's agreement to a meeting.

The first of these was associated with the victim's family being annoyed by the offender's smiling demeanour in court, which they interpreted as a sign of insincerity and lack of caring. The offender's whānau were able to explain, via the probation officer, that in Kiribati this demeanour was consistent with greeting and conveyed aroha and respect.

The second cultural factor concerned an incident at a proceeding held during a pre-trial hearing when the defence lawyer was represented by a colleague because he could not attend himself. During this proceeding, the colleague commanded the victim's husband to be quiet when he tried to speak. He did this because no plea had yet been entered and he wished to avoid anything being said which might prejudice the offender's case. While this action was consistent with legal requirements, it was extremely offensive to the victim's family for their member to be treated so discourteously. However, the revelation that the offender and his family had themselves been deeply offended by this

treatment of the victim's husband, and felt very sorry for him, was crucial to persuading the victim's family to meet the offender's family.

The third factor concerned the need in I-Kiribati culture (culture of the inhabitants of Kiribati) to establish and maintain balance in relationships, and to re-establish this balance when it is disturbed or destroyed by the commission of a wrong or offence. The victim's whānau gained comfort from the heartfelt expression of apology conveyed by the sobbing offender. This apology was accompanied by the offender declaring himself prepared to accept any penalty whatsoever, including forfeiting his life. He also offered to assist the victim's family in any way he could.

Finally, the victim's whānau gained comfort from learning that the offender's whānau, who had wanted to attend the tangi, but had not done so on the advice of the police, had held their own service at the same time.

As a result of the understandings reached during these meetings between the probation officer and the victim's family, a meeting between the two families was agreed to and arranged to be held in a Catholic church under the auspices of a priest. According to the probation officer, the victim's husband, and the offender's family, this meeting had a powerful effect upon them all as they shared their grief at what had happened.

According to the judge, the defence lawyer indicated to the court that the victim's husband wanted to address the court and that the victim's father might also wish to do so. The defence lawyer indicated that specific arrangements had been made with the judge beforehand to accommodate submissions from the different families. In addition, the victim's husband, who spoke for the offender before sentencing, spoke to a court officer about arrangements for him to speak. The defence lawyer also discussed cultural factors in his pre-sentencing submissions.

Preparing the people to make submissions

The victim's husband received advice from the probation officer and Victim Support on matters relating to making a submission. However, he emphasised that the content of his submission was prepared by him alone, and the decision to speak for the offender was his alone, too.

The defence lawyer was assisted in his cultural submissions by an I-Kiribati who had acted as an interpreter in the case and the mediation meetings, and provided general support to the offender and his family.

The relationship between the offender and those making submissions

The victim's husband and father and the offender were only related through the incident in which the offender had caused the victim's death. The I-Kiribati interpreter was originally from the same atoll as the offender, but there was no family connection between the two.

The use of section 16

Making the submission

The submissions were all made to the court orally. The defence lawyer spoke first and gave what the judge referred to as a quite long and detailed submission which he finished by asking if the family of the victim could speak. The victim's husband and father then addressed the court, sometimes addressing each other as they did so. The victim's husband spoke for about an hour and a half.

The content of the submission

In his submission prior to sentencing, the defence lawyer included cultural factors on which he had been advised by the I-Kiribati translator and cultural advisor. He spoke of the desire of the offender and his family to approach the victim's family at an early stage, to attend the funeral, and to lay mats at the graveside. He explained how they had been deterred from doing so, on the advice of the police, for fear of retribution by members of the victim's family who had threatened this. He spoke of the misunderstanding that had arisen due to the offender's smiling demeanour in court and explained that this was appropriate behaviour in the context of the offender's culture.

In his submission, the victim's husband spoke of the mediation process and the ways in which this had enabled him and his family to move from their initial feelings of anger towards the offender to forgiveness. He discussed the mutual cultural understanding that had developed during the mediation meetings and the way this had allowed him and his family to understand aspects of the offender's demeanour which they had found offensive when judged from the perspective of their own culture. Underlying his submission was an understanding of death and an approach to grieving which was firmly grounded in his Māori identity and the networks of relationships in which that was based. An important feature of this was the Māori way of dealing with the pain of bereavement by speaking out and talking about it.

When interviewed he emphasised the healing nature of the process that his family and the offender's family were going through and indicated that this was a partnership that had begun when their families met at the church. This process continued after the sentencing when the offender and his family accompanied the husband to his wife's grave. He described this as an emotional and grieving process for the offender and his family, and as a blessing for himself.

> *Once we left the courtroom I endeavored to take the family to where my devoted lady is buried in [place], in which that [the offender's] whānau had agreed to come along with me that same afternoon, which ended with an emotional and, of course the grieving process for them was time for them to come out and for me was a blessing, that is what my wife would have wanted and I know that she would have wanted it that way*…(Victim's husband)

The judge's reception of the submission

The judge considered that the submissions in this case did not fit a narrow interpretation of section 16 because they were not confined to cultural matters relating strictly to sentencing. He saw the process as one enabling people to vent their feelings in ways culturally appropriate for them and allowing them to grapple with their feelings about

what had happened. He considered that section 16 was a very positive provision when interpreted widely, but of less value when interpreted narrowly.

While he found the submissions relevant to the case and to sentencing considerations, he did not think that they influenced the sentence he finally imposed because he considered that the issues aired in the submissions would have still been dealt with by him, but in other ways. When asked if it had been difficult to bring together the cultural factors presented in submissions and the legal framework within which he worked, the judge explained that it was not difficult for him because of his life experience and upbringing in a Māori setting. Because of this he had a good idea of what responses to expect when he questioned people about cultural matters or allowed people to speak of them. He explained that while there were sometimes contradictions between the sentiments expressed in cultural submissions and the accepted ways of administering justice, he found that these could be resolved by being open to suggestion, the exercise of lateral thinking, and being prepared to find outcomes which represent justice for the people concerned, rather than operating from the punitive position usually required by legislation. This attitude was reflected in his observation that there was a lot more to this particular case than the act of somebody being run over.

The judge found the experience of dealing with the submissions in this case very satisfying because they had contributed to providing the people concerned with an experience of justice that gave them hope and a desire to go on to better things. He felt that the environment created in these situations enabled him to dispense justice in a way that elevated the human spirit.

> *Personally these are the sorts of things which … elevate my spirit, which make me feel worthwhile, which make me feel that I have sat here and I have dispensed the justice which elevates the human spirit. And I think where justice is done like this, … that to me is true justice, not prize giving, … but exercising or creating a justice experience that causes people to have hope and to want to go on to better things.* (Judge)

According to this judge, section 16 submissions were more the rule than the exception in cases he heard. He particularly valued hearing from offenders' family members because he considered that they knew the offender much better than anyone else in the court did, and by listening to them speak he was able to discern where justice lay for the offender. He emphasised that it was not conveyed directly by those who spoke, but indirectly in the way they spoke. He contrasted this with the way in which the actions of lawyers were often aimed at shielding offenders from the consequences of their offending. He also considered that such family participation in the court proceedings was beneficial to the family, particularly Māori and Pacific families, because he realised that offending was not an individual matter, but something that affected a variety of people and the family in particular. In the case of Māori and Pacific offenders, he recognised a particularly close relationship between offenders and their families because of the extent to which an offender's family members felt implicated in his or her actions. The judge illustrated that closeness with the example of the case being discussed here in which the offender's family voluntarily assumed responsibility for paying reparation to the victim's family because they felt they shared their kinsman's culpability.

It was clear that this judge considered section 16 as much more than an aid to sentencing. For example, in the case being discussed, he did not consider that the submissions had influenced his sentencing at all, but they, and the process of mediation

preceding them, had combined to create an atmosphere of forgiveness, reconciliation, shared grieving, and a feeling of justice having been done. He was unsure how much support there was for section 16 among the wider judiciary, but did consider that judges were increasingly moving to achieve outcomes consistent with restorative justice.

The defence lawyer and husband of the victim both considered that the judge had listened to their submission sympathetically and seriously. The probation officer described the manner in which the judge delivered his judgement and sentencing as most sensitive and caring and occupying over two hours, which he considered to be a very long time for sentencing in a district court.

> … *he delivered a judgement in a most sensitive and caring way, and that was brilliant to hear. I mean the whole sentencing matter took probably two or two and a half hours, which for one sentencing matter in a district court is an immense amount of time. But it was very worthwhile and certainly it was [a] privilege to be part of that process.* (probation officer)

Changes made to the court processes to accommodate the submission

Both judge and defence lawyer agreed that there had been a departure from normal court procedure to the extent that the judge allowed the victim's husband and father to make their submissions from wherever in the court they felt comfortable and also allowed them to speak to each other while making their submissions. Perhaps the most significant departure from normal court processes in this case was the degree of latitude the judge allowed the husband and father of the victim in making their submissions. As the judge explained it,

> … *I allowed them to stand where they felt comfortable in court and I allowed them, for a time, to debate with each other in the back of the court, to argue with each other and to explain their views to each other and to tell each other how they felt. I just sat back there and let them, it went on for about, almost two hours, an hour and three quarters or something.* (Judge)

It was his view that it was necessary to provide this degree of latitude, to allow people to yell if they needed to, if the process was to be taken seriously and allowed to work.

Other significant issues relating to the use of section 16 in this case

The judge explained again that section 16 had not been formally invoked in this case saying that the cultural submissions were made as a result of him exercising his discretion, as the judge, to allow it to happen.

The defence lawyer thought that there had been problems associated with attempts to introduce cultural input too early in the case, before a plea had been entered and while the defence waited for the police to supply technical information, such as whether the accident had been caused by a mechanical failure, which would have provided a defence. The defence lawyer thought this had happened as the result of a misunderstanding on the part of the community magistrate. It was during this period that the incident, referred to earlier, occurred in which the defence lawyer's colleague told the victim's husband to stop talking and sit down. It was the defence lawyer's view that the introduction of cultural evidence during the pre-plea stage of a case was problematic because it had the potential to prejudice the subsequent entry of a not guilty plea. He

felt that the use of section 16 was of greater relevance either following a guilty plea or a conviction.

The victim's husband expressed the hope that the example of this case would encourage a process of change in the relationship between the justice system and the people, and that those involved in the justice system would increase their understanding of cultural values. He emphasised that this was particularly important in terms of the Treaty of Waitangi.

> *I would like to see major changes being made, we need to make these changes in terms of the Treaty of Waitangi. 150 years have gone by, now we're in a new millennium. The changes that need to be made in attitudes between the justice and the people that they come face to face with within the court system. And I hope that out of this [will] be a learning point for all those within the justice system, particularly to the Crown of New Zealand, that they have more understanding of cultural values of all nations. Let this be a turning point and let it be a hearing point that is not just hearing but putting into practice in the future*…. (Victim's husband)

The views of both the judge and the defence lawyer illustrate the element of confusion which has been found to exist around the issue of section 16. This confusion is between a strict interpretation and application of section 16, on the one hand, and an *ad hoc* introduction of cultural evidence, on the other. For example, strictly speaking, section 16 is designed to be used after conviction and before the passing of sentence.

Assistance needed by judges in order to be able to apply section 16 more effectively

When asked whether he found the cultural information challenging because it represented a set of values, beliefs and norms significantly different from the judicial set of values, the judge acknowledged that they were different, but that his prior extensive contact with Māori and Pacific people had rendered him sensitive to their ways of expressing themselves and acting. Because of this he had not found the experience personally challenging. He did agree, though, that he might have been able to make better use of the cultural information presented if he had received some training in the assessment of the impact of cultural factors in the commission of offences against the law. He expressed an interest in receiving such training if it was made available and said that he thought it was being considered for the first year of judicial studies. As far as interest in such training among other members of the judiciary was concerned, he thought there would be great interest.

The effect of section 16

Increasing the amount of information available to the judge

The judge considered that the submissions had definitely meant that he had more information available to him than would otherwise have been the case. This was also the view of the victim's husband.

The defence lawyer considered that the information given during the pre-sentence submissions was already known to the judge, so he did not think that the content of the

submissions actually increased the amount of information the judge had available to him. What he did think was important, though, was the fact that it was said again, and the way it was said, because it demonstrated to the judge the extent of the healing that had taken place for both families.

On-going family and community support for the offender

The judge said that the submissions told him a lot about the offender's community and support networks.

The defence lawyer considered that ongoing family and community support infused the whole mediation process as well as the submissions.

The victim's husband said that his submissions were definitely linked to ongoing family and community support for both the offender and his family.

The impact of section 16 on sentence outcomes

The judge considered that the use of section 16 did not affect the sentence directly, but did affect the process of sentencing.

The defence lawyer considered that the submissions did have an effect because they addressed three valid sentencing factors: remorse; reparation; and victim impact. These are factors which judges have to take into account in sentencing.

The use of community-based sentences or alternative sentencing options

The victim's husband said that his main concern was that the offender should not be imprisoned or deported to Kiribati, but should pay reparations to contribute to the support and education of the victim's children and his own commitments.

> *… first and foremost one of the things that I did not want to happen to [the offender] was to be imprisoned or to be extradited. …all I asked for was reparation in order to secure my family, particularly for myself and my commitments and above all my children in terms of their education into the future.* (Victim's husband)

The defence lawyer explained that the victim's husband had discussed the question of reparation in some detail during his submission. He described the need for reparation to help support his family, which included a child with a disability. According to the defence lawyer, he calculated a sum of about $20,000 as being the reparation sought. In the sentencing, the judge considered that the offender did not have the means to pay such an amount and set a lower amount of $5,000, which was to be paid within two years. In addition to paying reparation, the offender was sentenced to five months' periodic detention and disqualified from driving for two years.

Other effects of the use of section 16

When considering this case, it is difficult to separate the use of section 16 from the mediation process which preceded its use at sentencing. For this reason, the effects of the mediation process have been discussed in this section.

The offender and his family greatly valued the mediation process and the opportunity it provided for them to establish a direct relationship with the victim's whānau. They felt that the whole experience had brought them closer together as a family, and also strengthened their relationships with their wider I-Kiribati community in their city. In addition, it had created a relationship between the I-Kiribati community and the family of the victim.

The offender had been aware of threats made by some members of the victim's whānau to take physical revenge on the offender and his family.

> *He still worries about us, what the [victim's] family are going to do to us, that's why he's still worried too when he talked to me and I said to him, don't worry about everything what will happen, …. When somebody's going to kill us, or something like that, but he still worries about us and that's why he doesn't want us to be in trouble with those people, that's the feeling, that's what he's feeling.* (Offender's family member)

The reconciliation achieved by the mediation had served to allay the offender's fears for himself and the safety of his family in this regard, although the offender was still concerned that his family might be subject to attack if he was deported to Kiribati, despite assurances from the victim's family. According to members of the offender's family, while he was still extremely distressed by what he had done, the reconciliation had made it easier for him to bear the burden. It was a great comfort for him to receive the victim's husband's forgiveness and to be able to speak to him face to face.

Satisfaction of those involved

The judge thought that he had struggled with articulating his decision on the day, but felt that the process had worked well, overall. The judge's self-evaluation is in contrast with the probation officer's comment that the judgement was delivered "in a most sensitive and caring way, and that was brilliant to hear."

The offender and his family expressed their satisfaction with the submissions presented to the court by their lawyer and were satisfied with the sentence that was passed, saying that they had prayed for a sentence of periodic detention and reparation. They were also grateful for the representations made on the offender's behalf by the victim's husband.

The victim's husband was very satisfied with the presentation of his submissions because he felt well prepared for the task by his involvement and participation in other official engagements and hikoi (walks/activities). He felt that his submission had been instrumental in setting the offender free and saving his life.

> *…I feel as though, and I do not think that I'm a smart person, but I believe I set a young man free and saved his life.* (Victim's husband)

Improvements suggested by informants, based on their experience with section 16

The judge's main concern was that the provisions of section 16 should be wider than they are. He was of the view that the section should allow and encourage submissions which go beyond cultural features like tikanga or customs, and allow any affected parties to speak on any subject pertaining to the ways in which they have been affected by the actions of the offender. He felt that judges should be encouraged to take the time to

listen more widely to the views of those affected because this would make it easier for them to identify the most appropriate application of justice for each particular case. He emphasised his view that it was not the function of the judiciary to merely dispense justice according to the strict framework of legislation and precedent, but rather to do justice in each individual case.

> *…I think judges should be encouraged to hear more widely, to take the time to hear more widely because it makes the identification of where justice is in the circumstances far more easy. And that's important, you know we're not here to dispense prizes in accordance with the strict framework of the legislation and precedent; we're here to do justice in the individual case.* (Judge)

The offender's family thought that it was important to obtain the assistance of a cultural support person as soon as possible in the case.

The victim's husband argued that the provisions of section 16 should be used more widely so that cultural values and background are always taken into account before sentencing.

4.3 Case study eight

Introduction

In this case, interviews were conducted with the offender, the judge, the defence lawyer, two probation officers, the person who made submissions on behalf of the offender, and the person who made submissions on behalf of the victim's family.

The circumstances of the offence

Details of the offence

The offender was a young Samoan man who was charged with, and convicted of, the offence of careless driving causing death. The case was heard in a District Court. The main details of the offence are as follows. The offender had been returning home in a van with family members, including his father and an uncle, after attending a wedding. He was designated by older family members to be the driver, although he was unlicensed. At about ten o'clock on a Saturday night, he crossed the centre line into the opposing lane, collided with an oncoming vehicle and killed its sole occupant, a Pākehā woman. The offender had not been drinking at the wedding, and was in fact a non-drinker. The offender was unable to explain why the van crossed into the opposing lane, but it has been conjectured that he fell asleep at the wheel.

Initiating section 16

Arranging the submission

The judge explained that before going into court for sentencing, she was asked by court staff if she would be prepared under section 16 to listen to a representative of the offender's family and she agreed to this.

While the judge was personally unaware of who had initiated the use of section 16, it seems that the processes leading up to its use began when she called for an emotional harm reparation report under section 22 of the Criminal Justice Act in addition to the normal pre-sentence report. The preparation of the emotional harm reparation report involved a process of mediation between the families of the offender and the victim which was facilitated by the probation officer responsible for preparing the emotional harm reparation report for the Court. This probation officer was also involved in case study seven.

The emotional harm reparation report was prepared by the probation officer interviewed for this case study, who was based in the area where the accident occurred. He explained that in the course of preparing an emotional harm reparation report, attempts are made to bring the victim's and offender's whānau together, to start a process of reconstruction, to find out if apologies can be given and received, and to find out if there is a willingness on both sides to enter into a process of reconciliation and resolution.

If there is a willingness to enter this process, meetings are arranged to allow the exchange of feelings, to give and receive apologies, achieve mutual understanding, and

attempt some resolution of the question of the payment of reparation. There is no set formula for determining the level of reparation and the level arrived at is very much a balance of the victim's need and the offender's ability to pay. If there is an offer of reparation from the offender, the judge must take that into account when deciding sentence.

When he spoke of his meeting with the victim's family, the offender said that his purpose in meeting them was not to obtain their forgiveness, but only to explain his part in what had happened. He was extremely nervous before meeting them and thought he was going to faint. But when the members of the victim's family started to speak, he realised that they were not there to judge him, or blame him, but to listen to his side of the story and then to offer their help and their love. The offender said that he had found it very hard to understand how they could respond in such a kind and understanding way. He found it very helpful and healing to be able to tell the victim's family about what had happened, and he thought that they had found it helpful to be able ask him questions and hear his side of the story. The children of the victim were not at the meeting, however, and the offender has written to them to explain what happened and express his sympathy to them.

> *Before I went in there, I thought I was going to faint, I was really scared, my head was down, and then once I got in there and they started talking, it just helped me a lot, you know, just thinking, they're not there to blame me, they're not there to judge me, they were just there to listen to my side of the story, and then offer help, and then offer their love for what I had done, and that to me was something else, it wasn't easy.* (Offender)

According to the probation officer, the use of section 16 became part of this process and the understandings arrived at during the process informed the submissions made by the probation officer in his report, and the submissions made by the family of the victim under section 16, prior to sentencing. It seems, however, that the submission made for the offender by a church minister was not directly influenced by these proceedings, because the minister had not been involved in them and his offer to speak had not been solicited by any party involved, as will be explained below.

The defence lawyer encouraged this process because he had spent time in Samoa, and was aware of the seriousness and sincerity with which a Samoan family would treat an event like this. He knew that they would accept an overall family responsibility to atone for the damage caused to the victim's family. From the defence lawyer's point of view, there were good reasons for doing this, from both human and legal perspectives. The defence lawyer explained that from a legal perspective, the courts are very mindful of victims' families, and any apology or offer to make amends can be taken into account by a judge and result in a more lenient sentence. The defence lawyer discussed this with the offender and his family. The defence lawyer knew that the offender wanted to have the opportunity to apologise and express his remorse and he informed the probation officer of this.

As far as the actual use of section 16 was concerned, the offender said that his lawyer had suggested to him that he have someone speak on his behalf. However, the church minister who did speak for him had, in fact, done so without being asked. The minister explained that he had known nothing of section 16, and based his decision to speak for the offender on his experience as a policeman in Western Samoa, where the law allows a person to raise their hand in court and ask to be allowed to address the court before

sentence is imposed by the presiding judge. According to the minister, he met the defence lawyer outside the court on the day of sentencing and asked if he could speak on the offender's behalf. The lawyer then made arrangements for this to happen, as described below.

On the day that sentencing was to be carried out, the defence lawyer met with the prosecuting sergeant, who represented the victim's family. He explained that a submission would be made on the offender's behalf under section 16 and asked if the victim's family would have any difficulty with that. The prosecuting sergeant suggested that the two parties got together to discuss this – something the defence lawyer considered to be most unusual, in his experience. At this meeting, the defence lawyer explained to the victim's family what was going to be said on the offender's behalf.

The Pākehā victim's family, for their part, chose one of their women members to make their submission to the court. According to other family members, she had been very active in keeping the family together during this difficult time, helping with arrangements for the funeral, travelling to be with the victim's children, and acting as a general contact person. This woman said that she wrote out the family's submission in consultation with other family members and read this to the court.

> … *I did that with the help of the family, we sort of wrote something out and I phoned them and read it through and would have a cry and write something else, bring up the next one, go through the same… that in itself was healing…* (Victim's cousin)

The relationship between the offender and those making submissions

The offender's spokesperson was his church minister, but not otherwise related to him. The spokesperson for the victim's family was the victim's cousin.

The use of section 16

Making the submission

The submissions were all made to the court orally. The defence lawyer said that they had thought about how best to present them and decided that an oral presentation would be more genuine and effective than a written one. They were also aware that the points that would be made in the oral submission would be covered in writing as well, in the probation officer's report. Although the victim's cousin had the submission written down so that she would not leave anything out, she said she did not read from it because her hand was shaking too much.

The probation officer described both submissions as having been given with very real feeling and with very strong emotion.

The content of the submission

It seems that the cultural matters relating to the case were presented to the court in the probation officer's report, rather than in the church minister's submission, because the minister made it clear that he did not discuss matters pertaining to Samoan culture at all as he understood that this had already been done through the probation officer's report.

Instead, he focused on his knowledge of the offender as a member of a congregation in which he was a minister. He spoke of the offender's involvement in the Sunday schools, with the church youth, and as an organist. He also spoke about the fact that the offender was single and lived at home with his parents and two sisters.

The victim's cousin spoke about their family's desire that the offender should not be sent to prison because he was young, it was his first offence, he had not been drinking, and that he'd had an accident that could happen to anyone. These feelings were reinforced by the meetings they had had under the auspices of the probation officer, during which the two families had come to understand each other and experience healing together. She indicated that, in essence their submission was intended to show their support for the offender and his family.

> *Yes, I had [written it out], I didn't want to leave anything out, although I couldn't read it because my hand was shaking that much. It was just saying we didn't want him to go to jail, we felt it would be a waste of time and that … basically we just asked the judge not to send him to jail, that we'd had a meeting and that we had … had a lot of healing and … we just wanted to show our support to him and his family basically.* (Victim's cousin)

The probation officer said that he placed emphasis upon the weight of responsibility that the offender felt after being asked to drive the vehicle by his elder. This was an obligation the offender had derived from his family, and which led to the offence. In view of this, the probation officer emphasised the appropriateness of the sentence being shared by the family members through their contribution to any reparation order that was going to be made.

According to the judge, the cultural content of the submissions contained in the probation officer's report emphasised the Samoan system of forgiveness and the process by which the offender's family had gone to the victim's family and knelt before them to ask forgiveness.

The judge's reception of the submission

The defence lawyer considered that the judge was not initially sympathetic to the submissions. He said that it required considerable work to persuade her that what she was being told was true and that the process by which the offender sought to obtain forgiveness was a genuine aspect of Samoan culture. The defence lawyer had feared that if there had been the slightest suggestion from the police that they did not accept what the offender and his family were saying, then the judge would not have accepted the submissions. However, he said that in the end the judge seemed to accept what was said and the value of the meeting between the two families. He thought that it was the fact that the victim's family had accepted the offender's apology and remorse that had persuaded the judge to take the submissions seriously.

The probation officer's perception of the way the judge received the submissions differs from that of the defence lawyer, although the probation officer was not actually in court for the sentencing. However, it was his understanding, at second-hand, that the judge had been very delighted with the probation reports and had listened with great interest to the families' submissions.

The church minister who spoke for the offender thought that the judge had been sympathetic to what he said, and that this had been reflected in the sentence. The offender, himself, said that he could not tell what the judge thought of the submissions as she was listening to them, but she had seemed to be listening carefully and taking them seriously.

For her part, the victim's cousin did not think that the judge had taken notice of her family's wishes concerning sentencing. They had asked that there be no prison sentence or periodic detention, but despite that the offender was given a suspended sentence and five months periodic detention. She felt that that was quite severe in view of her family's feelings on the matter and the offender's remorse.

The judge, herself, said that she did not find the submissions themselves, from the minister and the victim's family, helpful in determining the sentence because it was an offence of some significance in that the victim died. However, she said that what did affect the sentence was the attitude of the victim's family towards the offender and the fact that they did not want an actual term of imprisonment imposed.

> … *it was an offence of some significance, in that the victim died. It [the submissions] didn't affect the sentence. What did affect the sentence was the attitude of the victim's family to the offender, and the victim's family did not want an actual term of imprisonment imposed. I would have imposed an actual term of imprisonment had it not been for the view of the victim's family. As it was I suspended that term of imprisonment to reflect the victim's family's view. Now the victim's family may have been influenced by the cultural approach.* (Judge)

The judge found the cultural information that was presented familiar and did not think that she would have been able to make better use of it if she had received training in the assessment of the impact of cultural factors on the commission of offences. However, she did say that it might, for her, be a case of not knowing what she does not know.

When asked whether she had found it difficult to bring together the cultural factors presented in the submissions, and the legal framework within which she worked, the judge said that she did not because the issues of remorse and restitution which the submissions addressed were factors of direct relevance to determining sentence. The judge did not experience any difficulty in dealing with the submissions because she considered that they were relevant and to the point. She said that, in her experience, difficulties only arose with section 16 submissions when they were not relevant, or the expectations of sentence that they expressed were unrealistic.

The judge in this case identified a number of positive and negative aspects of section 16. The positive aspects, for her, were associated with the way in which the family of the offender became connected with the offence, the sentencing, and the sentence. The judge considered the involvement of the victim and/or victim's family to be an added bonus because this enabled the court to be informed of their response to the offence and views about sentencing. As indicated above, the judge said that difficulties with section 16 arose when unrealistic expectations of sentencing were expressed in submissions, and she considered the potential for this to happen as a negative aspect of section 16. This was particularly the case with serious offences, for which custodial sentences were appropriate, where the submissions called for an alternative option such

as the offender being released into the care of his or her family to be loved and cared for in order to prevent any further offending.

> *In my experience of negative aspects [a problem] is not realising what is relevant when making submissions or addressing the court, secondly unrealistic expectations of sentencing. In other words "We know our family member has … done some bad things. We would like to take him away and immerse him into family support and love and care and look after him so that he won't offend again", when clearly the seriousness of the offense precludes dealing with it on that basis.* (Judge)

When asked how much support she thought there was among members of the judiciary, generally, for section 16, she said she could not give an accurate assessment of that, but did say that some colleagues she had spoken to had expressed serious misgivings. She thought these misgivings were the same as those she had expressed.

Changes made to the court processes to accommodate the submission

While the judge considered that no changes had been made to the normal court processes to accommodate the section 16 submissions, both the defence lawyer and the probation officer considered that there had been because of the extra time allowed for the submissions to be made and the fact that people other than counsel addressed the court. This disagreement is probably due to the judge referring to normal court processes when section 16 is being used, whereas the defence lawyer and probation officer were referring to normal court processes when section 16 is not being used.

Other significant issues relating to the use of section 16 in this case

For the defence lawyer, a significant issue raised by the use of section 16 in this case was that of appropriate punishment. He considered that there was, in the justice system and the political arena, a preoccupation with revenge and punishment. Yet this had not been a preoccupation of the affected families at all. The primary concern of the offender and his family was to apologise to the victim's family and convey their absolute horror and trauma over what had happened.

> *What this case underlined was that all [the offender] wanted to do was to apologise and to convey to the family his absolute horror and his trauma about what happened. All they wanted to do was to be assured that [he] was not a bad man, that he made a small mistake and he hadn't been drunk, and that he was genuine in his remorse. Now having seen that and having met the family, they healed faster than any other victims ever would. They were united in saying, "What is the point of sending him to jail, there is no point. One life has been lost, what's the point in destroying a second one?"* (Lawyer)

The defence lawyer argued that the emphasis in the justice system upon deterrence and sending clear messages about the consequences of offending often overrode the genuine wishes of victims and their families by imposing much stronger sentences than the victims recommended as appropriate.

> *What our justice system says is that it's not just between the parties; society has a stake in this process as well, and for some reason, judges or politicians perceive that society always has a harsh view, and … often it happens that the judges will say, "Oh, we appreciate the*

victims don't want him to go to jail, and we know he doesn't want to go to jail, but we must send a message out to others, and, therefore, off to jail you go." (Lawyer)

He considered that this case had been one in which the justice system had been caused to deal seriously with the views of the victims when determining sentence.

The effect of section 16

Increasing the amount of information available to the judge

The judge considered that the submissions had definitely made more information available to her than she would have had without them. However, it was not so much the information about cultural practices and processes that she had found useful as the information conveyed about the victim's family's attitudes to sentencing that she had found helpful.

Yes, yes definitely and in particular the victim's family's attitudes towards the actual sentence, it made a significant and helpful difference to know that. (Judge)

The defence lawyer agreed that a lot more information was available to the judge as a result of the submissions and he considered that this had been an educational process for the judge in which she had gained new insights.

The offender thought that the judge would have learned important things about Samoan culture, particularly the way in which people support each other in hard times.

Yeah, I reckon she would have, because she would have seen that he [the church minister] was there for support and some people don't have that sort of support, which is pretty bad. But she would have seen that he was there and that I was there with him and the family, so yes, she would have understood that everything that we do in our culture, we always support each other in hard times. (Offender)

The victim's cousin thought that the most important information made available to the judge as a result of the use of section 16 was the agreement that existed between the two families in their submissions, and this assessment is consistent with the judge's own comments, outlined above.

On-going family and community support for the offender

In the judge's view, the submissions were linked to ongoing family support for the offender because of the family involvement in paying the reparation of $10,000 to the victim's family and the family support he would receive to study at university. This material support from his own family was also linked to moral support from some members of the victim's family through their desire that he should do well at university so that his university achievements would stand as a memorial to their lost family member, who had been deprived of finishing her own degree by the accident. The defence lawyer noted that the sentence included supervision, and suggested that this had been imposed to ensure that the offender did not walk out of the court and feel he had got away with the offence. The defence lawyer considered it important that support for

the offender was sustained because there were concerns about how well he would recover from his trauma from the accident.

Impact of section 16 on sentence outcomes

From the judge's point of view, the main impact of the submissions was that they advised her of the victim's family's attitudes towards the offender and sentencing, which enabled her to suspend the actual term of imprisonment she imposed. She considered that the information she was provided with gave her confidence that the offender was as he appeared to be and was unlikely to go on to offend in the same way again.

> *It provided more information to me, as a sentencing judge, which gave me more knowledge and confidence that this offender was as he appeared to be, either a first offender or somebody who had minor offenses, and gave me comfort that he wouldn't go on to offend in the same way, and therefore I didn't need to take into account specific deterrent for the future when sentencing.* (Judge)

This was also the defence lawyer's view, and he considered that if the judge had thought the victim's family wanted the offender imprisoned, she would have imprisoned him. So from the point of view of the defence lawyer the meetings between the families prior to sentencing were crucial to the final outcome.

The probation officer was also of the view that the submissions had enabled the judge to arrive at a more balanced decision than she might have otherwise. He considered that she took the view that this was a case that would normally require imprisonment, but because she was able to take into account the factors raised in the submissions, she was able to make a judgement that balanced the needs of offender, victim and community.

The use of community-based sentences or alternative sentencing options

As a result of the use of section 16, the defence lawyer explained, a community-based sentence was imposed in the form of periodic detention, and supervision to ensure that the offender recovered from the effects of the accident and had guidance and support. The probation officer considered that the submissions and the meetings associated with preparing the emotional harm reparation report had provided the information the judge required to be able to pass a community-based sentence.

Other effects of the use of Section 16

For the offender, the degree of support he received from his family and the church minister was a revelation. He said that before the accident, he had not known that he had so much support available. He also considered that his family had been brought much closer together as a result of their involvement in the case and the meetings with the victim's family. He also thought that what had happened to him was serving as a cautionary tale for other family members who are anxious to avoid doing anything that might cause them to go before a court and end up doing periodic detention.

> *Well,.. people who were unaware of how the system works, they've asked me about what happens about this, what happens at PD all this sort of thing. So they want to know just in case they're in an accident and they don't want anything bad to happen, and they are trying*

to keep away from that side. So they ask me, you know, "What sort of punishment do they use, what happens in court?" and all that sort of thing. (Offender)

The probation officer, who is based in the offender's hometown, also noted that the offender's ties with his family and wider community had become stronger since the accident.

Another significant effect for the offender has been an increased awareness and understanding of his Samoan culture. As a result of conversations with the church minister, he had learned of the struggle his people have had with life in New Zealand and come to appreciate the way in which he was in-between cultures, in some ways, as a result of having been brought up in New Zealand.

Well, after the minister, when he talks to me about certain things, he talks about things that happen like the Samoan people -- how they struggle with sort of, life in NZ and that sort of thing. And he helps me understand -- cause I've been brought up in NZ -- he helps me understand about the Samoan culture, about what they do there in their system, which has helped me …sort of look in between, in between the two different cultures and helped me sort of… appreciate my Samoan culture. Before I wasn't ready to, but moving away from it. And then he helped me understand where the culture comes from, how we people are as a Samoan community, and that sort of stuff, which is quite helpful. It's brought me a lot closer to family in Samoa…(Offender)

Now that he has a greater understanding of where his culture comes from and become closer to his wider Samoan community, he has been brought closer to his family in Samoa, too.

The offender emphasised that the experience has made him determined never to re-offend and to seek help from parents, teachers, church ministers, and people from church if he needed support to avoid offending. He would recommend to other young people that if they found themselves in trouble, they should get someone, who knows them well and understands what sort of person they are, to help them and speak for them. An important result of the help and support he had received was that it encouraged him to talk about his feelings and relieve some of the pressure he was under.

Satisfaction of those involved

The defence lawyer was extremely satisfied with the outcome of using section 16 and the process leading up to its use. He thought that one of the most exhilarating feelings a defence lawyer could have was to complete a trial knowing that justice has been done for both the offender and victims in a case. He explained that while it was not the defence's brief to look after the interests of victims, it would be less than human for a defence lawyer not to be touched by the effects of offending upon them. In view of this, to witness a victim's family standing in court to forgive an offender and ask that he make a success of his life to honour the life he took by accident, touched the defence lawyer deeply.

… so I left that court with a wonderful feeling of exhilaration, coming out with huge admiration for a number of people, you know. And it's one of the puzzles of life, that you can have such a dreadful tragedy and, flowing from it, you can see the finest aspects of human nature, all within and happily on this occasion in the justice system that is flexible enough to

> *allow that to happen. And I really suspect that this section 16 is grossly under-utilised. Most judges want as much information as they can get, they want to understand what is different about this case, and … as I say even this judge, who did not appear receptive at first, in the end she had to recognise it.* (Lawyer)

The probation officer was very comfortable with the total process that the use of section 16, with sections 22 and 23, provided. Section 22 of the Criminal Justice Act provides for the court to sentence an offender to make reparation to a victim or victims, while section 23 provides for the probation officer or other person preparing a reparation report for the court to attempt to seek agreement between offender and victim about the level of reparation. He thought this should happen more often and that the members of the legal and judicial professions could do a lot more to promote it. He noted that there were varying degrees of ability among judges to make effective use of section 16, sometimes because of their own situations, and sometimes because of the pressures of court lists.

Despite her misgivings about section 16 when people's expectations were unrealistic, the judge too, was very satisfied with the use of section 16 in this case and considered that, given the particular circumstances of the case, a more appropriate sentence had been the result.

The offender was happy with the process and considered the sentence he received to be appropriate. Perhaps the only dissenter was the victim's cousin, who considered the sentence to be too harsh because of the periodic detention component.

> *I think it helped that he didn't go to jail, but I do feel that the sentence he received was too severe for that young man, definitely.* (Victim's cousin)

Improvements suggested by informants, based on their experience with section 16

While there was a high degree of general satisfaction with section 16 by those involved in this case, there were some suggestions offered to improve the provisions and application of section 16. However, for his part, the offender was entirely satisfied with the process and did not think it required any improvements at all.

The judge considered that it would be useful to have guidelines prepared for people who will be making submissions on behalf of offenders, so that they could make their submissions relevant to the sentencing issues that judges must consider. If this happened, there would be more chance of judges developing sentences which were consistent with the expectations of families and less chance of submissions being at cross purposes with sentencing requirements and containing information that judges cannot take into account.

The probation officer recommended changes in two areas. Firstly, he recommended that, when appropriate, the courts order emotional harm reparation processes more frequently than they do at present, and that the courts be clear about the difference between an emotional harm reparation report and a victim impact statement. He said that the courts are not always clear about the difference between the two and sometimes considered that a victim impact statement was sufficient on its own. However, as he argued, it is the emotional harm reparation report that allows the process of mediation to take place, and this process can facilitate the input of cultural factors, as was

demonstrated in this case. He thought that not all judges were as familiar with this distinction as they could be. The second recommendation he made was that all judges, as part of their sentencing process, make a general comment to the court to ask if anyone present would like to talk about the offender. While he appreciated that judges might find this an unwelcome added burden upon their already constrained time, he felt that they would benefit from people coming to regard the courts as user-friendly places.

The defence lawyer was satisfied with the present situation because he considered that the provisions of section 16 were flexible enough to allow it to be used effectively. He was generally of the view that the principle of allowing people, other than defence lawyers and other officials, to speak on behalf of offenders, should be encouraged, and that section 16 could be expanded to allow submissions which were not strictly about cultural factors so that a wider range of people could be called on to make section 16 submissions.

4.4 Case study nine

Introduction

In this case, interviews were conducted with the offender, the judge, and the Samoan defence lawyer, who, in this case, also presented cultural submissions under section 16. While agreeing to be interviewed, the judge declined to speak directly about this particular case, and restricted his responses to general comments about the use of section 16.

The circumstances of the offence

Details of the offence

The offender was a Samoan woman, a solo parent who worked part-time. The victim was her adopted daughter. This was the offender's first offence. The police case against the offender was that she had assaulted the victim and she was charged with assault with a weapon. The victim, who was also from Samoa, had been adopted by the offender and came to live in New Zealand, where she stayed with the offender and her other children, who were also adopted.

The offender discovered that the victim, who was then seventeen or eighteen years old, was having an affair with a married man. There were a number of attempts to counsel the victim to stay away from the man, but she ignored these attempts. The man came to the offender's house one night, while intoxicated, and asked to see the victim. The offender turned him away and she and another daughter told the victim to stay away from the man. The victim ignored this advice and ran away from home the following morning.

The offender and her other daughter went to where the man was staying, but he refused them entry. However, it was clear to them that the victim was in the house, so the offender and her other daughter entered the house, grabbed the victim and dragged her back to their van. This was accompanied by a lot of yelling and screaming, and people who were present became very upset. Eventually the victim was put in the van and taken back to the offender's house. During the journey home, she was assaulted with a jandal, and punched and slapped. At home, she was further beaten with a vacuum cleaner pipe by the offender, and others who were not charged. Finally, the victim's hair was cut as a form of discipline.

In the meantime, the man had called the police, who arrived at the offender's house shortly after the assault on the victim. By the time the police arrived the situation had calmed down, but they took statements from the people present and then charged the offender and her other daughter with assault with a weapon.

Initiating section 16

The offender and the defence lawyer agreed that it was the defence lawyer who had initiated the use of section 16 in this case. The defence lawyer said that he decided to use section 16 because it is possible for an offender to avoid being imprisoned for an offence involving serious violence, if there are special circumstances relating to the

offence, or the offender. He used section 16 to explain the Samoan cultural practice of cutting the hair of young women as a sanction for serious breaches of acceptable behaviour. He emphasised this because the police case placed some weight upon the hair cutting, representing it as spiteful and malicious.

Arranging the submission

During pre-sentence submissions, the defence lawyer spoke alternately as defence lawyer and cultural advisor, in his capacity as a Samoan Matai (Samoan person of chiefly or high ranking status). It is unclear whether the submissions made by the defence lawyer in his capacity as a Matai met the strict criteria of section 16 because he was also the defence counsel. However, it seems that the purpose of section 16 had been met by the cultural submissions, made by the defence lawyer, in his capacity as a Matai.

The offender, for her part, had chosen this particular lawyer because he was Samoan and would understand why she had done what she did. She made it clear that she did not want a lawyer to make excuses for her. She wanted a lawyer who would be able to explain to the court that she loved her daughter (the victim) and that what she had done was not to punish the victim, but to protect her.

> *I knew I had to tell him the truth, I knew I had to tell him what was in my heart as to why I committed the offence. I did not want him to find an excuse for me, I did not want him to protect me from the offence, I did not want him to tell anything other than the truth. I told everything truthfully, everything that I have used and I wanted the lawyer to speak of the truth. I was invited by police to look for a lawyer. I was sure that I did not want a lawyer to provide me with an excuse, I wanted the lawyer to speak the truth, that I did it because I loved my daughter. I did not do what I did to punish my daughter, I did it to protect her. So my lawyer submitted all the cultural evidence to the judge…* (Offender)

The judge explained, speaking generally, that the onus for initiating and arranging section 16 submissions rests with either the offender or their counsel.

The use of section 16

Making the submission

The defence lawyer made his submission in person, speaking from the bar table. According to him, there was no written material, diagrams or historical analysis of the practice of hair cutting. He presented the submission as an oral description of a cultural practice, and no other person spoke on the matter.

The content of the submission

The defence lawyer explained that his submission concentrated on the cultural significance of the offender cutting the victim's hair, and did not deal with the beating. The submission explained that cutting the hair of a young woman, in these circumstances, is carried out as a form of correction or discipline, for them having overstepped the bounds of the behaviour required of them. Normally this would involve a serious breach of promise, deliberate disobedience, or bringing shame to the family name. In these circumstances, young girls up to the ages of eighteen to twenty

could have their hair cut as a punishment which is visible to them, and a sign to the village that they have been disciplined for something that they have done wrong. The practice also reinforces families' authority over young girls.

> *…with my research and my own understanding of the cultural practice of haircutting young women, I put that aspect of what happened in it's proper context. The haircutting of young women is done traditionally as a form of correction or discipline, if they overstep the bounds of what's required. Normally if there's a serious breach of promise or they've been deliberately disobedient or they've brought shame to the family name, then young girls up to the age of, I think about eighteen, twenty, can get their hair cut as a form of visible punishment, to them, as well as a sign to the village, that this young girl has been disciplined for something that she's done wrong, and also it reinforces the family's authority over young girls.* (Lawyer)

The submission explained that the hair cutting, in this case, wasn't severe, because, while it was cut short, it was not shaved completely, as sometimes happens in these cases. The submission also explained that the victim, herself, understood why it had been done. In essence, the cultural explanation was used to put what seemed to be a most cruel punishment in its proper cultural context.

The judge's reception of the submission

The defence lawyer considered that the judge had received the submission sympathetically. He felt that the judge would have started from the premise that the haircutting represented a very cruel and heartless approach to dealing with a young woman who had rights of her own.

The judge did not indicate how he had received the submissions in this particular case. However, he did say that while it would be very unusual for a court to conclude that serious violence could be excused by some cultural factor, it could be sympathetic to cultural factors that might suggest that an offender was open to rehabilitation and support.

When asked if he experienced difficulty in bringing together cultural factors presented in section 16 submissions with the legal framework within which he worked, the judge explained that the law set out a sequence of reasoning to be followed, and priorities that had to be observed. He said that, in general, cultural factors tend to combine with other factors in this sequence of reasoning to illuminate the circumstances of the offender and take their place in the process of sentencing. He did not experience difficulty dealing with cultural evidence in this context and had never been given information about an offender's cultural background which he had found personally challenging or unhelpful to his dealing with the case.

When asked if he thought that it would be helpful to have training available for the judiciary in the assessment of the impact of cultural factors on the commissioning of offences against the law, the judge thought that training was important in all areas where the law is applied in the context of the community. However, he considered that, in the absence of training, an openness to accurate and carefully considered information about a person's culture could allow the purpose of section 16 to be served just as well.

Changes made to the court processes to accommodate the submission

In this case, the presentation of the submissions involved no change to normal court processes because they were presented by the defence counsel from the bar table.

Other significant issues relating to the use of Section 16 in this case

The defence lawyer thought that there was an important learning process for the public and the legal profession associated with the use of cultural submissions in this case. An important part of this process involved a minority group sharing information about its practices and lifestyles, making them more understandable to the general public, and having them taken seriously by the courts.

> *Well, I think with cultural issues it's about the minority groups sharing information about their own practices and lifestyles, which will make it more understandable to the general public. And in this particular case there was a legal … forum in court. But the cultural practice could be … looked at in court.… I think people learn from it, the judges and the media and the other people in court. I understand that the case actually received some publicity in the newspaper and I think that may have highlighted the practice as well to the general public.* (Lawyer)

For the judge, speaking generally, it was necessary for the judiciary to treat section 16 submissions carefully because of the potential for the case for leniency to be overstated and supported by appealing to cultural considerations which might not be quite correct. He did not advance this caution to argue that Section 16 submissions should be ignored, but to indicate that they should be heard and weighed carefully with all of the other evidence presented.

The effect of section 16

Increasing the amount of information available to the judge

The offender was of the view that her lawyer's cultural submissions had provided the judge with more information than he would otherwise have had.

> *My thinking is yes, the judge said right after [my lawyer's] submission that I could have been taken to prison. But because the lawyer had submitted what he submitted about the cultural reasons, he was now going to sentence me to community sentence. I knew [my lawyer] had submitted that I should be given a community sentence because I am the only worker that looks after my children. I felt that the judge took what [my lawyer] had said and therefore lightened the sentence.* (Offender)

The judge affirmed, in general terms, that information about cultural factors relating to an offence and an offender can help to identify circumstances which might justify the imposition of a community sentence where a term of imprisonment would otherwise be the most appropriate sentence. However, he noted that the information contained in section 16 submissions is usually also covered in pre-sentence reports, particularly when the writer is of the same ethnic background as the offender.

On-going family and community support for the offender

According to the defence lawyer, his cultural submissions were linked to on-going support for the offender.

The use of community-based sentences or alternative sentencing options

The offender was sentenced to 200 hours community service.

Other effects of the use of section 16

Although the set of circumstances leading up to the offence were not unusual, according to the defence lawyer, he considered that the offender's experience of the court process was itself likely to deter her from re-offending. He explained that the process was long and drawn out, and very stressful for the offender. During the process she had been very concerned about her future, thinking that she might be imprisoned, and wondering what would happen to her children. He considered that the offender's family had pulled together to support her and had become aware of the pressure she had been under.

While it is unclear to what extent, if any, the use of section 16 in this case contributed to the lessened likelihood of re-offending, the defence lawyer suggested that it might have helped the offender in the process of reconciling her Samoan cultural beliefs with what is acceptable under New Zealand law.

> *… now that the case has gone to court and there's been a lot of publicity and everyone knows about it, they would probably be much more conscious of using that as a form of discipline. So … the case itself, for this family actually might be a deterrent to using it [hair cutting], where some other families may still see it as an appropriate cultural practice.* (Lawyer)

He felt that her children were helping her in this process, as most of them had been born in New Zealand.

The offender felt that the process had strengthened her relationship with her family and her church because of the support she has received from both. She attributed this support to their understanding of her situation and recognition of her love and concern for her children.

> *Yes it certainly has. My family love me for what had happened, they feel for me in my wish and my strong longing for my kids, and I'm still very close with my kids.* (Offender)

Satisfaction of those involved

The offender was satisfied with the way her lawyer had represented her and explained the cultural factors involved in the offence. Both the defence lawyer and the offender were satisfied with the sentence imposed. The offender was relieved that she had not been imprisoned, while the defence lawyer considered that the sentence of community service was appropriate in the circumstances.

Improvements suggested by informants based on their experience with Section 16

The defence lawyer said that one thing he regularly experienced was the need to educate judges, court staff, police, and lawyers about the cultural practices of the members of other minority groups he represents, to allow the evidence in those cases to be placed correctly in context.

For the judge, speaking generally again, there were two broad issues to be considered as part of any reform of section 16. These issues involved a choice between a provision which enabled a person to call a witness if he or she wanted to, or a provision which gave the court the ability to ask for a report. The advantages and disadvantages of these provisions were outlined by the judge, as follows.

The advantage of the first option would be that it could bring to the court, very quickly, informally, and at no cost to the court, information that could be helpful in determining sentence. The disadvantage of this option would be that it might not be used enough by the people who could benefit from it most. The advantage of the second option would be that it could ensure that everyone appearing before a court would be guaranteed the provision of this information because the court would arrange for it to be provided. The disadvantage of the second option could be that it would very rapidly become elaborate and very expensive. On balance, the judge thought that the present situation was probably the safest because, in cases where cultural factors are truly important, they tend to be identified either by the pre-sentence report, or by counsel, or by both, even when section 16 is not strictly used.

4.5 Discussion

Introduction

The aim of this discussion is to draw together the results which were reported separately in case studies seven, eight and nine. This discussion will cover the areas of: recruitment; characteristics of the three cases; problems associated with the use of section 16; and suggestions for improving the use and application of section 16. Although the case studies are the primary focus of this research and provide the main substance of this discussion, important information was also obtained during the recruitment process and aspects of this are discussed here, too.

Recruitment

Although there are no negative examples of section 16 use represented among these three case studies, it was clear from difficulties encountered during the recruitment phase that there were problems associated with the use of section 16 in cases of criminal offending by Pacific people in New Zealand. One problem which became evident during the case identification and recruitment phase of the research, and before any interviews had been conducted, were differences of opinion among judges and lawyers about whether or not section 16 had actually been used in particular cases. For example, the researchers were referred to cases thought to have involved the use of section 16, which the lawyers concerned agreed had involved the use of section 16, but which the presiding judges considered not to have used section 16. The judges came to these conclusions because cultural evidence had been submitted first as part of the defence and then simply re-stated prior to sentencing.

It also became evident that there was a degree of unwillingness on the part of Pacific lawyers to use section 16 because they considered that judges were most likely to interpret the submissions as attempts to excuse offenders' behaviour. There was also evidence that Pacific community groups were not promoting the use of section 16 in cases involving their members and clients, even though they had information about section 16 on display. This was because they were concentrating on working with probation officers to provide cultural information to the courts through pre-sentence probation reports.

Characteristics of the three cases

As far as the three cases studied are concerned, there was general agreement that they had involved the use of section 16. Despite this agreement, there were significant differences in the attitudes of the three judges to section 16 and the ways they used it. Case studies seven and eight were very similar in terms of the types of offences involved and the processes of mediation which preceded the use of section 16. It has already been noted that the same probation officer was involved in both of these cases and he was very active in facilitating the mediation process. Case study nine involved a different type of offence, an assault by a mother on her daughter, and no mediation process was involved.

In each of the three cases considered here, there was a high degree of satisfaction with the process and outcome of the use of section 16. It is significant, though, that guilty pleas were involved in each case, and each offender acknowledged his or her responsibility for their offending. In case studies seven and eight, the willingness of each offender to acknowledge responsibility, express remorse, seek forgiveness, and pay reparation was crucial to the processes of mediation between offender and victim which preceded the use of section 16. It is unlikely that the same results would have been achieved in either of these cases if the offender had pleaded not guilty. In such an event, it is unlikely that the victims' families would have made submissions in support of the offenders that would have persuaded either judge to impose a non-custodial sentence.

Mediation and reconciliation

The most compelling feature of case studies seven and eight is the way in which the use of section 16 was combined with the determination of reparation, in accordance with section 22 of the Criminal Justice Act, and the associated mediation between offender and victim, in accordance with section 23 of the Criminal Justice Act. In each of these two cases, section 16 submissions were made by members of the victims' families in support of the offender. In neither case were the victims or their family Pacific people, and their positive submissions in support of the offenders were informed by the understandings of the offenders' cultural backgrounds that they had obtained during the mediation meetings. It was the evidence of reconciliation and forgiveness reflected in these submissions that convinced the judges to impose non-custodial sentences. This was particularly the case with the judge in case study eight.

Cultural evidence offered in mitigation of the seriousness of an offence

Case study nine was a different kind of case from the others and represents, perhaps, a more classical use of section 16 because the section 16 submissions were related directly to an aspect of the offending: the cutting of the daughter's hair by her mother. According to the defence lawyer in this case, the act of cutting the daughter's hair had been represented by the police as being a particularly malicious and calculated act which was, perhaps, worse than the initial assault. Had this representation been accepted by the court, it is possible that a custodial sentence would have been imposed (although this cannot be asserted with confidence because the judge concerned declined to comment directly on this case, as noted in case study nine). However, the lawyer was able to mitigate the significance of this act in the context of an assault charge, by explaining the significance of cutting a woman's hair, in such a situation, in the context of Samoan culture.

Problems associated with the use of section 16

While the successful use of section 16 in these three cases is ultimately attributable to the participation of those making submissions on behalf of offenders and victims, the process was facilitated and enabled by the openness and commitment of the judges, probation officers and lawyers involved. This is important because, although there are no case studies of negative experiences of the use of section 16 by Pacific offenders to inform this research, there is evidence that it is not used as often as it could be in cases involving Pacific offenders. As indicated earlier, the information obtained while identifying suitable cases suggests four reasons for this. These are associated with: (1)

reliance upon the presentation of cultural evidence in probation reports; (2) section 16 not being clearly understood by probation services and community groups; (3) the perception of Pacific lawyers that judges are likely to view section 16 submissions as being offered to excuse offending; and (4) lawyers not offering the option of section 16 to their clients.

Suggested improvements to the use and application of section 16

A number of suggestions for improving the application and use of section 16 were made by those participating in this research, and these are summarised below. The directions of these suggestions range from broadening the provisions of section 16 to make it more flexible, to measures designed to allow people to make more effective use of the existing provisions of section 16. Those arguing for greater flexibility were of the view that justice should be administered in the broadest possible way and be actually experienced as justice by those involved from all sides of any particular case.

Increased flexibility for the use of section 16

Among those arguing for flexibility were: the judge in case study seven; the lawyer in case study eight, and the probation officer involved in case studies seven and eight. The judge in case study seven argued that the provisions of section 16 should be broadened to allow and encourage submissions which go beyond cultural features like tikanga or customs and allow any affected parties to speak on any aspect of the offender's actions upon them. If judges allowed more time to listen to the views of those affected it would be easier for them to identify the most appropriate application of justice for each particular case. He emphasised his view that it was the function of the judiciary to do justice in each individual case, rather than to merely dispense justice according to the strict framework of legislation and precedent. The lawyer for the offender in case study eight was also of the view that submissions on matters other than cultural features should be permitted.

It is also clearly important that knowledge of section 16 be increased among all those involved in the criminal justice system, and that they be encouraged to be proactive in encouraging its use. In line with this, the probation officer involved in cases seven and eight recommended that all judges, as part of their sentencing process, make a general comment to the court to ask if anyone present would like to talk about the offender. While he appreciated that judges might find this an unwelcome added burden upon their already constrained time, he felt that they would benefit from people coming to regard the courts as user-friendly places. Such a culture would also encourage the participation of those lawyers who were concerned that use of section 16 submissions might be counter-productive or, at best, a waste of time.

Using section 16 in conjunction with sections 22 and 23

Case studies seven and eight have illustrated how effectively section 16 can be applied in conjunction with emotional harm reparation processes. The probation officer responsible for initiating and facilitating these processes in those cases recommended more frequent use of emotional harm reparation processes by the courts in addition to the provision of victim impact statements. In his view, the courts were not always clear about the difference between the two and sometimes considered that a victim impact

statement was sufficient on its own. However, as he argued, it is the emotional harm reparation report that allows the process of mediation to take place, and this process can facilitate the input of cultural factors, as was demonstrated in both cases.

More effective use of the existing provisions of section 16

The judge in case study eight argued for the implementation of measures designed to allow people to make more effective use of the existing provisions of section 16. To achieve this she suggested the preparation of guidelines to help them make their submissions relevant to the sentencing issues that judges must consider. If this happened, she argued, there would be more chance of judges developing sentences which were consistent with the expectations of families and less chance of submissions being at cross purposes with sentencing requirements and containing information that judges cannot take into account.

Conclusions

These case studies highlight a number of issues concerning the roles of legal professionals in the application of section 16 as well as issues for offenders and victims. In this concluding section, the roles of judges, lawyers and probation officers are discussed with reference to their contribution to these successful applications of section 16. In turn, these successful applications of section 16 are linked to the sense of closure experienced by offenders and victims in these cases. The final point to be made in this section is the fundamental importance of legal professionals being receptive to the different ways in which events can be understood according to the cultural perspectives from which they are viewed.

Role of the judiciary

The role of the judiciary in fostering the use of section 16 is particularly important because of the power judges have to interpret, and accept or reject, culturally-based submissions and evidence. Although all of the judges involved in the three cases considered in this research were open to the submissions they received, they had different degrees of personal exposure to the issues of cultural difference which were raised in these cases. This meant that the bases upon which they dealt with the submissions varied. For example, the judge in case study seven had family connections into both Māori and Pacific communities and had been brought up in a Māori setting. As a result of this he was already familiar with the cultural factors and issues involved in both the case and the relationship which developed between the families of the offender and the victim. In addition to this, it enabled him to grant the members of the victim's family a considerable degree of latitude in presenting their submissions. By contrast, the judge in case study eight did not appear to have had the same degree of exposure to Pacific or Māori cultural perspectives.

Although the end results in these particular cases were similar, the greater confidence of the judge in case study seven enabled him to view the provisions and application of section 16 much more broadly and creatively than was possible for either judge in the other two cases. In order for members of the judiciary to be similarly equipped to assess section 16 submissions, it seems desirable that the further development of section 16 be accompanied by specific training for members of the judiciary in areas such as the

assessment of cultural evidence and the impact of cultural factors in the commission of offences against the law.

Role of lawyers and probation officers

As the offender's first point of reference in the court process, defence lawyers have an important responsibility to bring section 16 to their clients' attention and work with them to ensure that they are able to make the best possible use of its provisions. Probation officers are also well placed to promote its use and, when they are involved in facilitating mediation processes between offenders and victims, are able to involve victims and their families in the section 16 submission process too. It is clear from issues raised during the recruitment phase of this research that some lawyers do not advise the use of section 16 submissions because they do not expect judges to take these seriously. This is a perception which will be dispelled if judges demonstrate their commitment to section 16 by openly encouraging and facilitating the presentation of submissions.

As these case studies demonstrate, it is also important that victims be afforded the opportunity to participate in the section 16 process. In the cases discussed, victim participation was facilitated by the probation officer responsible for preparing the emotional harm reparation report and the associated mediation process. While probation officers in such cases are well placed to facilitate the participation of victims and/or their families, alternative means should be found for facilitating this in cases which do not bring victims and probation officers directly into contact.

Issues for offenders and victims

The involvement of offenders and victims in the judicial process through emotional harm reparation processes and section 16 submissions had been shown, in case studies seven and eight, to benefit both parties. The key to this benefit was the creation of a relationship between the two parties and their respective communities where none had existed before. The creation of this relationship resulted in a sense of closure being experienced by the participants in each case, which would not have been achieved without the creation of these relationships and sense of mutual understanding.

Intercultural awareness among legal professionals

While it is not possible to generalise from such a small number of studies, the cases considered here have identified the crucial contribution to the successful application of section 16 that professionals in the legal, judicial and probation fields can make. These studies have illustrated that legal professionals have been most able to facilitate the process of applying section 16 when they have been open to, and aware of, cultural difference and the possibility that any particular action can be imbued with a different meaning and significance according to the cultural framework from which it is observed, as well as in terms of the cultural framework from which it is perpetrated. In view of their pivotal roles in the court process, these professionals carry a significant burden of responsibility for facilitating the effective use of section 16.

5 Use of section 16 by other ethnic groups: case studies ten and eleven

Tony Waldegrave and Kiri Simonsen
Ministry of Justice

This chapter presents two case studies, one involving a New Zealand European offender, and the other involving a Japanese offender, that were completed by Ministry of Justice researchers.

5.1 Methodology

The cases selected for the study were obtained from surveys where respondents indicated that they were aware of cases where section 16 had been used, and were happy for researchers to contact them about these cases. As a first step researchers contacted the survey respondent. This was either the defence lawyer in the case or someone who could refer researchers to the defence lawyer for the case. Each defence lawyer was asked if they would act as an intermediary between researchers and the offender. A detailed consent process, designed to respect their privacy and other rights as research participants, was undertaken in each case. Offenders' consent to be contacted about the research and for the research to be conducted was obtained via intermediaries.

The offender's lawyer was sent an information pack about the research to pass on to their client. The pack included a project information sheet (Appendix eight), a sheet answering some questions about the research (Appendix nine) and a consent form (Appendix ten). Researchers informed the potential participants, before their involvement in the research, about:

- the purpose of the research
- who was conducting the research
- what participation involved
- the rights of the research participants
- participant access to information provided and feedback on the research
- how information would be used (i.e. publication)
- the storage of materials relating to participation
- individual confidentiality
- the possibility of cases being recognisable due to distinctive case characteristics.

The consent form asked for the offender's consent to several different issues:

- to contact the offender
- to contact their family
- to contact the judge and access their sentencing notes
- to contact the lawyer and access their notes

- to contact the person who spoke on behalf of the offender
- to access the pre-sentencing report. The offender indicated on the consent form who Ministry researchers could contact and interview.

The interview process

Interviews were arranged once the consent of the offender was obtained. In both cases the offender declined to be interviewed, but agreed for their case to be the subject of a case study. They consented to researchers interviewing their families, lawyers, the Judge, and the person who spoke on their behalf. Where possible, the family of the person before the court was interviewed first. This provided a context for the case so that when talking with the judge and the lawyer, Ministry researchers were clear about the details of the case. Interviews took place at a location convenient to the interviewee, and varied in length from 30 minutes to 120 minutes. Semi-structured interview schedules were used to guide the interviews. Interviews were audio-taped with the consent of the participant. Care was taken that information was not passed from one participant to another during the course of interviewing for the data collection of the case study.

Documenting the case studies

The information sources for the case studies were semi-structured interviews, sentencing notes, pre-sentence reports, and written submissions.

Confidentiality of participants was an important consideration in this research. Researchers were careful not to use the actual names of the people involved and ensured that no identifying details were included in the case study report. Researchers discussed with each participant the possibility of cases being identifiable, especially to criminal justice professionals in the area where the case was heard, due to distinctive characteristics of the cases. Drafts of the written case studies were sent to participants who requested them.

5.2 Case study ten

Background

Introduction

The offender in this case study chose not to be interviewed, but agreed for her case to be the subject of a case study. She consented to the researchers interviewing her lawyer, the judge in her case, and her mother (who made the section 16 submission). For reasons of anonymity, the offender is referred to as P throughout this case study.

Background and details of the offence

P was a young Pākehā woman. She had no criminal history prior to this conviction. She is the eldest of three children. As a child P had lived overseas with her family. P was in her teens when her parents unexpectedly announced their separation and that their mother intended to return to New Zealand with the children. P spent a year in New Zealand but was unhappy and returned overseas to live with her father, leaving her mother and younger siblings in New Zealand. P completed her schooling at a private school, but often felt depressed and appeared to have suffered an emotional reaction to her parent's separation. In 1997 P developed a genuine state of clinical depression and she began to use LSD frequently as the year progressed. It was during this time that P was involved in an accident while driving her father's car. It was not P's fault but she blamed herself and it was shortly after this accident that the offence occurred. P was referred to a psychiatrist but continued to feel depressed. At the time of the offence P was thinking of her forthcoming trip to New Zealand and the fact that she may have needed to use LSD at that time. She sent 20 tablets of LSD to a post office box in New Zealand with a false addressee name and false sender's name. New Zealand Customs intercepted this package. New Zealand Customs and the New Zealand Police identified P as the sender of the package. P did not tell anyone of her actions and she reports that her thinking at the time was quite irrational.

In 1998 P decided not to use LSD any more and it was at that time that her family noted an improvement in her mental and physical state. P also felt she had to return to New Zealand and confront the consequences of her actions. On entering New Zealand P was spoken to by Customs and the Police, and charged with the offence. P expressed remorse and regretted the anxiety and distress she had caused her family and friends. P also realised the effect a criminal conviction could have on her future career.

P was charged with, and convicted of, importing a Class A drug for personal use. Due to the seriousness of the offence, the case was heard in the High Court. P received a sentence of 100 hours of community service.

Initiating section 16

Arranging the submission

P's lawyer and the person who made the submission (P's mother) reported that it was P's lawyer who broached the idea of making a section 16 submission. P's lawyer expressed

the view that when taking on a new case he looked at how section 16 might be used in the case, as it was his opinion that a Judge would be more affected by a plea made by a family member.

> *In this area where we're mainly talking about drugs or sexual offending, other offences as well, invariably I look at section 16 and think now how is that going to help us. And often, and this is a simple premise, a judge will, in my view, frequently be more affected by, in terms of mitigation, a plea by a family member or a member of the whānau, just some one that can put a human element onto it.* (P's lawyer)

P's lawyer suggested that her mother make a submission, as she was used to speaking in formal situations and was very articulate. It was left to P's mother to decide what she would be presenting in the submission. P's lawyer checked the content of the submission before it was made.

The day before sentencing P's lawyer advised the court and the judge that a section 16 submission would be made and provided the material that would be spoken to. P's lawyer felt this was an important part of the section 16 process as it allowed the court to extend the period of time provided for sentencing.

> *I advise the court so that they extend the period for sentencing, because frequently, and wrongly I might add, they treat sentencing as something you can get over and done with early on and get on with commercial issues. So I let them know and give them all the material we are going to rely upon and case and reference the day before. For example 'these are the references provided by her and here is a break down of what* [P's mother is] *going to say to the court'.* (P's lawyer)

The use of section 16

Making the submission

At sentencing P's lawyer requested the judge hear a section 16 submission and asked whether he would like to hear the submission, or counsel, first. The judge indicated that he wished to hear from counsel first, followed by the submission.

When it came time for the section 16 submission to be made, P's lawyer turned to P's mother to indicate that it was time to come forward and speak to the court. The submission lasted for three to five minutes.

The content of the submission

P's mother explained how her daughter's depression and withdrawn behaviour had resulted from family problems over the last few years. P's mother also discussed the family's relief at the discovery of the offence, as it meant that the family had been able to *"get through to [P]"* and make progress with her recovery. P's mother also mentioned that the family realised the seriousness of the offence, that P had sought help for her drug use and was now making a slow but progressive recovery. Finally P's mother mentioned P's ability to relate to children and the future career path that her daughter hoped to pursue.

P's mother and lawyer thought the judge listened to and received the information well. However, it was explained that the section 16 submission needed to be placed in a context of all the other factors presented, including P's lawyer's submission to the judge and the numerous written submissions made about P's character. Approximately twenty family members had came to court to support her. P's mother thought these factors supported and complemented the section 16 submission.

The effect of section 16

P's lawyer and P's mother thought that the section 16 submission and written submissions contributed to assuring the court that P had sought help for her problems and that she had on-going family support. P's mother felt that the submission also gave the judge confidence not to order a term of imprisonment.

> *It was another building block to give the judge confidence not to order a term of imprisonment. To give them the confidence to impose the sentence that was appropriate and in the end we all think that he came to the appropriate decision.* (P's mother)

A sentence of 100 hours community service was imposed.

Reflections

P's lawyer reported that he broadly interprets section 16, and thought that the information presented fitted within the category of family background. Initially the judge did not think the submission really came under the umbrella of section 16 because he interpreted the section as being related to cultural and ethnic background. Nevertheless, the judge allowed P's mother to speak.

> *I really didn't apply in my mind so far as I could remember as to whether this was a case, which came within section 16, as to ethnic and cultural background because my attitude on sentencing is that, subject to not being abused, I welcome any constructive information relating to the circumstances of the offender; and the circumstances under which the offender committed the offence is relevant to the question of the assessment of the appropriate penalty. And I have in many cases, where somebody, a friend, or somebody's wanted to speak from the floor of the court where I have considered it appropriate, said 'yes'. Because they can actually confirm or amplify aspects which are raised in the pre-sentence report. So perhaps I may be a little more flexible than many judges who might decline to hear any statements from people other than the lawyer from the floor of the court.* (Judge).

On closer examination of the section the judge realised that the section could allow for submissions relating to family background.

> [The judge reads from the act] *It's interesting isn't this, the section heading says "offender may call witnesses to cultural and FAMILY background" but the actual section itself says "subsection two: the matters to which a person may be called to speak under subsection one are broadly the ethnic and cultural background of the offender" and that's not necessarily the same thing as family background is it. It's an interesting point because in my case it was certainly family background, but not really ethnic or cultural background.* (Judge) [Caps denote emphasis]

P's mother suggested that her previous experience with the justice system might have had an impact on her level of comfort in making a submission.

> *It's easier because we know how to write things,* [and] *say things, so you know the whole access to justice thing is easier for us than for some people that don't have the same ability with the written word or spoken word. And even though we are familiar with the court it is still an overpowering and very emotional experience for us.* (P's mother).

P's mother's knowledge of the justice system also meant that she was able to make an effective submission.

> *But I also know that you make your point in the first sentence. You can speak for ten minutes, you can speak for half an hour, or you can speak for three minutes; it's only the three minutes that count really, so I'm not here to waste the judge's time and start going on and on about what a wonderful girl she is and everything else.* (P's mother)

P's mother reported that being able to participate during the sentencing process assisted P and her mother to deal with the court experience. P's mother suggested that without the opportunity to participate, the sentencing process might have been a frustrating process:

> [P's lawyer] *also knew that* [I] *would appreciate some involvement in the process because then I just wouldn't feel like, you get very frustrated being part of the criminal process because you're such a passive factor in it all. You've got no influence in it. I'm used to being able to influence things or being able to have some control over things, and then you're just swept up into this process you feel very inadequate and it helped to have some involvement.* (P's mother)

All participants were satisfied with both the way the submission was made and how it was received:

> *We were extremely grateful for the chance to be involved.* (P's mother)

Research participants were not in favour of narrowing section 16 and thought that it would be unfortunate if the provision was only for Māori, Pacific Peoples and ethnic minority groups.

> *I think if I had been told that there was a section, but it wasn't available to me because it was only available for Māori say, I won't agree with that. I don't think there is any logical ground for that because we all have family.* (P's mother)

5.3 Case study eleven

Background

Case background

This study focuses on the use of section 16 in a case that involved three Japanese offenders and a Japanese victim. All of the offenders and the victim were under the age of twenty, and all were part of the same local Japanese community, at the time of the offence. Although many of the issues discussed in this study apply to all three offenders, it is restricted in focus to one of the offenders and the presentation of information to the court on his behalf. The pseudonym J will be used to refer to the offender throughout.

J's mother was Japanese and his father was a New Zealand European. J grew up with his family in Japan until he was 16 years old. His family then moved to New Zealand. Since coming to New Zealand he attended secondary school then studied at university. The incident in this case occurred when J was seventeen. When the case was heard he was twenty.

The District Court judge's notes on sentencing outline the established facts of the case and show the basis on which J was sentenced. There were three separate incidents. On the first occasion J, in the company of one of his co-offenders, demanded $700 from the victim, as a payment for some shoes. On the second occasion, which was two days later, all three offenders were present. The offenders were said to have bullied, committed minor physical assaults on, and demanded money from, the victim. On the third occasion, J was alone and demanded more money from the victim.

During the early stages of the court proceedings J's parents were not aware of the trouble their son was in. When they did become involved there was little they could do to avoid a guilty plea. In dissatisfaction at both the process, and the legal advice that their son had received up to that point, the parents dismissed their son's lawyer and found another.

The new lawyer and family focused on the opportunity to provide information in mitigation of the offending, at sentencing. J, like the other offenders, had no previous convictions. During the hearing he had offered his apologies to the victim and offered to pay reparation. He was found guilty of two counts of demanding with menaces.

His pre-sentence report identified him as an equal participant in the offending and recommended he be ordered to pay a fine and reparation. Defence counsel invited the court to consider a discharge without conviction. He was sentenced to six months imprisonment suspended for two years, reparation, and a fine.

The family and lawyer appealed the sentence. On appeal, the High Court judge quashed the suspended sentence, imposed community service, and upheld the orders to pay a fine and reparation.

Case study informants

J declined to be interviewed but agreed for his case to be the subject of this case study. He provided his written consent for researchers to discuss his case with his supporters and to consult relevant case documentation.

Five people contributed information to the study in four separate interviews. These were: J's parents; his second lawyer; the person who made the section 16 submission; and the High Court judge who heard the case on appeal. The District Court judge was not available to contribute her perspective.

Initiating section 16

The need to use section 16

The timing through which J's parents became aware, then active, in their son's defence, was integral to how section 16 came to be used in this case. The parents found out about their son's situation through a friend, who read about the case in a newspaper and rang them to express her sympathy. At this point a full confession about the offending had already been made to the police and the parents were unable to avoid a guilty plea being entered. The offender's father explains the position they found themselves in to be able to assist their son:

> …*our hands were tied, so at that point we had to decide how best to try to diminish what was likely to happen in the sentencing.* (Father)

Informal discussions with people who had been involved in the case to that point revealed three main issues that had not been raised in court but that the parents believed mitigated the offending and justified lenient treatment by the court.

1. J's parents believed the offenders had behaved according to Japanese custom.

> …*once we'd talked to our son, and found out more about the situation, it became clear to us that what had occurred was very much a Japanese cultural situation*…(Father)

Through their son's description of events the parents recognised an expression of Japanese values in the commission of the offences. During interviews with the parents and spokesperson they frequently stated that Japanese society is much more conformist and hierarchical than New Zealand society. Their perception was that the offending had been motivated by these values, and the related values of 'giri' (duty) and 'Kohai-senpai' (hierarchical relationships).

2. The judge who heard the case on appeal summarises how these issues were presented at the District Court sentencing:

> *It was said that the victim had not respected them as their elders, had behaved in a* [demeaning] *and irritating* [way]*, and that he needed to be taught a lesson, and that the Japanese way to teach him a lesson was to inflict some kind of punishment on him. In the judgement it was referred to as 'the nail that sticks out gets hammered down', and that's all*

they were doing, so they said. And that, because it was only amongst Japanese boys, and it was a Japanese problem, dealt with in the Japanese way. (Appeal Judge)

3. In Japan this case would not have been dealt with by the courts.

The parents believed that because, from their perspective, the incidents were minor, understandable from a Japanese point of view, and involved Japanese offenders and a Japanese victim, that they would not have been dealt with by a court, if they had occurred in Japan. They explained that if an incident like this had been reported to Japanese authorities it would have been referred back to the families for resolution.

…it wouldn't have gone to court. That kind of thing would never go to court in Japan. (Spokesperson)

4. Quality of legal advice.

The parents said that they were surprised to realise that the court had not been made aware of the Japanese interpretation of the offending prior to their involvement. They, and the spokesperson, felt the legal advice received to that point had been poor.

…there were aspects of the case that have never been dealt with well, which with adequate representation they could have been used to have defended a not guilty plea. (Spokesperson)

The parents chose to relieve their son's lawyer of his responsibilities and appoint someone to concentrate on the presentation of the Japanese perspective, where further opportunities were available:

…when we went to meet with [counsel] *that* [the cultural situation] *was one of the things that we emphasised very strongly to him ……we talked with* [counsel] *about how we could introduce that and what scope there was for introducing it.* (Father)

Deciding to use section 16

Counsel explained that he decided to use section 16 because by the late stage he and the parents became involved in the case, his options for defence were limited.

…it seemed to me that we couldn't plead not guilty because he had made a full confession… So my advice was to plead guilty and to ask for mercy, and one of the ways I thought of doing that was to argue the cultural context in which this occurred, to use section 16 as a support for that argument…(Counsel)

Deciding how to use section 16

Although counsel identified section 16 as a way to present the cultural issues, he was not entirely sure of how it should be used:

It wasn't quite clear how to deal with section 16, whether to do it by way of submissions from me, whether to do it through someone just speaking from the floor of the court, or whether to do it through a witness giving sworn evidence on a usual basis where they are open to cross examination; and it seemed to me that we got most mileage out of having

> *someone actually give evidence in a formal way, being sworn to tell the truth then being open to cross examination.* (Counsel)

Counsel's decision to call an expert witness, who was open to cross-examination by the prosecution and the judge, is an unusual way to use section 16. Counsel however insisted that this method of submission was appropriate, particularly in this case:

> *This is all at sentencing. Although I've seen it done before, I mean there's absolutely no reason why you can't call evidence at sentencing; it's not done very often but it is done on occasions that you call evidence on sentencing for whatever reason.* (Counsel)

> *I repeat that this case, if ever there was any case ever where section 16 was appropriate, then this was that case.* (Counsel)

Finding a spokesperson

J's parents realised that their perspective would not be seen as objective, so sought a spokesperson who offered, to bring neutrality, expertise, and an ability to speak convincingly in court:

> *…we felt we had a biased perspective if you like, and what we really wanted was someone who could be perceived to be independent and also with a bit of a reputation.* (Father)

Similar concerns guided counsel's approach to finding an appropriate presenter:

> *…in the present case it seemed to me that it was not appropriate to call* [the offender] [to speak] *because he really couldn't talk in an objective way about the mores and cultural values of Japan, in a way that an independent person could … and for obvious reasons it wasn't sensible to call* [his mother] *because she was so distraught about the whole process.* (Counsel)

A suitable presenter was found through a series of phone calls between family, friends and other contacts:

> *I had a phone call from* [the supporter] *volunteering his support because he was concerned about what had happened and he wanted to know if he could help and he told me a little bit about Japanese culture.* (Counsel)

> *Counsel said, after having spoken with* [the supporter]*, he felt that* [the supporter] *had a good feel for the whole issue and felt that it would be useful for us to, if you like, have an expert witness to come and sort of testify.* (Father)

Preparing the speaker

The interviewees did not indicate that there was a need for significant preparation of the spokesperson before the sentencing. As previously mentioned, considerable effort had been put into finding someone who could identify with the Japanese perspective of the offending circumstances, and speak authoritatively about it in court. This, and the style of submission selected by counsel, possibly negated the need for detailed and consultative preparation. The spokesperson explained simply:

> *I was asked to come and address the court on culturally-mitigating circumstances.* (Spokesperson)

Counsel notified the court two days before sentencing of his intention to request the court to hear a submission under section 16. At sentencing however, the judge was unaware that counsel intended to do this. It was apparent to counsel that this caused some frustration for the judge:

> *I stood up and said I was proposing to call evidence. The judge said that she knew nothing about that, and it was a total surprise to her, so then I had to tell her that I'd spoken to the court, and had to try and calm things down a bit.* (Counsel)

Time constraints

In response to counsel's request for the court to hear the spokesperson, the judge stood the case down until later in the day. Counsel sensed that this inconvenience, in the context of a busy schedule, did not bode well for things to come:

> *And she had a huge workload on that day already, so then we stood my case down until the afternoon… it just all got away to a bad start.* (Counsel)

The use of section 16

Familiarity with section 16

Counsel was of the view that the judge was unfamiliar with section 16:

> *… she was not aware of section 16 of the Criminal Justice Act, I actually showed it to her so she could see what I was talking about and what I was wanting to do.* (Counsel)

Submission process

The spokesperson recalled counsel making the following type of introductory statement before he was invited to take the stand:

> *…under this section I think there are culturally-mitigating circumstances and as a consequence I'd like to call so and so, who because of x y z, for these purposes is an expert witness.* (Spokesperson)

Counsel had this to say about the submission process:

> *…he gets sworn in as a witness, and then I just walk through various points with him. I then make a written submission to the court after he had given his evidence…then the judge made her sentencing remarks, but you'll see in the evidence that the court asked* (the supporter) *some questions and so did the police, they cross-examined him as well.* (Counsel)

From the spokesperson's point of view, his role in the submission process was somewhat passive:

> *I just did what was asked of me…and just appeared and when was asked questions tried to answer them to the best of my ability.* (Spokesperson)

J's parents, while present at sentencing, were not directly involved in delivery of the submission. The father's perspective differs significantly from the perspectives of those who were directly involved in making the submission, but offers some insight as to the parent's contribution:

> *…my recollection is that counsel had basically prepared some comments based on his discussion with us that covered a lot of the issues that my wife raised here, but that was largely in a verbal form, although I think he gave a copy to the judge during the hearing process.* (Father)

Content of the submission

In this case, section 16 was used solely to present information in mitigation of the offending. The submission maintained a general focus on Japanese societal and cultural norms, and more detailed focus on the values that were thought to have driven the offending. The submission did not include information about the possible use of alternative sentencing options, or information about on-going family or community support for the offenders. Counsel explained that the broad focus of the submission was upon:

> …*the cultural and societal practice in Japan.* (Counsel)

He offered more detail about how the spokesperson explained what he believed would have happened if the offending had occurred in Japan:

> … *one of* [the spokesperson's] *points that he was making, that it's hard for a nation of individuals to understand Japanese society which is a nation of conformists; and it's not necessarily approved what happened, but it is recognised that it can be dealt with in that particular way; and what would happen afterwards is that the parents would then get together and there would be apologies and counter apologies and the kids would be told off in a very firm sort of a way; but it would be dealt with inside a family structure rather than go to court.* (Counsel)

When asked about the content of his submission, the spokesperson highlighted the Japanese values that he believed would have motivated the offenders, as Japanese, and as peers of the victim:

> …*those three boys would have seen themselves, at least in part, as doing their cultural duty.* (Spokesperson)

> …*they would have been seen as saying to that boy 'look if you carry on like this you can't live in Japan; you've got to be able to go back to Japan, you have to behave, and we're here to kind of frighten you and punish you.* (Spokesperson)

How the submission was received

J's father thought that a number of factors combined to affect how the judge received the submission:

> …*Then, because of all the delays we ended up being last on the court list for the day, and she* [judge] *was probably tired… and she'd said in the morning session when we got it deferred that he'd* [supporter] *only wanted to talk for ten minutes or so, but it actually went on for quite a while.* [Counsel] *asked him questions, then the Police guy jumped in; and I didn't time it, but it probably took 25 or 30 minutes*…(Father)

The spokesperson felt that the judge did not receive his submission well. He felt that her responses, comments and questions from the bench conveyed that she wasn't going to give his submission a great deal of credence:

> …[the judge] *was clearly displeased that she was being required to listen to this stuff at all, made her displeasure very, I mean was tutting, looking heavenward, was very much in support of the prosecuting counsel, said this is just simple thuggery and if we set this kind of argument we are going to get Islanders beating up their wives and coming in and claiming cultural clemency, that kind of stuff. I thought pretty outrageous but that was the tenor of the proceedings and it was very clear to me that justice in cultural terms was not going to be done, that this was very much a case of Pākehā sort of Kiwi law saying thank you very much this is our society, when you come and live here you do what we say and you behave the way we think is appropriate and there's no mitigating circumstances.* (Spokesperson)

Counsel felt that the judge's questioning indicated that she did not fully understand part of the submission:

> … [the spokesperson] *went through his evidence; he could only talk in general terms; he couldn't talk about this offence obviously; he just talked in general terms. The judge misunderstood what he was actually getting at; he was talking about pressures to conform in Japanese society, and she said to him at one occasion 'you're obviously referring to the tall poppy syndrome' and he said 'no, I'm actually not referring to that at all'.* (Counsel)

On several occasions during the interview with J's parents, they explained that they had taken offence at the way the sentencing had proceeded, and particularly at how the judge had received the submission. J's mother interpreted the judge's response as being anti-Japanese. She felt the judge was unable to understand the cultural differences being presented:

> …*this case is all Japanese, and she* [judge] *doesn't know anything about Japanese culture or background but she's so angry in court, she is very angry so …we can not receive truth, because I don't know why she is so angry, maybe because we are Japanese, so angry.* (Mother)

J's father stated that a vehement cross-examination of the spokesperson by the police prosecutor heightened his wife's sense of alienation:

> …*we were also appalled by the way that the police guy asked his questions…he was just unbelievably aggressive and quite unpleasant, I thought, which was unnecessary. I mean*

> *here's* [what is] *supposed to be a court of law with civilised people, and again that intensified in my wife's thinking that there was a real sort of anti-Japanese or anti-Asian slant to the questions.* (Father)

Unfortunately no prosecution or judicial perspective was available about how the submission was received. During sentencing the judge expressed her gratitude to the spokesperson for his submission.

Sentence received

Counsel had proposed that J be discharged without conviction under section 19 of the Criminal Justice Act. The probation report had recommended J receive a fine and order for reparation. J received a sentence of six months imprisonment although this was suspended for two years. He was also ordered to pay reparation to the victim and a fine.

The District Court judge's remarks on sentencing present her interpretation of the offending circumstances, the relevance of the information presented in mitigation of the offence, and other considerations germane to the sentence she imposed:

> All defendants have admitted that there was an element of planning involved in their dealings with this boy. It was therefore deliberate. It involved stand-over tactics and bullying. The Court is told that the plan was to teach the boy his place and on the evidence that I have heard from [spokesperson], under section 16 of the Criminal Justice Act, it seems that there are significant cultural differences, and I am grateful to the [spokesperson] for explaining those to the court. [The spokesperson] said that the boys could arguably be said to be acting responsibly and with due cause in order to get a younger person to comply with certain behavioural norms. [The spokesperson] said that the importance of conformity could explain the way that these defendants behaved, but [the spokesperson] significantly accepted that it did not excuse their behaviour. He said also that Japanese society does not condone bullying. What he said was different between Japan and here, was that such conduct in Japan would be dealt with socially or between the families rather than through the courts.
>
> While the defendants are present in New Zealand, they are all subject to New Zealand law, just as the complainant in this matter is subject to New Zealand law and entitled to its protection. If there has been a complaint to the police in New Zealand, then the law must pursue its normal course in this country, whatever might have happened if this behaviour had been carried out in some different forum.
>
> I take into account in dealing with sentencing that while the defendant's initial intention may be explained by their cultural background, it would not excuse their behaviour beyond speaking to him about what they saw as his sins. These incidents were bullying. There were three against one, it was cowardly behaviour on the defendants' part, and they chose a vulnerable victim alone in this country, and younger than them.
>
> In my view a sentence of imprisonment is appropriate. I make allowance for any cultural differences, for early pleas of guilty, for previous good records, and for the apologies, which have been given to the court this afternoon. I sentence each of you to six months imprisonment … … The sentence of six months imprisonment I have imposed will be suspended for a period of two years. (Judge's sentencing notes)

The effect of section 16

There were quite diverse perceptions about the effect of the section 16 submission on the sentence:

> *She simply paid lip service to section 16 of the Criminal Justice Act, acknowledged it was there but said that this was not appropriate and as I was saying ended up with a sentence of imprisonment.* (Counsel)

> *The judge considered it* (the section 16 submission) *and rightly said, 'well I put it on the scale but you're not getting discharged without conviction; these were bad crimes in a sense of terrorising the young boy'. And I agreed with it.* (Appeal Judge)

Appeal

The offender's family and counsel took the case to appeal. They argued first; that in sentencing the offenders to a suspended sentence, the Court had failed to achieve parity, because two of the offenders were now in Japan; and secondly, that the judge had failed to take into account information that was submitted under section 16. Counsel again submitted that discharges without conviction or conviction and discharge were proper outcomes.

The High Court discussed section 16 in some detail and reached the following conclusions: (1) those who choose to live in New Zealand are required to conform to New Zealand law, (2) cultural customs in Japanese society which might condone or permit bullying or physical discipline of younger men, do not permit theft or extortion by threats, (3) the victim, resident in New Zealand, was entitled to the protection of New Zealand law, (4) the appellant did not act solely because of his cultural heritage, and, he would have understood the requirements of New Zealand law, (5) the culpability of the offenders was not diminished by any cultural features, however, (6) the cultural influence involved in the offending should properly be taken into account in mitigation.

The High Court held that the District Court had not ignored the cultural matters, but that factors such as the age of the offenders, their blameless records, remorse and apologies to the victim, and the cultural influences which may have shaped part of their behaviour, meant that a term of imprisonment would not normally have been imposed in a case like this.

Counsel explained his approach at the appeal stage:

> *I'd run through the same argument with him, that this was a culturally-explicable offence and you had to run through it with Japanese eyes to actually place a proper value on it.* (Counsel)

And the response they received:

> …*at the end of the day* [the High Court judge] *probably looked at it through New Zealand eyes but recognised that it was not an imprisonment type offence. It was better dealt with at a lower level, by fine or by community service.* (Counsel)

The spokesperson felt the judge paid some considerable attention to the appellants' submissions regarding the information submitted to the District Court under section 16, but ultimately did little further than the previous judge to take this into consideration:

> *I think he was doing his best, I think he had read everything very clearly and carefully and was listening very carefully. My feeling was he still didn't understand the cultural complexities of the issues and was still running with things through that western cultural filter. Now there is a case for saying there are these laws and they apply and we don't care whether you claim cultural clemency or not, this is still a crime, this is the punishment. It's usually put in terms of the 'slippery slope' or the 'give an inch take a mile' theory. You start making allowances for them and you've got anarchy and chaos within a week and every ethnic group claims immunity from prosecution for some sort of crackpot reason, I mean that's the argument you tend to get and I don't think he was free of that sort of feeling.* (Spokesperson)

> *He said there was nothing else the District Court judge could have done in terms of acknowledging the information, and that she'd acknowledged it in the sense she said that they don't have any previous convictions and I have heard the cultural information.* (Spokesperson)

The appeal judge explained the information that was presented to him and how he took it into account in his decision:

> *…I did receive some written material, affidavits, from friends of the family of the accused who were experienced in assessing cultural things, and it was a New Zealand person* [spokesperson] *who presented this through counsel to say 'look this is the Japanese way and therefore they're not really guilty'. And all I could say was they pleaded guilty, that's the first thing, and that they had to have some punishment; but not necessarily that which you might have imposed on some other offender depending on their background, previous convictions and so forth. What actually I did was impose the sentence that would properly have been imposed upon any first offender of that age who's not going to offend again for that type of crime. And I can understand the District Court judge said 'this is really bad and you're going to prison but I'll suspend it'.* (Appeal Judge)

> *In [name of case] I discussed it all but in the end said no, they deserved to be sentenced as though they were anyone else in society.* (Appeal Judge)

When asked how helpful the information was the judge replied:

> *Well it was helpful, just so I could understand the big picture – in the end it didn't help appellants in terms of getting discharged because of other factors, but it enabled me, for example, the fines that the judge imposed on the boys were paid by the parents of the boys and I said I suppose that's the Japanese way and that the parents would in time exact their own punishment on their children, and I'm sure they would, and I was able to incorporate that into my sentencing notes.* (Appeal Judge)

Other issues

The case study interviewees not only provided rich information about how section 16 was used in J's case, but also offered their perspectives about usefulness of section 16

more generally. Counsel and the spokesperson outlined some of the dilemmas that section 16 raises:

> *Section 16 has a real tension inherent in it, because on the one hand you've got people saying, if you come to New Zealand you have to conform, you have to accept our way of doing things, you have to obey our laws, or on the other hand you have section 16 which says that in appropriate cases you can take into account cultural differences. Now how you actually square that circle is the real difficulty.* (Counsel)

> *I think it's a real problem for societies that want to be, in fact have an obligation to be, culturally tolerant and where do you draw the line, and is there a line you draw, or is there just a zone of tolerance you explore each time? I mean in some places they have parallel court systems and you can choose which court system you want to go in.* (Spokesperson)

Counsel felt there was no need for change to the section 16 legislation but that some attention from judges to how it is used in differing circumstance could result in improvements:

> *I think the legislation is an entirely appropriate provision to have on the statute books. It's the way that it's used that is the difficulty and it may be appropriate for judges to have some discussion about section 16.* (Counsel)

Counsel also felt that education of potential users could improve use of the provision:

> *I think it's a question of not changing the law, but educating people into the circumstances in which it might be appropriate to use it.* (Counsel)

The judge on appeal explained how section 16 could be used to assist the court more generally, explaining that a judge could call for relevant cultural information to be submitted at sentencing. This was likely to happen in more serious cases and particularly those heard before a jury. He explained that his requesting of the information, in the open court, could sometimes be for the benefit of a jury:

> *…so the jury could understand that the sentencing process is not just automatic pulling of a lever and putting up the numbers.* (Appeal Judge)

The appeal judge expected that due to the sheer volume of cases, section 16 submissions may occur more frequently at the District Court, although he thought this may vary according to the cultural make-up of a region.

5.4 Discussion

The following discussion highlights issues in the case studies that provide insight as to how section 16 can be more effective. The discussion focuses on: reasons for use of section 16; quality of representation; notifying the court; quality of submissions; style of submissions; systemic issues; changes to the legislation; and changes to the context.

Reasons for use of section 16

The two case studies showed that section 16 can be used to present distinctly different types of cultural information, and can be used for people of European or non-European ethnicity. In case study ten, section 16 was used to present family background information for a young New Zealand European woman. In case study eleven, section 16 was used to present a cultural interpretation of the offending of a young Japanese man.

In both cases the offenders' offending circumstances were relevant to the decisions to use section 16. In both cases the offenders had no prior convictions and were convicted of reasonably serious offences that could have resulted in lengthy imprisonment sentences. These circumstances present two significant incentives to present information about the cultural background of the offenders under section 16. First, a lack of prior convictions may mean that information about the cultural background of the offenders would be new to the court, and possibly more convincing than where presented for repeat offenders. Second, the possibility that the offenders could receive lengthy imprisonment sentences provided a strong incentive to present any information that might reduce the severity of sentence received.

The case studies illustrated two different processes through which section 16 came to be used. In case study ten, the lawyer explained that he, as a matter of course with new cases, sought opportunities to use section 16. In case study eleven, section 16 was identified as the only option available to present a Japanese cultural version of events following the offender's conviction without this information having been presented.

Further reasons for the use of section 16 can be seen in the purposes and benefits reported by those involved in these two cases. In case study ten, the opportunities for participation and lay representation were important reasons for using section 16. In case study eleven, the decision to use section 16 was more of a last resort; lay representation and participation were less important than ensuring the opportunity was taken to present new information authoritatively and objectively.

Significant factors in the effectiveness of section 16 use

The case studies raised several issues that can contribute to the effectiveness of section 16.

Quality of representation

The offenders in both cases were represented, from their own funds, by Queen's Counsels. The supporters thought that the quality of representation, in the cases that

they were involved in, including organisation of the section 16 submission, was directly related to their having paid privately for 'top quality representation'.

Notifying the court

Notifying the court of the intent to request that section 16 submissions be heard has been shown to be significant. In these two cases, both counsels made every effort to notify the court in advance of the sentencing. In case study ten, the Judge also received a written outline of the issues that the verbal submission would address.

The potential impact of a judge not receiving this notification was evident in case study eleven. In this case counsel's notification was not transmitted to the judge. The resulting postponement and frustration, while not counsel's responsibility, were thought to have impacted negatively on how well the submission was received.

Quality of submissions

Selection of speakers and the quality of their submissions can also be seen to be significant to the effectiveness of section 16 submissions. The presenters in these two cases were selected for their experience and credibility, but also for their relationship (in one case) or lack of relationship to the offender (in the other case). In case study ten, the offender's mother brought direct experience of the offender's family circumstances, knowledge of court processes, and presentational skills. The presenter in case study eleven was selected for his authority on cultural issues, perceived objectivity and ability to address the court confidently.

Although significant effort went into deciding who would be an appropriate speaker, in both cases the combinations of 'relationship to the offender' and 'expertise' that each presenter offered had different effects. In case study ten, the combination of a mother's direct relationship to the offender and eloquence seemed highly effective. In case study eleven, the spokesperson's lack of personal relationship to the offender and highly intellectual presentation, may have made the submission more open to challenge by the judge and prosecution.

Style of section 16 submission

The case studies illustrated that two distinctly different styles of presentation can be made under section 16, to address quite different needs. In case study ten the spokesperson spoke to a written outline that had been handed to the judge in advance of the sentencing. The submission was complementary to an oral submission from the lawyer, numerous written submissions from supporters and the presence at sentencing of approximately twenty supporters. It seemed that this combination of factors: providing a written outline to the judge; a brief, well focused submission; and evidence of wider support for the offender; were significant to the effectiveness of section 16 in this case.

In contrast to this, and to the more orthodox style of uninterrupted submission, the lawyer in case study eleven chose a formal and interactive style of submission. The spokesperson was called to the stand, sworn in as a witness, questioned by defence counsel (along pre-arranged lines) then cross-examined by both the judge and prosecution counsel. This method was chosen to give the submission increased legal credibility, but may have made it open to a more adversarial style of challenge.

Systemic issues - court process, awareness, information

Case study eleven highlighted a number of factors that could impact negatively on how well a submission is received. These pick up on several themes raised in earlier case studies and in the following survey chapter. First, that the court was not aware of the lawyers' intention to request a section 16 submission highlights a need for courts to have a clear and reliable system in place for section 16 submissions to be accommodated. Secondly, that counsel believed the judge was not aware of section 16 and that his efforts to explain what he wanted to do frustrated the court, highlights a need for information and guidance for both judges and lawyers about section 16.

Case study eleven also raised a need for lawyers to manage the expectations of their clients about the possible effects that section 16 submissions can have on a sentence. In this case the supporters expressed disappointment at the impact of the section 16 at both district and high court stages. Their expectations may have been more in line with the sentencing outcomes if they had had more information about the extent to which the issues of section 16 can affect a sentence.

Changes to legislation

Case study participants' perceptions of the wording and purpose of the provision were generally favourable. One of the judges identified a need to address the inconsistency between the subtitle and body text of section 16 (case study ten). The spokesperson in case study ten was pleased to have had the opportunity to participate and felt that that would help the family to deal with their issues. Her perspective was that family information should be able to be presented under section 16 and that it should not be narrowed to exclude European participation.

Changes to context

Participants in case study eleven endorsed the provision but noted a tension between the intent of the provision and the context in which it is applied. The spokesperson in particular thought that section 16 implies a climate of cultural acceptance, but that tolerance of culturally-based submissions was in fact limited. This may be somewhat evident in the High Court ruling where the appeal judge explained that anyone living in New Zealand is required to conform to New Zealand law.

6 Survey

6.1 Introduction

This chapter reports findings from a nation-wide postal survey conducted by Ministry of Justice researchers about the use and perceptions of section 16. Respondents to the survey were judges, lawyers, Community Probation Service staff (CPS staff) and community organisations in eleven different regions. Information about the survey objectives, design and sampling procedure is presented in section 2.3 of chapter two of this report.

This chapter presents the survey response rates; a profile of the sample; descriptive information about respondents' most recent cases involving use of section 16; respondents' perceptions of the use, effectiveness and possible changes to section 16; and additional comments about section 16.

6.2 Response rates

The survey was mailed to potential respondents in November of 1999. Follow-up letters were sent and follow-up phone calls were made to those who had not returned surveys by the survey cut-off date. Questionnaire data were entered and coded over the December/January 2000 period although researchers continued to accept incoming questionnaires through to February 2000.

Table 6.1 presents the population size, sample size and response rates of each professional group.

Table 6.1 Population, sample and response rate of each respondent group

Professional group	Population	Sample	Response Rate (%)
Lawyers	534	299	56.0
Judges	56	43	76.8
CPS staff	70	61	87.1
Community organisations	47	25	53.2
Total	707	428	60.5

Four hundred and twenty eight of 707 questionnaires were completed and returned. This represented an overall response rate of 61%. The Community Probation Service returned the highest response rate of all professional groups (87%). Seventy-seven percent of the judges completed questionnaires, including all five High Court judges who had volunteered to participate. Over half of the lawyers (56%) and community organisations (53%) that were invited to participate completed questionnaires.

Pilot experience, and feedback received with incomplete questionnaires offered some information about why some survey recipients chose not to complete the survey. Some explained that they had not used, or were not previously aware of, section 16; others explained that they did little or no work in the criminal area and could not offer a useful perspective; and some simply had no time to spare, or no interest in participating.

6.3 Sample profile

Number of respondents

Table 6.2 presents the number and percentage of respondents of each professional group in the overall sample.

Table 6.2 Number and percentage of respondents of each professional group

Professional group	Number	Percentage
Lawyers	299	69.9
Judges	43	10.0
CPS staff	61	14.3
Community organisations	25	5.8
Total	428	100.0

All members of each professional group in the regions surveyed were invited to participate in the research. This has resulted in a dominance of lawyers in the overall sample. Seventy percent of the survey respondents were lawyers; 14% of respondents were Community Probation Service staff and 10% were judges. The 25 community organisations who responded represented 6% of the overall sample.

Because of the relatively high proportion of lawyers and low proportions of other professional group members in the overall sample, any differences in the relative frequency of responses between respondent groups are noted in the text that follows. Where no differences between groups are noted, it can be assumed that the responses were relatively uniform across respondent groups.

Region of respondents

Table 6.3 shows the regions in which survey respondents were based.

Table 6.3 Number and percentage of respondents from each region

Region	Number	Percentage
Invercargill	26	6.1
Christchurch	85	19.9
Wellington	48	11.2
Hastings	16	3.7
New Plymouth	20	4.7
Gisborne	12	2.8
Whakatane	16	3.7
Hamilton	42	9.8
Auckland	163	38.1
Total	428	100.0

Just under three-quarters of respondents were based in North Island regions (74%) and just over one quarter were based in South Island regions (26%). A similar major-urban to minor-urban split was represented with seventy-nine percent of respondents based in the major urban centres of Christchurch, Wellington, Hamilton or Auckland and the remaining twenty-one percent based in minor urban centres. Over one third of respondents were from Auckland (38%). This included lawyers, judges, Community Probation Service staff, and community organisations based either in Otahuhu or central Auckland. The 48 Wellington respondents included lawyers and Community Probation

Service staff based in both Porirua and central Wellington. Twenty percent of respondents were based in Christchurch.

Ethnicity of respondents

Judges, lawyers and Community Probation Service staff were asked to identify the ethnic groups to which they belonged. Table 6.4 shows the ethnicity of these respondents[29].

Table 6.4 Ethnicity of respondents

Ethnicity	Number	Percentage
Māori	42	10.4
Pacific People	15	3.7
Asian	8	2.0
New Zealand European/European	294	73.0
Other	7	1.7
No Response	37	9.2
Total	403	100.0

Just under three-quarters (73%) of respondents identified as New Zealand European/European. Ten percent identified as Māori and four percent as Pacific Peoples.

The lawyers' sample was almost identical in ethnic group make-up to the overall sample (New Zealand European/European 75%, Māori 9%, Pacific People 4%). Three-quarters of the judges, including all five High Court judges, identified as New Zealand European/European. There were three Māori judges, two Asian judges and no Pacific judges.

The Community Probation Service sample differed noticeably from the other samples in ethnic group makeup. Fifty-nine percent of the Community Probation Service respondents identified as New Zealand European/European, 19% as Māori, and three percent as Pacific People.

Years of experience of respondents

Judges, lawyers and Community Probation Service staff were asked how long they had worked in their current roles.

Table 6.5 How long respondents had spent in their current role

Time in current role	Number	Percentage
Less than one year	8	2.0
One year to less than two years	9	2.2
Two years to less than five years	48	11.9
Five years or more	310	76.9
No response	28	6.9
Total	403	100.0

[29] Respondents selected as many ethnic groups as they wished to represent their ethnicity. Multiple responses were prioritised using a Statistics New Zealand priority recording system.

Table 6.5 shows that just over three-quarters of respondents (77%) had spent five years or more in their current roles. Further analysis showed a relatively even spread of a high level of experience across professional groups and regions.

6.4 Respondents' involvement in cases of section 16 use

Respondents were asked whether they had been involved in cases where someone had presented information about the cultural or ethnic background of an offender at sentencing. Respondents who reported involvement in such cases were asked to complete a section about how and to what effect section 16 was used for the most recent case. Respondents who had not been involved in cases where section 16 had been used were directed to the next section of the survey.

Table 6.6 shows the number and percentage of respondents who had been involved in cases where section 16 was used. This information should be considered as potentially limited as a reflection of the wider practitioner population. It is likely that a disproportionate number of people who had experience of section 16 completed the survey, while those who had no experience of section 16 were less likely to participate. There is also likely to be some repeat reporting of individual cases as different respondents may have been involved in the same case.

Table 6.6 Number and percentage of respondents who had previously been involved in cases where section 16 was used

Professional group	Number	Percentage of group
Lawyers	167	55.9
CPS Staff	37	60.7
Judges	36	83.7
Community organisations	14	56.0
Total	254	59.3

Table 6.6 shows that the majority of respondents (59%) had been involved in cases where section 16 had been used. Forty-one percent of respondents had not been involved in any cases where section 16 had been used. Judges were most likely (84%) to have been involved in cases where section 16 was used, followed by Community Probation Service staff (61%). Just over half of the lawyers (56%) and community organisation respondents (56%) had been involved in cases where section 16 was used.

Involvement in cases in which section 16 was used in last year

Respondents who reported involvement in cases where section 16 was used were asked how many they had been involved in during the last year.

Table 6.7 Number of cases respondents had been involved in during the last year where section 16 was used

Respondent Group	No Cases	1 – 5 cases	6 – 10 cases	11 – 20 cases	21 or more cases	No Response
Lawyers	54	92	9	3	2	7
CPS Staff	10	16	6	3	0	2
Judges	5	19	6	3	1	2
Community Organisations	0	8	1	2	3	0
Total	69	135	22	11	6	11
Percent of total	27.2	53.1	8.7	4.3	2.4	4.3

Table 6.7 shows that over half of respondents who had been involved in cases where section 16 had been used (53%) had been involved in one to five cases during the last year. Just over a quarter (27%) of respondents who had been involved in cases where section 16 had been used had not been involved in any such cases in the last year. Nine percent of respondents had been involved in six to ten cases where section 16 had been used in the last year and seven percent had been involved in more than ten cases where section 16 was used in the last year.

6.5 Cases in which section 16 was used

The following section presents the type of offender, type of information presented and the effect of information presented, in cases where section 16 was used. This information refers to the most recent case that respondents were involved in where section 16 had been used. The figures presented can only be regarded as indicative of the range of cases in which section 16 has been used because there is likely to be some multiple reporting of cases where respondents in different professional groups worked on the same case.

Most recent case of section 16 use

Respondents were asked to report when the most recent case was that they were involved in.

Table 6.8 When was the most recent case that respondents had been involved in?

When most recent case was	Number	Percentage
Less than 1 year ago	145	57.1
1 to 2 years ago	50	19.7
More than 2 to less than 5 years ago	40	15.7
More than 5 years ago	16	6.3
No response	3	1.2
Total	254	100.0

Table 6.8 shows that the most recent section 16 case for the majority (93%) of respondents had been within the last five years. The most recent case for over half (57%) of respondents had been within the last year and a further twenty percent reported their most recent case was one to two years ago.

Ethnicity and gender of offenders in reported cases

Respondents were asked to identify the ethnic group and gender of the offender in the most recent cases where section 16 was used. Multiple responses were priority ranked so that this data could be easily cross-tabulated with other data.

Table 6.9 Ethnicity and gender of offender in most recent case

Ethnicity	Gender	Number	Percentage
Māori	Male	136	53.5
	Female	11	4.3
	Not Known	4	1.6
Subtotal		*151*	*59.4*
Pacific People	Male	69	27.2
	Female	7	2.8
	Not Known	3	1.2
Subtotal		*79*	*31.2*
Other ethnicity	Male	14	5.5
	Female	1	0.4
	Not Known	0	0.0
Subtotal		*15*	*5.9*
Ethnicity unknown	Male	2	0.8
	Female	0	0.0
	Not Known	7	2.8
Subtotal		*9*	*3.6*
Grand total		254	100.0

This shows that more than half of respondents' most recent cases involved Māori male offenders (54%). Four percent of most recent cases involved Māori female offenders. Just under a third of reported cases involved offenders who were Pacific People (31%). Twenty-seven percent of cases involved male Pacific People and three percent involved female Pacific People. Fifteen of the reported cases (6%) involved offenders who were neither Māori nor Pacific People. These included, among others, several New Zealand European offenders, a Somalian, a Korean, a Greek, a Lebanese, a Japanese, and an Indian offender. The ethnicity of nine (4%) offenders was unknown.

Researchers were interested in the ethnicity of those who used section 16 and whether particular ethnic groups in different areas used section 16 more. Table 6.10 presents the ethnic group of offenders by the region that the respondent was based in.

Table 6.10 Ethnicity of offenders in most recent case reported by region

	Māori	Pacific People	Other	Not Known
Invercargill	9	4	0	1
Christchurch	11	7	2	2
Wellington	9	12	5	1
Porirua	2	1	0	0
Hastings	10	2	0	0
New Plymouth	13	3	0	1
Gisborne	9	0	0	0
Whakatane	11	0	0	0
Hamilton	26	2	2	1
Otahuhu	3	8	0	0
Auckland	48	40	6	3
Total	151	79	15	9
Percent of total	*59.5*	*31.1*	*5.9*	*3.5*

The table shows that section 16 was most likely to have been used by Māori in Hastings (83%), Gisborne (100%), Whakatane (100%) and Hamilton (84%). In Otahuhu section 16 was most likely to have been used by Pacific People (73%).

Type of offence in reported cases

Researchers were also interested in the type of offences for which section 16 was most frequently used. Respondents were asked to give the most serious offence for which the offender was convicted in their most recent case[30].

Table 6.11 Most serious offence in most recent case

Offence type	Number of respondents	Percentage of respondents
Family Violence	66	26.0
Other Violence	71	28.0
Sexual	20	7.9
Property	36	14.2
Drug	12	4.7
Traffic	16	6.3
Other	6	2.4
Don't know	18	7.1
No Response	9	3.5
Total	254	100.0

Due to rounding to one decimal place, the total percentage does not add to exactly 100.0%

The most serious offence in more than half (62%) of reported cases was some form of violent offending[31]. In half of the violent cases that were non-sexual, the offending was some form of family violence.

Type of offender in reported cases

Researchers also wanted to know the types of offenders for whom section 16 was most frequently used. Respondents were asked to indicate whether the offender in their most recent case was a repeat offender, first time offender, young offender, or other type of offender.

Table 6.12 Type of offender in the most recent case

Type of offender	Lawyer	CPS Staff	Judges	Comm. Orgs.	Total %
Repeat	67	15	16	8	41.7
First time	68	8	11	5	36.2
Young	34	9	8	0	20.1
Other	10	4	1	1	6.3

Table 6.12 shows that forty-two percent of all most recent cases had involved repeat offenders. A slightly lower percentage of cases involved first time offenders (36%).

[30] Although only one response was sought, some respondents gave more than one. Multiple responses were priority ranked to collect the most serious offence in each case.
[31] Includes 'family violence', 'other violence' and 'sexual offending'.

Who presented section 16 information

Respondents were asked who presented the information under section 16 in the most recent case. Although respondents were asked to select one main role for each presenter some respondents selected more than one.

Table 6.13 Role of presenter in most recent case

Role of Presenter	Number	Percentage
Whānau/Family member of offender	117	35.2
Friend of the offender	14	4.2
Community group representative	59	17.8
Cultural expert paid by counsel	7	2.1
Kaumātua	48	14.5
Church leader	26	7.8
CPS officer	8	2.4
Lawyer	37	11.1
Other	16	4.8
Total	332	100.0

Due to rounding to one decimal place, the total percentage does not add to exactly 100.0%

Section 16 presentations had been made most frequently (35%) by a member of the offender's whānau or family. The next most frequent presenters were community organisations (18%) and kaumātua (15%). There were fewer reports of lawyers presenting section 16 information (11%). Almost all presentations by church leaders had been made in cases involving Pacific People. Similarly, most presentations by kaumātua had been made in cases involving Māori offenders. 'Other' types of presenter accounted for five percent of responses and included a neighbour, a navy officer, a 'political activist', a victim, and a victim's representative.

Organising the section 16 submission

Table 6.14 shows the role of the person who organised the section 16 submission in most recent cases.

Table 6.14 Role of person who organised the section 16 submission in most recent case

Organiser	Number	Percentage
Lawyer	155	58.7
CPS Officer	18	6.8
Community Organisation	25	9.5
Judge	5	1.9
Offender	38	14.4
Other	23	8.7
Total	264	100.0

In over half of reported cases (59%) a lawyer had been at least one of the organisers of the person who presented information under section 16. The next most common organisers were offenders (14%), followed by community organisations (10%), and Community Probation Service staff (7%). In five cases (2%) judges were reported to have organised the section 16 submission. In these cases a judge may have asked for someone to present relevant cultural information to the court at sentencing. The nine

percent of organisers categorised as 'other' included, among others, a PARS[32] representative, a CYPFA[33] representative, a victim, an iwi representative, and an unspecified court worker.

Why was section 16 used in the most recent cases?

Table 6.15 Reason for use of section 16 in most recent case

Reason for use	Number	Percentage
Cultural interpretation/justification of offence	54	15.8
To obtain a lesser/particular sentence	43	12.6
To explain cultural process that had taken place	23	6.7
To explain cultural process that could take place	8	2.3
Explain offender's place in family/community and support available	144	42.2
To present alternative sentencing options	25	7.3
Family wanted to speak/address court	12	3.5
To highlight social circumstances	17	5.0
To express views on Māori justice	3	0.9
Other	12	3.5
Total	341	100.0

Due to rounding to one decimal place, the total percentage does not add to exactly 100.0%

Table 6.15 shows that section 16 had been used most frequently (in 42% of the most recent cases) to explain an offender's community or family background. This was done either to show how the background had contributed to the offending or to show that support from the community or family sources would be available to help prevent further offending. The following are examples of this type of information:

- to explain how the offender's family was active in the local Samoan church
- to explain (armed forces) environment and culture
- to explain attempts being made by client, family and community to assist in rehabilitation
- to explain a history of family abuse/sexual abuse (that the offender had suffered).

The next most frequent reason (16%) for using section 16 was to present a cultural interpretation or justification for the offence:

- to explain offender's reaction to severe provocation before commission of assault
- to explain a recent immigrant's different understanding of traditional male and female roles, and punishment
- to mitigate the seriousness of offending by explaining a gang context.

A further common reason (13%) for using section 16 was to obtain a reduced or particular sentencing outcome, such as:

- to try to avoid imprisonment
- to reduce a sentence
- to present a case to give the offenders another chance
- to make a plea to the sentencing judge for leniency.

[32] Prisoners Aid and Rehabilitation Society.
[33] Children, Young Persons and their Families Agency (Department of Child, Youth and Family Services).

What was the outcome in cases in which section 16 was used?

Table 6.16 Most serious sentence imposed in most recent case

Sentence	Number	Percentage
Imprisonment	74	29.1
Suspended Sentence	39	15.4
Periodic Detention	23	9.1
Community Programme	10	3.9
Community Service	10	3.9
Supervision	21	8.3
Monetary	9	3.5
Corrective Training	5	2.0
Sentence if Called	1	0.4
S19 Discharge (Discharge without conviction)	6	2.4
Not yet finalised	6	2.4
Other	13	5.1
Not known	37	14.4
Total	254	100.0

Due to rounding to one decimal place, the total percentage does not add to exactly 100.0%

Table 6.16 shows that imprisonment was the most serious sentence received in just under half (45%) of the most recent cases reported. The imprisonment was suspended in a third of these cases. The most serious sentence in a quarter (25%) of the most recent cases reported was a community-based sentence of periodic detention, supervision, community service, or community programme. Some responses (5%) were classified as 'other' because a specific sentence was not identifiable.

Effect of section 16 information

Table 6.17 Perceived effect of using section 16 in most recent case

Effect	Number	Percentage
Resulted in lesser sentence	93	36.6
Provided assurance for sentence	25	9.8
Minor impact	39	15.4
No impact	38	15.0
Impact unclear	26	10.2
Other	1	0.4
Not known	32	12.6
Total	254	100.0

Table 6.17 shows that just over half of the respondents (52%) reported that the use of section 16 had had some impact on the sentence received, including resulting in a reduced sentence (37%) or having a minor impact (15%). Examples of ways in which sentences received were lighter than could have been expected were:

- suspension of imprisonment sentences
- a smaller fine being received
- an imprisonment term of shorter length being imposed
- a sentence that included a rehabilitative programme
- an alternative sentence to prison being received.

The following are examples of ways in which respondents described section 16 information having a minor impact on the sentence received:

- tended to sway the judge a little
- information had a partial effect.

Fifteen percent of respondents thought that the information presented under section 16 had no impact on the sentence received. Twenty-three percent of respondents were unclear about the impact of the information on the sentence received.

6.6 Perceptions of section 16

The second part of the survey sought respondents' perceptions of section 16. Respondents provided their perceptions about: the frequency of section 16 use and reasons for non-use of section 16; the purposes of section 16; the effectiveness, and ways to increase the effectiveness of section 16; and changes to the section 16 legislation. All respondents completed this section of the questionnaire.

Frequency of section 16 use

Table 6.18 shows respondents' perceptions of whether section 16 is used as often as it could be.

Table 6.18 Is section 16 used as often as it could be?

Response	Number	Percentage
Yes	58	13.6
No	267	62.4
Don't Know	91	21.3
No Response	12	2.8
Total	428	100.0

Due to rounding to one decimal place, the total percentage does not add to exactly 100.0%

The majority of respondents (62%) felt that section 16 was not used as often as it could be. Just under a quarter of respondents (24%) either did not know or did not provide their perspective.

Reasons for non-use of section 16

Respondents who felt that section 16 was not used as often as possible were asked the reason for their response. Many respondents gave more than one reason.

Table 6.19 The main reason that section 16 is not used as often as it could be

Reason	Lawyers	CPS staff	Judges	Comm. Orgs.	Total %
Information provided elsewhere	15	3	2	0	7.5
Unavailability of people to speak	28	10	4	3	16.9
Administrative issues/court process issues	42	7	0	4	19.9
Lack of awareness/information about section 16	70	32	11	8	45.3
Provision is unnecessary/of questioned value	22	8	0	0	11.2
Resistance to use	57	9	7	4	28.8
Submissions not of high enough quality	5	2	3	0	3.8
Other	9	3	1	1	5.2
Don't know	1	1	1	0	1.1

Table 6.19 shows that the most frequently-mentioned reason given for section 16 not being used as often as it could be was a lack of awareness and/or lack of information about section 16. All professional groups reported this reason most frequently. Examples of responses in this category included:

- most defendants are unaware of section 16
- lack of use of the provision due to being further away from enactment
- lawyer's ignorance about the power of this information
- confusion about procedure.

Twenty-nine percent of respondents thought that a lack of use may be due to resistance from criminal justice professionals or the court system to section 16 information being submitted or received. A similar proportion of judges and lawyers identified resistance as a reason for lack of use of the provision. Examples of reasons categorised as resistance include:

- [section 16 is...] not promoted by offenders' representatives
- courts take a mono-cultural approach
- very little tolerance to this type of information.

Seventeen percent of respondents felt that lack of use was due, at least in part, to a lack of people available to speak on behalf of offenders. This referred to a lack of individuals being available to make submissions and a lack of organisations that have the expertise to assist with organising and making submissions. Some felt that the lack of speakers was due in part to offenders not having strong cultural or community ties. Others thought that offenders' supporters feel uncomfortable about the court setting or court processes.

Twenty percent of respondents, but no judges, identified administrative or other court process issues as reasons for lack of section 16 use. The majority of these comments focused on the resources available to criminal justice professionals to assist offenders and the resources available to the court to accommodate submissions. Some felt that lawyers and Community Probation Service staff did not have enough time or money to organise section 16 presentations. Other comments in this category referred to a lack of time or a lack of flexibility in the court process to accommodate section 16 submissions.

Some lawyers (22) and Community Probation Service staff (8) thought section 16 was unnecessary, or questioned its value. Some of these respondents rejected the idea that

offending could be related to an offender's ethnic background. Others believed there was less need for the provision in regions where there were fewer people of minority cultures appearing before the courts. Others felt that exceptional circumstances were required for section 16 information to be taken into account, or that set tariffs and statutory presumptions about particular types of offending meant there was little room for this information to have an impact on sentencing[34].

Comments categorised as 'information provided elsewhere' suggested that use of section 16 was not necessary because this information could be made available through the normal course of a court hearing, without the need to invoke section 16. Most of these comments identified counsel or Community Probation Service staff as the usual providers of this type of information through pleas of mitigation or pre-sentence reports. Others commented that cultural information was sometimes submitted in letters, or that judges would take into account the presence of supporters in court without needing to hear submissions from them.

Responsibility for organising section 16

Respondents were asked who they thought should be responsible for organising the use of section 16. The majority of respondents gave more than one response.

Table 6.20 Who should be responsible for organising use of section 16?

	Lawyers	CPS staff	Judges	Comm. Orgs.	Total %
Lawyer	210	38	34	12	68.7
CPS officer	112	18	13	12	36.2
Judge	30	9	1	6	10.8
Community Organisations	24	10	6	9	11.5
Offender	51	9	6	7	17.1
Other	15	7	0	4	6.1

Lawyers were most frequently nominated (69% of respondents) as those who should be responsible for organising use of section 16. Of all professional groups, judges were most in favour (79%) of lawyers having responsibility for organising use of section 16. There was less support across all groups, except community organisations, for Community Probation Service staff to have responsibility for this task. Some respondents felt judges and community organisations had roles to play in organising use of section 16. Only one judge thought that judges should have some responsibility in this area.

Examples of responses coded as 'other' include, CYFS staff[35], accredited cultural experts, minister of religion, kaumātua, matai, court staff, police, drug and alcohol counsellors, and family. Others thought a combination of the suggested organisers, based on the circumstances of each case, was most appropriate. A few respondents said that no-one should have to have responsibility for this task.

[34] Section 5 of the Criminal Justice Act 1985 states that violent offenders are to be imprisoned except in special circumstances.
[35] Staff of the Department of Child, Youth and Family Services.

Purpose of section 16

Respondents were asked what they thought was the main purpose of section 16.

Table 6.21 What is the main purpose of section 16?

Purpose	Lawyers	CPS staff	Judges	Comm. Orgs.	% of all respondents
Provide information about type of sentence	43	6	7	3	13.8
Provide cultural aspect to the justice system	17	5	3	4	6.8
Assist court with sentencing	213	39	26	14	68.2
Opportunity for participation	7	9	1	2	4.4
Identify support for offender	3	2	1	1	1.6
Effective presentation of information	2	0	3	1	1.4
Other	17	2	1	1	4.9
Don't know	4	0	1	0	1.2

Sixty-eight percent of all respondents and the majority of respondents in each professional group identified one of the purposes of section 16 as assisting the courts in sentencing. Examples of 'assist court with sentencing' include providing information about cultural background, providing information about support for the offender, and mitigation of offending. Some respondents (14%) saw section 16 as an opportunity to present particular sentencing options, or, to promote alternative sentencing options more generally, to a judge. The majority of responses coded as 'other' stated either that the purpose was clear from the wording of the provision, or suggested that the provision was motivated by a need to appear politically correct and served no real purpose.

Effectiveness of section 16 use

Respondents were asked whether they thought that section 16 was used as effectively as possible. The overall response was similar to the response about whether section 16 was used as often as possible.

Table 6.22 Is section 16 used as effectively as it could be?

Response	Number	Percentage
Yes	36	8.4
No	262	61.2
Don't Know	107	25.0
No Response	23	5.4
Total	428	100.0

The majority of respondents (61%) reported that section 16 was not used as effectively as possible. A quarter of respondents (25%) did not know whether section 16 was used as effectively as possible.

Increasing the effectiveness of section 16

As previously mentioned, an exploratory study was conducted preparatory to this research. Exploratory study respondents suggested several ways to increase the effectiveness of section 16. These suggestions were presented in the survey. Respondents were asked to express their level of disagreement or agreement with each suggestion option.

Table 6.23 How could section 16 be made more effective?

Suggested way of increasing effectiveness of s16	Disagree/ Strongly Disagree	No Opinion	Agree/ Strongly Agree	No Response	Total
Displaying information about s16	20.6	13.3	62.6	3.5	100.0
Require written submissions under s16	50.0	12.2	32.7	5.1	100.0
Court setting more culturally appropriate	44.2	22.7	29.4	3.7	100.0
Sentencing hearings held outside of court	61.0	12.6	21.5	5.0	100.0
Require information be taken into account	48.4	12.6	34.1	4.9	100.0
Meet costs of supporters to come to Court	55.6	17.3	20.6	6.5	100.0
Increase legal aid to allow time to organise s16	18.7	10.1	63.3	7.9	100.0
Increase CPS resources to allow time to organise s16	19.4	10.1	65.2	5.4	100.0
Require cases to be referred to cultural groups	37.6	22.4	35.1	4.9	100.0
Ensure more organisations available for referrals	23.1	18.9	53.0	4.9	100.0
More programmes for community-based sentences	13.6	11.5	69.2	5.8	100.0
Require lawyers explain s16 to offenders	16.8	13.3	58.4	11.5	100.0
Require CPS staff notify offenders about s16	16.4	14.5	65.4	3.7	100.0
Judges promote s16	20.6	18.0	57.0	4.4	100.0
Education programmes for Judges	15.9	16.4	64.3	3.5	100.0
Education programmes for Lawyers	12.2	11.7	72.7	3.5	100.0
Education programmes for CPS staff	12.2	11.9	71.5	4.4	100.0
Increase number of judges of different ethnicity	29.2	23.8	43.5	3.5	100.0
Increase number of lawyers of different ethnicity	29.0	24.1	41.8	5.1	100.0
Require POs consider need for s16 in PSRs	16.1	11.2	58.2	14.5	100.0

Due to rounding to one decimal place, the total percentages do not add to exactly 100.0%

Table 6.23 shows that there was strong agreement that the education of criminal justice professionals about section 16 could increase the effectiveness of section 16. There was similar support for the education of lawyers (73%) and for the education of Community Probation Service staff (72%), although slightly less support for the education of judges (64%). Judges were less likely to agree with these suggestions than other professional groups.

The majority of respondents agreed, or strongly agreed, that publicising section 16 to potential users could increase the effectiveness of section 16 use. In particular, there was strong support for Community Probation Service staff to be required to notify offenders and their families of section 16 (65%). Respondents also supported lawyers explaining section 16 to offenders (58%) and judges promoting section 16 (57%). Displaying information in court about section 16 was also seen as a way to increase the effectiveness of section 16 use (63%).

Over half of respondents (58%) agreed that requiring probation officers to consider the need for section 16 in pre-sentence reports could increase effectiveness of section 16 use. Community organisation respondents expressed strongest support for this option (88%), followed by lawyers (61%), and Community Probation Service staff (49%).

The majority of respondents agreed, or strongly agreed, that increasing resources to lawyers (63%) and Community Probation Service staff (65%) could increase the effectiveness of section 16. The majority of respondents (56%) disagreed, or strongly disagreed, that extra resources aimed at assisting supporters to come to court could increase the effectiveness of section 16.

Suggestions involving changes to court processes were usually met with disagreement. However, while community group respondents tended to agree that changes to court processes could increase the effectiveness of section 16, judges, lawyers and Community

Probation Service staff tended to disagree. Judges and lawyers for example, were more likely to disagree that holding sentencing hearings outside of courts could increase the effectiveness of section 16, while the majority of community organisation respondents (64%) felt that changing location could increase effectiveness. Probation officers were evenly split on whether holding hearings outside of courts could increase effectiveness. The majority of lawyers, judges and probation officers thought that requiring written submissions under section 16 could not make section 16 more effective, but most community organisation respondents (60%) thought that it could.

The majority of respondents (44%) agreed, or strongly agreed, that increasing the number of judges of different ethnic groups could increase the effectiveness of section 16. The majority (42%) also agreed that increasing the number of lawyers of different ethnic groups could increase the effectiveness of section 16. Analysis by professional group showed that Community Probation Service staff and community organisation respondents were more likely to agree that increasing the number of judges and lawyers of different ethnic groups could increase the effectiveness of section 16. Similar proportions of lawyers agreed and disagreed, and judges more frequently disagreed that increasing numbers of judges and lawyers of different ethnic groups could increase the effectiveness of section 16.

Changes to section 16 legislation

Table 6.24 Should changes be made to the section 16 legislation?

	Number	Percentage
Yes	79	18.5
No	229	53.5
Don't Know	101	23.6
No Response	19	4.4
Total	428	100

Over half of respondents thought that section 16 should not be changed. This is a particularly interesting finding given that sixty-two percent of respondents thought that section 16 is not used as often as possible and sixty-one percent thought that it is not used as effectively as possible.

Those who felt that there needed to be changes made to the legislation were asked what they thought these changes should be.

Table 6.25 What changes should be made to the section 16 legislation?

Type of change	Lawyers	CPS staff	Judges	Comm. Orgs.	Total %
Widen provision	8	8	2	0	22.8
Legislate to increase significance	7	0	0	1	10.1
Specify practical issues	5	1	1	1	10.1
Legislate to increase use	13	3	1	3	25.3
Delete provision	8	1	0	0	11.4
Legislate to clarify purpose	2	1	2	1	7.6
Other	4	0	0	2	7.6

The most popular type of change overall, and particularly popular amongst lawyers and community organisation respondents, was legislative change that could increase use of the provision. Most frequently suggested were options that would require judges,

lawyers and Community Probation Service staff to take cultural factors into account in their respective roles. One respondent suggested that it could be the judge's duty to enquire if anyone wished to be heard under section 16 before passing sentence.

Comments in the category 'legislation that increases significance' differed slightly from those coded under 'legislate to increase use' but emphasised that section 16 submissions should be given more weight.

The next most frequently-suggested legislative change overall (and most frequently-suggested by Community Probation Service staff) was to widen the provision. Several suggestions about how this could be done were offered, including:

- removing inherent biases toward particular ethnic groups
- extending cultural issues beyond ethnic information to all relevant background information
- allowing for rehabilitative options from outside the offender's ethnic community to be presented
- allow for the court to hear section 16 information regardless of whether the penalty for the offending is fixed by law.[36]

An identical proportion of lawyers who thought the provision should be widened thought that the provision should be deleted. One Community Probation Service respondent thought that the provision should be deleted.

There were some calls for changes to legislation to clarify practical issues. These included 'making it clear that only one person can speak', 'clarifying who can speak', and 'outlining what sort of issues section 16 could be used for'.

Changes categorised as 'other' included making allowances for greater use of restorative justice principles in the sentencing process, and increasing the range of sentences and rehabilitative processes that make use of cultural resources.

6.7 Further comments

The survey concluded by inviting respondents to make any further comments on section 16. One hundred and sixty-five of the 428 survey participants responded to this question. These responses have been combined with responses of 43 participants who provided additional comment to the question on how section 16 could be made more effective. It should be noted when reading this section that these are responses to a general question, and that it is probable that more respondents would have commented in each area if they had been asked specifically. The responses have been divided into comments which supported retaining, extending or improving section 16, and comments which expressed reservations about section 16.

[36] Subsection 1 of section 16 reads "……and the Court shall hear that person unless it is satisfied that, because the penalty is fixed by law or for any other special reason, it would not be of assistance to hear that person".

Comments supporting retaining, extending, or improving Section 16

Raise awareness about section 16

Community organisations urged that offenders, their families and the general public be given information about section 16. Some believed that community organisations, given the resourcing to do so, were best placed to give this information. One community organisation representative had spoken after sentencing to families who indicated they had wanted to speak in court but did not know how to go about it.

Many respondents believed that it was the lawyer's responsibility to inform offenders and their families of the provision. However, some respondents also stated that lawyers, judges, and probation officers themselves need to be more aware of its existence and potential use. A lawyer thought that pre-sentence reports should refer to section 16 more routinely. This would alert lawyers to the potential to use the provision, especially those who rely heavily on pre-sentence reports for their sentencing submissions. This lawyer observed that probation officers can be more familiar with the sentencing provisions than less experienced lawyers.

Extend section 16

Twenty respondents, including 12 lawyers, five probation officers, and three judges, believed section 16 should be extended beyond the provision in the existing legislation. The consistent view of nearly all of these respondents was that the section should allow for the presentation of any relevant information on the background of the offender or the offence, rather than specifying ethnic or cultural information.

Items mentioned that could be included in submissions under an extended provision included the offender's contribution to the community, employment, age, and family background. A lawyer thought that the section should be broadened to enable any relative or friend of the offender to speak, particularly in serious cases, about the issues that they commonly write about in letters to the judge. The opportunity for these supporters to speak would provide an opportunity to convey the strength of feeling behind the submission.

Two lawyers thought that the provision could more clearly focus on the rehabilitative goal of sentencing, but that the section was limited in this area because of a lack of availability of suitable programmes. A lawyer and a probation officer thought the section should be amended to require that ethnic and cultural factors be taken into account at sentencing.

Improve the operation of section 16

Twenty respondents, including 12 lawyers, five probation officers, and three community organisations made the following suggestions for improvements to the operation of section 16:

- use of section 16 should be linked with greater use of restorative justice, reparation, and victim/offender mediation at sentencing (two community organisations, two lawyers and one probation officer)

- courts should become more 'user friendly', for example by providing private spaces for whānau to meet and talk with lawyers and probation officers (two community organisations and a probation officer)
- use of section 16 could be linked with introducing traditional cultural means of dispute resolution, such as ifoga (Samoan interfamilial process used to address serious grievance) into sentencing (probation officer and lawyer)
- section 16 could be used more effectively at status hearings prior to the entry of a guilty plea. More time could be allocated to each case and there is greater opportunity to influence the result than at the time of sentencing (two lawyers)
- a register or list of people and community organisations who may be available to speak about the ethnic or cultural background for different ethnic groups could be kept at court (two lawyers)
- the section could be written clearly and simply so that lay people of different ethnic backgrounds could understand it (community organisation)
- the section could be written in Māori (probation officer)
- cases in which section 16 has been used effectively could be documented to guide lawyers and others (lawyer)
- courts could have a designated place from which lay people address the court, indicating that this is a normal part of court proceedings (lawyer)
- section 16 should be applied where a suspended sentence is likely (lawyer)
- section 16 submissions should be on oath to increase their credibility (lawyer)
- extend the provision to the concept of marae justice, particularly for young people who would benefit from greater whānau involvement (lawyer).

Section 16 works well and should not be changed

Thirteen respondents, comprising eight lawyers, two judges and three probation officers commented that they thought section 16 currently worked well. Most thought that the current legislation was adequate and did not need to be changed. Individual respondents stated that section 16 had benefits for offenders where it had been used, and that it acknowledged the importance of the family in stabilising offenders within their culture. A probation officer observed that it worked well within the context of preparing pre-sentence reports in terms of involving whānau in the sentencing process. A judge and a lawyer who worked in small towns observed that the use of section 16 was frequent and informal in these contexts. In these courts, Māori wardens, kuia, or offenders' supporters would commonly attend court and would be given the opportunity to address the court.

The benefits of section 16

Nine comments from six lawyers, two judges and a community organisation representative referred to specific benefits from using section 16. The main theme was the benefit to both the court and the community from the flow of information between them. A judge thought that section 16 allowed families to feel that they had been consulted and had done all they could on behalf of the offender. Others thought that section 16 engaged the offender and their community in the sentencing process and was an opportunity to show the court the extent of family support.

A judge thought that section 16 was particularly useful in sentencing people from immigrant communities. A lawyer stated that the provision had provided a judge with

an opportunity to explain to an offender and his community that his offending behaviour, while it may be acceptable within his culture, was not acceptable in this country.

A Pacific Islands community organisation thought that section 16 could be of benefit if families were able to make submissions about the stress and pressure that particular types of sentence may place on the extended family.

Comments expressing reservations about section 16

Use of section 16 should not be mandatory

Twenty-eight comments from 25 lawyers and three judges expressed opposition to any change that would introduce any compulsion into the use of section 16. These respondents held the view that section 16 should be used only in cases in which it was judged appropriate, and that there were few cases in which ethnicity was a factor in offending. Some lawyers thought that the effectiveness of section 16 submissions would be reduced if they were made routinely. Used in the right case, section 16 could be extremely useful, but if promoted as a general rule, the cases in which it was most appropriate would be demeaned.

A judge and a lawyer expressed concern that the courts were already under stress and that there was not time available to receive submissions in every case. One judge stated that they already allowed any supporter, who showed sufficient interest, to speak on behalf of a defendant. Thus, increasing the use of section 16 was not an issue in that judge's court.

Maintain equality before the law

Twenty-five comments from 19 lawyers, three judges and three probation officers expressed reservations about the use of section 16 in view of the importance of maintaining fairness and equality before the law. These lawyers and probation officers were wary that the provision might result in a perception that offending was being condoned or excused, or that different treatment was being applied to some groups before the law. They tended toward the view that taking cultural factors into account at sentencing could result in different treatment on the basis of race. A few respondents thought that efforts would be better expended in informing immigrant groups what is expected of them under New Zealand law.

One lawyer saw the issue in terms of competing ideologies, contrasting the notion of equality before the law with the uniqueness of individual cases. Another stated that while sentencing criteria should be consistent, the court needed to be informed of everything relevant to understanding the offending and what was the best sentencing option.

Two judges observed that a range of mitigating factors, of which cultural factors were one aspect, were considered at sentencing. They thought there was a danger in giving too much weight to cultural factors. One judge stated that appeal judgements are the means by which the relevance of ethnic and cultural factors was identified. Another

judge observed that judges' sympathy and understanding had to be overridden by the requirement to apply the law at sentencing.

Problems with section 16

Eighteen comments from seven lawyers, seven judges, two probation officers and two community organisations referred to problems with the current use of section 16. The majority (five lawyers, two judges, one probation officer, and one community organisation) believed that section 16 had been misused. Examples where respondents believed section 16 was misused were:

- the opportunity being hijacked by people with an agenda other than support for the offender
- making submissions about 'collateral issues', such as family concerns, family distress, work opportunities, or early life disadvantage
- using section 16 as an opportunity to make a plea in mitigation in addition to that by counsel
- providing a character reference for the offender
- using section 16 as a means of verbal attack on counsel, judges, or police.

Others (two probation officers, two judges, two lawyers) felt that the legislation was vague, had no clear purpose, and as a result there was misunderstanding about what could be included in a section 16 submission. It was thought that the terms 'cultural' and 'ethnic' could be misleading, and a judge thought that there should be guidelines about how cultural and ethnic matters should be taken into account at sentencing.

Other problems mentioned included section 16 significantly extending the time taken to sentence an offender, leading to lengthy, ill-structured submissions; and spokespeople being poorly briefed.

Resourcing

Fourteen comments from 12 lawyers and two community organisations were about the resourcing required for section 16. Most of these respondents thought the use of section 16 would only be improved through better resourcing. The areas of resourcing most commonly referred to were legal aid, court time, and the availability of alternative community-based sentences.

Six lawyers observed that the current legal aid regime did not allow for the extra work involved if section 16 was to be used. They pointed out that the process of contacting and holding discussions with community and family groups could run into many hours of unpaid time. If more constraints were placed on legal aid it would be to the detriment of this type of work.

Three lawyers referred to the constraints placed on the use of section 16 by the pressures on court time at the sentencing stage. In some courts there was more pressure than others to minimise the length of time taken for sentencing submissions.

Two lawyers and one community organisation stated that more resources needed to be directed to community-based programmes which could provide options for alternative sentences.

Two lawyers thought that in the light of the current environment of budgetary restraint it was not appropriate to suggest any improvements that would imply additional resourcing.

Abolish section 16

Ten respondents, comprising nine lawyers and one probation officer thought that section 16 should be abolished. Three of these respondents thought that the application of section 16 amounted to racism or was anti-European. Others thought that cultural factors had no relevance at sentencing and taking them into account could prejudice justice. One lawyer stated that section 16 was not needed because sentencing precedents combined with judges' discretion to deal with a case on facts including aggravating, mitigating and explanatory factors, all allowed for the use of cultural evidence.

Barriers to use of section 16

Nine comments from seven lawyers and two community organisations referred to barriers to using section 16. Some referred to a scarcity of people who were suitable spokespeople, because:

- many offenders had little whānau support in court
- few supporters could achieve the right tone and balance in a submission
- the ethnic group might be so small in New Zealand that spokespeople were not readily available.

Other barriers mentioned included pressure on court sentencing time in a system whose main aim was processing efficiency, and pressure on the time of the community probation service.

7 Overview

The Criminal Justice Act 1985 brought a number of significant changes to the law relating to criminal justice. Among these changes, the Act increased the range of community-based sentences. It was hoped that these sentences would reduce the use of imprisonment for non-violent offenders and encourage more community involvement within the justice system. In particular, concern had been expressed about the high level of imprisonment of Māori in New Zealand.

It was in this context that section 16 of the Act was introduced. Section 16 allows for offenders' supporters to present information at sentencing about the offender's ethnic or cultural background, the way that may relate to the offending, and the way that may help in avoiding future offending.

This research aimed to examine the uses and perceptions of section 16, some 15 years after its introduction. In particular, the study has investigated the purposes of section 16, the use and effects of using section 16, and possible reasons for a lack of use. The study has also sought to identify any improvements that could be made to the legislation, or to the way the legislation is implemented. Each of these areas will be discussed in turn in this overview.

Two methods have been used to gather information for the study. Eleven case studies of situations in which section 16 has been used have been prepared by gathering information from those involved. Six of these case studies involved offenders who were Māori, three involved offenders who were Pacific People, one involved a Japanese offender and one a New Zealand European offender. Further information was gathered from a national postal survey of judges, lawyers, Community Probation Service staff, and community organisations. Findings from all of these sources will be drawn on in this overview.

7.1 The extent to which section 16 has been used

The survey indicates that where section 16 has been used, this is mostly in cases involving Māori offenders and offenders who are Pacific Peoples. The person making the section 16 submission was most commonly a member of the whānau or family, while community groups and kaumātua were also frequently spokespeople. Lawyers were most likely to organise the section 16 submission, while the offender organised the submission in a small proportion of cases.

Section 16 has been predominantly used for violent offences, and a significant proportion of these involved family violence. Case study nine is an example of use of section 16 for offending involving family violence. Section 16 was used to provide a cultural explanation for one aspect of the offending and place it in its cultural context.

In the cases reported in the survey, the sentence imposed was most likely to be imprisonment (45% of cases), although in one third of those cases the imprisonment was suspended. Community-based sentences were imposed in about a quarter of cases.

There are still significant proportions of professionals and community groups working within the criminal justice system who have never been involved in cases using section 16. Because it is likely that many of those who did not respond to the survey had not previously been involved in section 16, we can assume the actual numbers who have never encountered section 16 are greater than revealed in the survey (44% of lawyers and 14% of judges).

The survey results confirm the findings of the exploratory study, that section 16 is under-utilised. Only 14% of survey respondents perceived that section 16 was used as frequently as it could be.

The main reason given for under-utilisation of section 16, was a general lack of awareness of the availability of the provision or how it could be used. A further substantial group of respondents, believed that there was some resistance on the part of those working within the court system to making or receiving section 16 submissions. Other reasons given for under-utilisation were barriers to accommodating section 16 within the system, and a lack of suitable people available to speak on an offenders' behalf. All of these reasons point to areas in which improvements might be made to the implementation of section 16, discussed in section 7.4.

7.2 The purposes of section 16

Findings from the exploratory study and previous consultations had suggested that there was some confusion about the purposes of section 16. The survey findings confirm that there is a divergence in understanding of what section 16 is there to achieve. One group of respondents believed that section 16 had a narrow purpose, which was to assist with the processing of a case by providing the court with additional information relevant to sentencing. Another group of respondents believed that section 16 had a wider purpose relating to access to justice, and community participation in, and satisfaction with, the sentencing process. These differences will be explored in the later discussion of the purposes for which the provision has actually been used.

The study findings show that section 16 has been used for a much broader range of purposes than was originally envisaged.

The original purposes of section 16

Documentation produced at the time the Criminal Justice Act was introduced shows that section 16 was clearly linked to the aim of reducing the use of imprisonment by encouraging the use of community-based sentences. Section 16 was seen as a means of involving peoples of different cultures in finding alternatives to imprisonment for offenders from their communities. It was developed particularly with a view to involving Māori whānau and communities in alternative sentencing, although it was available to any offender, regardless of cultural background.

It is useful to ask how far the original purposes of section 16 have been realised. It has been difficult to obtain recorded information about the use of section 16. To help fill

this gap, those surveyed were asked to give information about the most recent 'section 16' case that they had been involved in.

In the cases reported in the survey, the section 16 submission referred to an alternative sentence to imprisonment in only seven percent of the cases reported. A larger number of the cases actually resulted in a community-based sentence, indicating that alternative sentences were mostly proposed through other means, such as the pre-sentence report. Only a tiny proportion of cases resulted in a community programme[37]. When asked what, in their view, was the main purpose of section 16, only a small proportion of respondents thought its purpose was to provide information about a type of sentence.

The case studies reveal some of the dynamics when section 16 has been used to propose a community-based sentence. In case studies one, two, three and six, the section 16 submission included proposals for a community-based sentence.

- In case study one, the kaumatua made proposals for a marae-based community programme. However, the nature of the offence, aggravated robbery, meant that the court had little flexibility to depart from a sentence of imprisonment. This was one of the elements that left the offender's whānau very dissatisfied with the outcome of their involvement in the case.
- In case study two, the offender's supporter had proposed community programmes and counselling on several occasions for offences involving driving, drugs, or dishonesty. On each of these occasions, the sentence imposed was community-based and on at least one occasion, a genuine alternative to imprisonment.
- In case studies three and six the programme proposed related to mental health treatment. In case study three the result differed from the proposal because of a lack of a readily available programme, and in case study six a sentence of imprisonment was required by law because of the seriousness of the offence, which was armed robbery.

These findings show that although community-based sentences are imposed in a substantial minority of cases where section 16 has been used, a direct link between the sentence and the section 16 submission can be established only rarely. When community programmes are proposed by means of section 16, there are frequently overriding factors which rule out a community-based sentence. These factors include legislative presumptions in favour of imprisonment, or a lack of availability of suitable programmes.

The original aim of section 16 has largely been unrealised because of its lack of use. The case studies also show that the extent to which a section 16 submission can have an effect on the sentence will vary depending on the nature and circumstances of the offence and other information about the offender placed before the court.

[37] A type of community-based sentence in which an offender undergoes a programme agreed by the court and provided by any person or agency. The sentence was originally named 'community care'.

Current purposes of section 16

What then are the purposes for which section 16 has been used? These will be examined in turn from the case study and survey findings. As is apparent in the case studies, in any single case, section 16 can be used for a mix of the purposes discussed below.

Access to and participation in justice

Several of the case studies reflect the use of section 16 as a means of family and community access to and participation in the sentencing process. Section 16 was used to this end with varying levels of effectiveness. The case in case study five achieved this purpose particularly effectively. Section 16 was used as a vehicle for the families of the five offenders to work together to express their depth of feeling for their boys, their sense of shame at their offending, and their family values and concern. Overall, the submissions resulted in a sense of ownership of the outcome, even though there was no possibility of departing from a sentence of imprisonment. Meaningful participation could be achieved despite the fact that the use of section 16 made no apparent impact on the sentence imposed. Used in this way, section 16 had an impact on that community of people in terms of how they perceived justice, and the experience showed them that there could be benefits from working with the system.

Two of the Pacific Peoples case studies, case studies seven and eight, also reveal a use of section 16 which enabled the victim's family to participate in the sentencing process. Both of these cases show that the use of section 16 connected the offender's family with the offender, the victim's family, and the sentence. Although section 16 was used in these cases primarily to convey the outcome of restorative processes between victim and offender (which will be discussed below), it also resulted in a high level of participation of both victims' and offenders' families in the sentencing process.

In case studies one, three and six, although section 16 provided the means for the families to participate in the sentencing process, and to express their concern in public, a number of factors resulted in their dissatisfaction with their participation. In all of these cases a number of practice issues limited the effectiveness of the families' participation. These will be discussed below in the section on improvements to the implementation of section 16.

In case studies three and six, the families' submissions related to their concern about the mental health issues relating to their family member. Ultimately the court had little flexibility to deal with these issues at the sentencing stage, resulting in outcomes that caused the families much distress and pain. Thus, although section 16 was used to enhance the participation of families in the system, its use for this purpose was not always successful.

Of the cases reported in the survey, about one-third involved submissions to the court by a member of the whānau or family of the offender. This suggests that section 16 is frequently used by families as a means of participation in the sentencing process. However, very few survey respondents believed the main purpose of section 16 was to provide an opportunity for family and community participation in the sentencing process. This suggests that although section 16 is being used to enhance participation by offenders' families, this purpose is not widely acknowledged within the system.

Provision of information to the court at sentencing

The majority of survey respondents believed the main purpose of section 16 was to assist the court by providing further information at sentencing. When section 16 is used for this purpose, the content of the submission is of primary importance, to the extent that it contributes additional information to be considered in reaching a sentencing decision.

Respondents to the survey were asked about the content of the submission in their most recent case. The findings were as follows:

- Forty-two percent of submissions referred to the offender's place in and support from family or community
- sixteen percent of submissions gave a specific cultural interpretation of the offence
- thirteen percent of submissions were a plea for a reduced sentence, based on mitigating factors
- seven percent of submissions proposed alternative sentences to imprisonment.

This suggests that in the majority of section 16 submissions a broad interpretation is being given to what constitutes cultural factors. These include factors such as family background, contribution to the community, employment, early life disadvantage, health, age, and church or gang involvement. Very specific cultural factors were presented in only a small proportion of cases. The case studies show that Māori whānau in particular regard section 16 holistically.

The survey respondents revealed a divergence of opinion about how the 'ethnic or cultural background' should be interpreted. One group believed that the section should allow for the presentation of any relevant information on the background of the offender or the offence. Another group held that there were few cases in which culture or ethnicity were a factor in offending, and that by and large section 16 was being misused when 'collateral issues' were presented.

In case studies nine and eleven, the content of the submission related to practices specific to Samoan and Japanese cultures respectively. When used in this way, section 16 can be seen as presenting information in mitigation of the offending. In case study nine, the judge took this additional information into account in deciding on the sentence, whereas in case study eleven, both in the District and High Courts the judges indicated that, while the information was considered, it did not ultimately have an impact on the their decisions.

In case study ten, the content of the submission related to the family and early life background of the New Zealand European offender. The judge willingly received this information which he believed complemented the other information available to him. It is difficult to assess to what extent the section 16 submission, as opposed to the other information, had an impact on the decision to give a community-based sentence.

The case studies show that when section 16 is used for the purpose of providing information to the court, this is frequently complementary to other information presented. In case studies nine, ten and eleven, the judges indicated that the section 16 submission was complementary to a co-ordinated package of information including the counsel's pleas in mitigation, the offender's record, and the pre-sentence report. Section

16 submissions appeared to be most effective when co-ordinated with the other forms of information presented at sentencing.

Formal closure to restorative processes

Three of the case studies have shown section 16 as a means of expressing formal closure to restorative processes between victim and offender which had taken place prior to the sentencing hearing. Case study seven, involving an I-Kiribati offender was the strongest example of this. The restorative process and the judge at sentencing recognised that within the cultures of the two families involved, offending was not an individual matter. The victim's family gave lengthy submissions at sentencing. Although the submissions may have had little influence on the sentence, they expressed remorse, forgiveness, and reconciliation, and in the judge's and the families' view, brought a just resolution to the situation.

In case study eight the restorative process arose from the ordering of an emotional harm report. At the meeting of the victim's and Samoan offender's families, the sharing of the sentence by the offender's family was seen to be appropriate. The victim's family was consulted about the section 16 submission. The judge felt that the expression of remorse and restitution were directly relevant to sentencing and that the involvement of the victim's family had been helpful.

In case study four a restorative meeting between victim and offender had been organised by counsel. The section 16 submission made by a member of the offender's family was a public expression of support for the offender and for his rehabilitation. It was a combination of the restorative process which was reported on by counsel and confirmed by the victim adviser, with the pre-sentence report outlining the programme which could be put in place for the offender, and the section 16 submission that resulted in a sentence of imprisonment being suspended.

Section 16 was used to explain a cultural process that had taken place prior to sentencing in only a small number of cases reported in the survey. Nevertheless, as restorative processes become more accepted, it is likely that section 16 will be used increasingly for this purpose.

7.3 The effects of using section 16

The effects of using section 16 can be seen on several levels. There are potential immediate effects on the type of sentence imposed and the way that sentence is carried out. And there are wide-ranging potential effects on all who have participated in the case.

The survey indicates that the use of section 16 was perceived to have had at least some impact on the sentence in approximately half of cases and to have resulted in a reduced sentence in more than one-third of the cases reported. Examples of reductions in sentences included suspension of sentences of imprisonment, reductions in length of imprisonment or amounts of fines, or receiving a community-based sentence when imprisonment was expected.

The case studies show that the use of section 16 can have positive or negative effects on participants in the case. It is clear, however, that many of the negative effects could be ameliorated through improving the practice surrounding use of section 16. This will be further discussed in the section 7.4 below.

Some of the broader positive effects identified in the study include:

- an opportunity for a whānau or family to publicly express support and involvement in rehabilitation of their family member who has offended
- a formal acknowledgement of a healing that has taken place between victim and offender and their families
- an offender rediscovering the support of their whānau
- a new sense of accountability of the offender to their whānau or family
- 'ripple effects' of the experience to other, possibly younger members of the offender's family
- reunification of a family and a drawing closer to an offender's cultural roots
- the expression of culture as a living concept in the court setting
- for the judge, a sense of having considered all possible factors and issues relating to the case
- professionals such as counsel gaining new understanding about different cultural processes
- whānau or family satisfaction with the sentencing process
- a sense of closure for all involved
- use of a community programme which addresses the causes of offending.

Some of the negative effects identified in the study include:

- the attempt to use section 16 can highlight the limitations of a system bound in the dominant culture; the system's lack of responsiveness and flexibility to incorporate alternative process can be exposed
- the use of section 16 can expose a lack of cultural competency on the part of those acting within the system
- whānau or family dissatisfaction, alienation, and bitterness when they believe the submission has not been heard or acted upon
- alienation of the judge when preparation is inadequate
- some survey respondents believed that the use of section 16 could undermine the integrity of the justice system if there is a perception that some offenders get special treatment
- some anecdotal instances of misuse of section 16; for example, the opportunity being hijacked by people with an agenda other than support of the offender, or being used to blame the victim, or to verbally attack counsel, judges, or police.

7.4 Suggested improvements to the implementation of section 16

Few survey respondents believed that section 16 was being used as effectively as it could be. Both the case studies and survey raised a number of areas in which improvements

could be made to the way section 16 is implemented. These will be considered in turn, before a discussion of suggestions for changes to the legislation.

Enhance the cultural competencies of professional groups in the system

Section 16 implies and encourages the participation of peoples from a range of different cultures in the sentencing process. It is important, therefore, that the professional groups who work within the system are adequately prepared to respond respectfully and sensitively. There was evidence from the case studies that some families were offended by responses they received, to the point that their confidence in the process was undermined. These families would be reluctant to participate in the process again. Raising the level of professionals' cultural understanding could also potentially contribute to their greater readiness to use section 16.

The survey respondents strongly supported further educational programmes in this area for lawyers, Community Probation Service staff, and judges. Comments from those interviewed indicated that as well as broadly enhancing understanding of cultures, the training could be as specific as guiding judges as to how to assess the impact of cultural factors at sentencing. While a lack of cultural awareness may not be a barrier to the appointment of justice professionals, their acknowledgement of their learning needs and their openness to learning are important qualities.

Increasing the number of judges and lawyers from different cultural backgrounds was also seen as a way of enhancing cultural competency within the system. One reason for this is that, for example, Māori personnel would bring with them their knowledge and experience of Māori communities and apply that to their work. Many other professionals working within the system may have experience of Māori only as offenders coming before the system. A substantial proportion (but less than half) of survey respondents agreed that there should be more judges and lawyers of different ethnic groups, although a substantial minority also disagreed with this.

Raise awareness of section 16

The case studies indicate that section 16 was generally initiated when families approached counsel with a desire to take part in the sentencing process in some way. While section 16 submissions may be an appropriate way to meet this need, this seems a haphazard means of ensuring that offenders are aware of their right to use the provision. Community organisations were aware of families who had wanted to speak at sentencing, but did not know how to go about it.

As quoted above, almost half of the survey respondents believed there was a general lack of awareness of section 16. Almost two-thirds of survey respondents thought that information about section 16 should be displayed in court waiting areas.

The case "Wells v. Police" quoted in the introduction to this report confirmed that section 16 provides the only opportunity for a lay person not under oath to address the court. This is what distinguishes section 16 from other sections of the Criminal Justice Act, which also provide for taking into account an offer to make amends (s12);

adjournment for inquiries as to suitable punishment (s14); pre-sentence reports (s15); or reparation (s22). It is apparent that families do not know of the opportunity to address the court because the system fails to inform them. As discussed in the section on 'Best practice issues' below, lawyers and probation officers could be encouraged by means of practice guidelines to inform their clients of the opportunity to stand and speak at sentencing.

Enhance the cultural responsiveness and flexibility of court processes

Several of the case studies involving Māori offenders and their whānau in particular reflected a high level of discomfort with culturally-insensitive practices within the court setting. The researcher for these studies referred to this as a 'cultural disregard', or a lack of understanding of Māori values and culture. The physical environment, unfamiliar language and process, and a clear imbalance of system knowledge and power combined to create an environment in which few of the whānau felt that they were able to participate freely. The researcher observed that wherever Māori meet to discuss matters of importance there are appropriate processes of encounter and acknowledgement to be carried out before attention turns to the *take* or issue of the day. When respect is paid to these processes, it is easier for whānau to accept the outcome of a sentencing decision, as was evident in case study five. The family in case study six expressed concern at the lack of status accorded to kaumātua who participate in the court process, and the imbalance of power between kaumātua and those who have legally-sanctioned roles such as lawyers and judges.

The need for courts to be flexible in time-frames for section 16 submissions can be seen in case study seven, where members of the victim's family spoke for two hours. The expectation of the court that presenters of submissions will 'come to the point', using as little of the court's time as possible, offends and disadvantages those from cultures who prefer to contextualise their kōrero.

The case studies also show a need for flexibility in other aspects of court processes and the court environment to accommodate section 16 submissions. Examples were:

- providing private spaces for families to meet and talk with lawyers and probation officers
- allowing for more than one speaker
- providing for the presenter to speak in Māori
- providing opportunity for the offender to acknowledge the speaker
- allowing for closure through physical contact before an offender returned to the cells.

The survey reveals that there is some resistance to accommodating these sorts of changes within the system. Almost half of the survey respondents disagreed that the court setting should become more culturally-appropriate in order to make section 16 more effective. However, almost a third of respondents did support this statement.

Enhance resourcing for section 16

The survey also revealed strong support for increasing resourcing within the system to better accommodate section 16. Some respondents thought that section 16 would only be improved through better resourcing.

Several lawyers in both the survey and case studies observed that the current legal aid regime did not allow for the extra time involved in arranging section 16. They pointed out that the process of contacting and meeting with community and family groups could run into many hours of unpaid time. Most of the survey respondents thought that legal aid should be increased to allow time to organise section 16. Similarly, most respondents supported increasing resources to the Community Probation Service to allow time to organise section 16.

Most survey respondents agreed that section 16 would be used more effectively if there were more community-based programmes available. This would mean that section 16 proposals would have more chance of offering viable alternatives to imprisonment.

Court time was a further resourcing issue, in an environment where there is pressure to process cases more efficiently. There was some evidence that in the smaller provincial courts time could be found more easily to accommodate section 16 submissions. In the larger courts, time could be found provided there was advance notification of a section 16 submission. This will be discussed in the section below.

7.5 Best practice issues

The case studies and the survey identified a number of issues concerning the practice of professionals who work within the system in relation to section 16. Ultimately, bringing about improvements in practice may be more effective than changing the legislation to make section 16 more effective. Potential improvements to the practice of judges, lawyers and Community Probation staff can be identified from the findings. Currently, no one professional group carries the responsibility for implementing section 16. Through changes to their practice, each of these groups could carry more of the responsibility for the effective use of section 16.

Issues for judges

The case studies reveal that the sentencing judge was key to the acceptance of section 16 as part of the sentencing process. The judge also determined the openness of the court context to different cultural process. Efforts to make the court context more culturally appropriate became peripheral if judges were not open to appropriate processes. The judges who were most flexible, and least worried that the process would derail, demonstrated a confidence and experience in their role as controller of the court environment. They also tended to take a broad rather than literal interpretation of the legislation.

It is evident from the findings that the judges' response and demeanour influence counsels' willingness to use section 16. Counsel will use section 16 only if they think

judges will listen. Establishing a climate of acceptance of the use of section 16 at sentencing is an important way that judges could increase its use.

The difficulty of managing case flows was an issue that judges frequently raised in relation to incorporating section 16 into sentencing. Some of the judges in the case studies demonstrated that they were empowered to use court time as needed. They were able to use their authority to change lists for the sake of enhancing the quality of justice. They are also empowered to take this up with the court administration if necessary.

More than half of survey respondents thought that judges should promote section 16. This role can be interpreted as taking a proactive stance to section 16, by making appropriate enquiries at sentencing as to whether there are other matters to be brought to the attention of the court. One of the judges stated that she enquired as a matter of course whether there was anyone present who wished to speak on behalf of an offender. Judges could also anticipate the possibility of a section 16 submission by suggesting that this be considered at the time the case is remanded for a section 23 pre-sentence report.

Issues for lawyers

The majority of survey respondents thought that it was the responsibility of defence counsel to inform their clients of the opportunity to use section 16 at sentencing, and subsequently to organise and prepare the spokesperson. In practice, defence counsel organised the submission in only half of the cases reported. This suggests that lawyers could become more active in this area.

In many of the cases studied, it was noted that judges and court managers preferred counsel to inform them in advance that a section 16 submission was proposed. This allowed time to be allocated for sentencing, particularly in a busy court with a full list. Pre-warning also allowed the judge to make a considered response to the submission. Without pre-warning, it is evident that a judge may indicate displeasure to counsel about the process, which raises anxiety for the family, and creates a feeling that the submission will not be given full consideration.

Counsel can also facilitate the use of section 16 by effectively preparing the offender and their family or supporter. Allowing time for planning with the offender's supporters helps them to decide who should speak and what matters should be raised in the submission. Counsel should work to clarify their own understanding and expectation of section 16 before preparing the offender and their supporters. It is particularly important to inform them of realistic sentencing options. The case studies show that, otherwise, the expectations of offenders and their families can be raised unrealistically, to the extent that their confidence in the sentencing process is undermined when their expectations are not met.

The counsel in case study four demonstrated particularly effective practice relating to section 16. She co-ordinated the section 16 submission with other representations, so that the outcome did not depend on the section 16 submission alone. She advised the judge in writing of the section 16 submission the day before, and provided a list of points regarding special circumstances for consideration. And she spent time informing and preparing the family for their role.

Issues for the Community Probation Service

More than half of the survey respondents thought that Community Probation staff should notify their clients and families of the option to use section 16. Probation officers who prepare pre-sentence reports are in a unique position within the system, in that they alone have a mandate to meet with the offenders' family. This could be seen as an opportunity to raise the possibility of section 16 with the family. Survey respondents strongly supported a requirement that probation officers routinely consider the need for a section 16 submission in the course of preparing pre-sentence reports.

The probation officer in case studies seven and eight demonstrated particularly effective practice in relation to section 16. He met on several occasions with the offenders and their families, and in this case, the victims' families, to facilitate the process leading to reparation reports and section 16 submissions, which confirmed the outcome of the process in court. He worked in co-ordination with other professionals involved, such as the lawyer and the victim adviser. He incorporated the outcome of the meetings into the pre-sentence and reparation reports and helped to prepare the families for their section 16 submissions.

The exploratory study revealed that Section 16 had no current defined place within Community Probation practice. This contrasts with the defined practice that exists around other provisions of the Criminal Justice Act, such as reparation, and community-based sentences. As a result, it was reported in the exploratory study that the implementation of section 16 often rested with Māori and Pacific Islands probation officers. To ensure it becomes part of accepted practice in sentencing, a process for introducing and using section 16 needs to be developed and built into the Community Probation Service practice guidelines. This may best be placed within the cultural assessment phase of the new Integrated Offender Management strategy.

Community organisations and section 16

The exploratory study revealed that some community organisations are working particularly effectively with section 16 in particular court districts. They have developed a close relationship with the local court or probation service and work with offenders and their supporters who are referred to them, or who they identify at the court. Community organisations are in a position where they can engage the trust of both system agencies and offenders from their communities. Their practice is quite specific from one location to another. Generally, the use of section 16 is not their primary purpose. Rather, it is used as a vehicle to assist in achieving their aims, which may revolve around restorative justice, or reducing the imprisonment rates of offenders within their communities. More than half of the survey respondents thought that section 16 would become more effective if more of these organisations were available to take referrals.

A further important role of community organisations is providing programmes which can be proposed as community-based sentences. More than two thirds of survey respondents thought that section 16 would be more effective if there were more such programmes to which offenders could be directed as part of community-based sentences.

7.6 Should the legislation be changed?

In deciding whether the legislation should be changed, the first step is to clarify the purpose of the provision. The provision is clearly rarely meeting the original purpose of involving the offender's community in proposing community-based sentences as alternatives to imprisonment. The research has shown that the provision can be used effectively to enhance both content and process at sentencing. Section 16 enhances process by facilitating the participation of offenders' whānau, and by providing for formal closure to restorative processes that have taken place between victim and offender prior to sentencing. It enhances content through the provision of additional information to the court. Survey respondents thought that it was important to clarify the type of content allowable in section 16 submissions.

If legislative changes are to be made to reflect the current purposes described in this report, the following issues should be considered:

1 The matters to which a person may be called to speak under section 16 should not be confined to "ethnic" or "cultural" matters, but allow for any relevant information on the background of the offender to be introduced. Many survey respondents believed that the terms "ethnic" and "cultural" were limiting because of differing interpretations of their meaning. Some thought that these terms included only a narrow range of specific behaviours or concepts relating to a defined ethnic group. Others thought that these terms included wider considerations such as family background and community involvement. The use of the term "family" in the title to the section, and statements made when the legislation was introduced suggest that it was originally intended that family background would be among the factors which could be spoken about under section 16.

2 Section 16 should more clearly state that submissions can relate to:

- understanding the background of the offending, and the culpability of the offender
- sentences that could be applied to the offender
- providing information about and giving formal closure to restorative processes that have taken place between victim and offender and their supporters.

3 The legislation could make it clear that one or more persons may stand and speak on behalf of an offender.

4 The legislation could be changed to clarify what judges can and cannot do in relation to hearing section 16 submissions. The court could be required to hear the submission regardless of the fact that the penalty for the offence is fixed by law, or for any other reason. In practice, the penalties for very few offences are fixed by law. Moreover, judges are able to deviate from presumption or precedent if there is good reason for doing so.

   A stronger expectation that section 16 submissions will be heard would better facilitate the goal of enhancing family and community participation in the sentencing process. The researcher who conducted the case studies involving Māori offenders

> described this as bringing about an atmosphere of partnership in the sentencing process. An atmosphere of partnership and participation can be destroyed if a judge is able to decline to hear a section 16 submission for no apparent reason.

If legislative changes are to be made to encourage greater family and community participation in the court process, corresponding changes should be made to the court environment and its underlying values. The physical environment, the behaviours of those within the system, the language and process all have an impact on the level of comfort of the peoples who come to the court environment. Moreover these factors have a bearing on the extent to which they can participate freely. To fail to address change at a broader level will only result in raising the expectations of offenders' whānau that may not be met in practice. The researcher who carried out the case studies for Māori offenders said: "A commitment to effective Māori participation in the administration of justice requires a continued focus on the cultural safety of all users of the justice system, including the whānau of offenders". In the words of one of the whānau interviewed:

> *Section 16 is excellent, but it's only one part of it; it has to be a bigger circle than one part of the pie for it to be very effective.*

Glossary

Māori terms	English translation
Aroha	Love
Hapū	Section of a large tribe
He pānui mō ngā kaiwhakauru	Information for participants
Hikoi	Walk, activity
Himene	Hymn
Hui	Meeting
Iwi	Tribe
Kai	Food
Kaiwhakauru	Participants
Kanohi ki te kanohi	Face to face
Karakia	Prayer
Karanga	Welcome call
Kaumatua/Kaumātua	Elder/Elders
Kaumātua kaunihera	Council of elders
Kaupapa Māori research	Research by a Māori values base
Koha	gift/donation
Kōrero	Talk or discussion
Kuia	Female elder
Mana Māori motuhake	The independence and autonomy of Māori
Mamae	Hurt or pain
Mate Māori	Māori spirituality
Mokopuna	Grandchild or grandchildren
Ngā Pātai	Questions
Pākehā	Person of predominantly European descent
Rangatahi	Young people
Takahia	Trample
Take	Issue
Tangi	Funeral
Te reo	Māori language
Tikanga	Custom
Whakapapa	Geneology
Whānau	Family
Whānau hui	Family meeting

Samoan and Kiribati terms	English translation
I-Kiribati	Inhabitant of Kiribati
Ifoga	Samoan inter-familial process used to address serious grievance
Matai	Samoan person of chiefly or high ranking status

Japanese terms	English translation
Giri	Sense of duty; honour; social obligation
Kohai – Senpai	Junior – Senior. Phrase used to emphasise difference in status between junior and senior members of Japanese society.

English translations for Māori terms were provided by Strategic Training and Development Services or were found in Williams (1992). English translations for the Samoan and Kiribati terms were provided by the Family Centre. English translations for the Japanese terms were provided by participants in the Japanese case study.

References

Bevan-Brown, J. (1998). *By Māori, For Māori, About Māori – Is That Enough?* Te Oru Rangahau, Māori Research & Development Conference, Massey University.

Chetwin, A., Knaggs, T. & Young, P. (1999). *The Domestic Violence Legislation and Child Access in New Zealand.* Ministry of Justice, New Zealand.

Department of Justice. (1989). *Monitoring the Innovations of the Criminal Justice Act (1985).*

Durie, A. (1998). *Me Tipu Ake Te Pono: Māori Research, Ethicality and Development.* Te Oru Rangahau, Māori Research & Development Conference, Massey University.

Durie, M. (1995). *Ngā Matatini Māori: Diverse Māori Realities* presented at the Wānanga Pūrongo Kōrerorero: Māori Health Framework Seminar. Turangawaewae Marae, Ngaruawahia.

Hall, G.G. (1998). *Hall's Sentencing* (updated to 6 November 1998). Butterworths, Wellington, New Zealand.

Harding, S. (1987). *Feminism and Methodology.* Indiana University Press, Bloomington, cited in Smith, L. (1998) *Towards the New Millennium: International Issues and Projects in Indigenous Research.* Te Oru Rangahau, Māori Research & Development Conference, Massey University.

Jackson, M. (1988). *The Māori and the Criminal Justice System. A New Perspective: He Whaipānga Hou.* Department of Justice.

Kane, R. and Briggs, L. *Is a modern code of ethics still appropriate in this post-modern world?* Social Work Review, June 1999.

Law Commission, *Justice: The Experiences of Māori Women, Te Tikanga o te Ture: Te Matauranga o ngā Wāhine Māori e pā ana ki tēnei.* (NZLC R53, 1999).

Morris, J. (1999). *Study Paper 1, Women's Access to Justice.* Law Commission, Wellington.

Tauri, J.M. (1996). *Indigenous Justice or Popular Justice: Issues in the Development of a Māori Criminal Justice System* in Spoonley et al. (eds) *Ngā Pātai: Racism & Ethnic Relations in Aotearoa/New Zealand.* Dunmore Press, Palmerston North.

Teariki, C. & Spoonley, P. with Tomoana, N. (1992). *Te Whakapakari Te Mana Tangata: The Politics and Process of Research for Māori.* Department of Sociology, Massey University.

Walsh-Tapiata, W. (1998). *Research Within Your Own Iwi – What Are Some of the Issues?* Te Oru Rangahau, Māori Research & Development Conference, Massey University.

Williams, H.W. (1992). *Dictionary of the Māori Language.* GP Publications, Wellington, New Zealand.

Appendix one

Reproduction of Department for Courts pamphlet: "How to tell the Court about your cultural background before sentencing"

The pamphlet, 'How to tell the Court about your cultural background before sentencing' can be obtained from:

The Department for Courts
PO Box 2750
Wellington
New Zealand

Tel: +64-4-384 5989
Freefax: 0800 266 627
Email: publications@courts.govt.nz

Appendix two

A suggested case study structure (Ministry of Justice)

Suggested Structure for Section 16 Case Studies

The circumstances of the offence

- background information about the offender – first offence?, age, ethnicity, gender, family background if relevant
- details of the offence

Initiating Section 16

- Who initiated it or recognised the need?
- How was it arranged?
- Who contacted and prepared the person to speak?
- How was the spokesperson related to the offender?

The use of Section 16

- What happened?
- How was the submission made?
- Were there any alternative processes that led to use of Section 16?
- What was the content of the submission?
- How did the judge receive the submission?
- Were any changes made to the court processes to accommodate the submission?
- Are there any other significant issues relating to the use of Section 16 in this case?

The effect of Section 16

- Was more information made available to inform the judge's decision at sentencing than would otherwise have been the case?
- Was the use of section 16 related to on-going family/community support for the offender?
- What impact did section 16 have on sentence outcomes?
- Was the use of section 16 related to the use of community-based sentences or alternative sentencing options? If so, how did the sentence go?
- Were there any other effects? Were there any longer term effects?

Satisfaction of those involved (this theme may need to be interspersed with earlier headings rather than treated separately)

- How satisfied were the research informants with the use and outcome of Section 16?
- What improvements do informants suggest based on their experience with Section 16 in this case?

Appendix three

Lawyers' survey (Ministry of Justice)

Use and Perceptions of section 16 of the Criminal Justice Act (1985)

Lawyers' Survey

Section 16 of the Criminal Justice Act (1985) allows someone to speak at sentencing about the ethnic or cultural background of an offender and how it relates to the offending or may help to prevent further offending:

> ***Criminal Justice Act 1985***
>
> ***S 16 Offender may call witness as to cultural and family background-***
>
> ***(1) Where any offender appears before any Court for sentence, the offender may request the Court to hear any person called by the offender to speak to any of the matters specified in subsection (2) of this section; and the Court shall hear that person unless it is satisfied that, because the penalty is fixed by law or for any other special reason, it would not be of assistance to hear that person.***
>
> ***(2) The matters to which a person may be called to speak under subsection (1) of this section are, broadly, the ethnic or cultural background of the offender, the way in which that background may relate to the commission of the offence, and the positive effects that background may have in helping to avoid further offending.***

Section 16 of the Criminal Justice Act is not always referred to when someone speaks about an offender's ethnic or cultural background at sentencing. For this survey we are interested in all cases where:

- someone spoke about the ethnic or cultural background of an offender at sentencing, or;
- a written submission (separate from the pre-sentence report) about the ethnic or cultural background of an offender was made at sentencing and someone was also available to speak.

Please answer the following questions by ticking boxes or writing in comments as requested

Use of Section 16

1. Have you been involved in cases where someone spoke at sentencing about the ethnic or cultural background of an offender?

Yes---------- ☐ a *(if your answer is yes please continue with question 2)*
No---------- ☐ b *(if your answer is no please go to question 14)*

2. When was the <u>most recent case</u> that you were involved in where someone spoke at sentencing about the ethnic or cultural background of an offender? *(please tick <u>one</u> box)*

less than one year ago---------- ☐ a
one to two years ago---------- ☐ b
more than two to five years ago---------- ☐ c
more than five years ago---------- ☐ d

For questions 3 - 12 please focus on the <u>most recent case</u> you were involved in (the one you referred to in question 2) where someone spoke at sentencing about the ethnic or cultural background of an offender.

3. What was the most serious offence that the offender was convicted of in the <u>most recent case</u>?

Family Violence---------- ☐ a
Violence – Non family---------- ☐ b
Sexual---------- ☐ c
Property---------- ☐ d
Drug---------- ☐ e
Traffic---------- ☐ f
Other---------- ☐ g
Don't know---------- ☐ h

4. Which of the following would you use to describe the offender in the <u>most recent case</u>?
(please tick as many boxes as are needed)

Repeat offender---------- ☐ a
First time offender---------- ☐ b
Young offender (under 20 years of age)---- ☐ c
Other---------- ☐ d--please explain:_____

5. What was the gender of the offender in the <u>most recent case</u>?

Male---------- ☐ a
Female---------- ☐ b

6. What was the ethnic group of the offender in the <u>most recent case</u>? *(please tick <u>one</u> box)*

Māori---------- ☐ a
Pacific Peoples---------- ☐ b
Other ethnic group---------- ☐ c---please specify which ethnic group:_____

7. In your view, what was the main reason that section 16 was used in the <u>most recent case</u>?

_____

_____

_____

8. Please briefly describe the information that was presented under section 16 to the court in the <u>most recent case</u>:

_____

_____

_____

_____

9. Please describe the main role of each person who addressed the court under section 16, in the <u>most recent case</u>? *(please tick only <u>one</u> box per person)*

Whanau/Family member of the offender--- ☐ a
Friend of the offender---------- ☐ b
Community group representative---------- ☐ c
Cultural expert paid by counsel---------- ☐ d
Kaumātua---------- ☐ e
Church leader---------- ☐ f
Community Probation Service Officer------- ☐ g
Lawyer---------- ☐ h
Other---------- ☐ i please explain:_____

10. Who organised the person to present the information in the <u>most recent case</u>? *(please tick <u>one</u> box)*

Probation Officer----------	☐	a
Lawyer----------	☐	b
Community Organisation----------	☐	c
Judge----------	☐	d
Offender----------	☐	e
Don't know----------	☐	f
Other----------	☐	g----please explain: _____

11. What was the sentence imposed in the <u>most recent case</u>?

_____

_____

12. To the best of your knowledge, what effect, if any, did the presentation of the s16 information have on the sentence that was imposed in the <u>most recent case</u>?

_____

_____

_____

13. Approximately how many cases have you been involved in <u>in the last year</u> (since October 1998) where someone spoke at sentencing about the ethnic or cultural background of an offender?

☐ a	☐ b	☐ c	☐ d	☐ e	☐ f	☐ g	☐ h	☐ i
0	1	2	3-5	6-10	11-15	16-20	21-30	31+

Perceptions of section 16

14. Do you think section 16 is used as often as it could be?
(please tick <u>one</u> box)

Yes----------	☐	a	*(if your answer is yes please go to question 16)*
No----------	☐	b	*(if your answer is no please continue with question 15)*
Don't know----------	☐	c	*(if your answer is don't know please go to question 16)*

15. In your view, what is the main reason section 16 is not used as often as it could be?

_____

_____

_____

_____

16. In your view, who should be responsible for organising use of section 16? *(please tick <u>one</u> box)*

Probation Officer----------	☐	a
Lawyer----------	☐	b
Community Organisation----------	☐	c
Judge----------	☐	d
Offender----------	☐	e
Don't know----------	☐	f
Other----------	☐	g----please explain: _____

17. In your view, what is the main purpose of section 16?

_____

_____

_____

18. Do you think section 16 is used as effectively as it could be? *(please tick <u>one</u> box)*

Yes	☐	a
No	☐	b
Don't know	☐	c

19 Please state to what extent you agree or disagree with each of the following:
(please tick <u>one</u> box next to each statement)

KEY		
SD	**=**	**Strongly Disagree**
D	**=**	**Disagree**
N/O	**=**	**No opinion**
A	**=**	**Agree**
SA	**=**	**Strongly Agree**

Section 16 could be made more effective by:

	SD	D	N/O	A	SA	
• displaying information about section 16 in Court	☐	☐	☐	☐	☐	a
• requiring that a written submission is provided in conjunction with someone	☐	☐	☐	☐	☐	b
• making changes to the Court setting so that it is more culturally appropriate	☐	☐	☐	☐	☐	c
• having sentencing hearings held outside of the Court environment	☐	☐	☐	☐	☐	d
• making it a legal requirement that cultural information is taken into account at	☐	☐	☐	☐	☐	e
• meeting the costs of whānau/supporters coming to Court	☐	☐	☐	☐	☐	f
• increasing legal aid to allow time for organising use of section 16	☐	☐	☐	☐	☐	g
• increasing resourcing of Community Probation Service to allow time for organising use of section 16	☐	☐	☐	☐	☐	h
• requiring that Māori and Pacific Peoples' cases are referred to community groups for for section 16 background information	☐	☐	☐	☐	☐	i
• ensuring there are more community organisations to support offenders in court	☐	☐	☐	☐	☐	j
• making more programmes available for offenders to receive community based	☐	☐	☐	☐	☐	k
• requiring that lawyers explain to all offenders that section 16 can be used	☐	☐	☐	☐	☐	l
• requiring that Community Probation Service staff notify all offenders and their families that section 16 can be used	☐	☐	☐	☐	☐	m
• promotion of section 16 by Judges	☐	☐	☐	☐	☐	n
• educational programmes for Judges	☐	☐	☐	☐	☐	o
• educational programmes for lawyers	☐	☐	☐	☐	☐	p
• educational programmes for Probation Officers	☐	☐	☐	☐	☐	q
• increasing the number of Judges with varied ethnic backgrounds	☐	☐	☐	☐	☐	r
• increasing the number of lawyers with varied ethnic backgrounds	☐	☐	☐	☐	☐	s
• requiring Probation Officers to consider the need for section 16 in all pre sentence	☐	☐	☐	☐	☐	t
• other - please						

20. Do you think changes should be made to the section 16 legislation? *(please tick <u>one</u> box)*

Yes----------	☐ a	(if your answer is yes please continue with question 21)
No----------	☐ b	(if your answer is no please go to question 22)
Don't know----------	☐ c	(if your answer is don't know please go to question 22)

21. What changes do you think should be made to the legislation?

_____

_____

22. Do you have any further comments about section 16?

_____

_____

Your Details

We need the following information to help us work out response rates and to analyse the differences between groups who respond. All identifying information that you provide will be kept confidential to the project team and will not be used in any reports about this research.

23. What is your name? _____

24. Which City/Town are you based in?_____

25. How long have you worked as a lawyer?

☐ a Less than 1 year
☐ b 1 year to less than 2 years
☐ c 2 years to less than 5 years
☐ d 5 years or more

1. Approximately what proportion of your work is in the criminal jurisdiction?

☐ a Less than ¼
☐ b About ¼
☐ c About ½
☐ d About ¾
☐ e All

27. Please tick as many of the following boxes as you need to show which ethnic group(s) you belong to

☐ a New Zealand Māori----------
☐ b New Zealand European or Pakeha --------
☐ c Other European---------- please specify: _____
☐ d Samoan----------
☐ e Cook Island Māori----------
☐ f Tongan----------
☐ g Niuean----------
☐ h Chinese----------
☐ I Indian----------
☐ j Other---------- please specify: _____

28. Would you agree to our contacting you about the possibility of including a case of section 16 use that you have recently been involved in, in our case study research?

☐ a Yes ☐ b No

29. Please indicate whether you would like to receive a summary of the findings of this survey:

☐ a Yes ☐ b No

Thank you for participating in this research

Please send your completed survey to us using the enclosed FREEPOST envelope

Appendix four

He pānui mō ngā kaiwhakauru – Information for participants (Di Pitama)

He Pānui Mō Ngā Kaiwhakauru

E nga reo, a nga mana, a nga waka
Tēnā koutou, tēnā koutou, tēnā koutou katoa.

We are carrying out some case studies of the use of s16 of the Criminal Justice Act. This section allows an offender before the Court for sentencing to ask the Court to let someone speak for them. Usually the supporter who speaks is a whānau member or Māori service provider who can talk about the ethnic or cultural background of the offender, and any positive things being done to help reduce reoffending.

We are Māori researchers who have been asked to study 6 cases where s16 has been used so that the Ministry of Justice can gain a better insight into how Māori offenders and whānau used s16, and how they felt about it. The information gathered will be used to help develop policies aimed to encourage positive Māori participation in the justice system.

We would appreciate the opportunity to speak with you kanohi ki te kanohi (face to face) to discuss your experience with us. For each case study we will need to speak to:

- **the offender**
- **the offender's lawyer**
- **the sentencing judge**
- **the whānau or support people who spoke in court or wrote a submission for the court at sentencing**
- **any other whānau involved who wish to speak with us.**

We will travel to you and interview you somewhere you feel comfortable. If possible we would like to interview whānau support people on the same day as the offender. If you are not all available on the same day and in the same place we will talk with you about the best times and places to meet. Any reasonable travel costs or other expenses will be paid by the research team.

If you agree to participate in this study then we will ask you to fill in a consent form, and explain your rights as kaiwhakauru (participants) to you.

Appendix five

Ngā Pātai - Questions about the research (Di Pitama)

Ngā Pātai

Who are the researchers?

The researchers are Di Pitama (Ngāi Tahu, Ngāti Mutunga), and George Ririnui (Ngāti Ranginui, Ngāi-te-Rangi). Di is based in Auckland and George is based in Hamilton. Di has worked with rangatahi for several years, and has worked with education programmes for people after release from prison. She has also worked for the Department for Courts. George has a background as a social worker, and in working with social service providers.

Ko to whatumanawa he Māori, he ngākau aroha.
Aroha to tangata, tētahi ki tētahi.
The heart that beats is Māori, is one of compassion.
Have love and regard to all people and to one another.

How did the researchers find out about me?

The Ministry and researchers contacted a number of lawyers to see if they had worked with s16 cases, and to see if they were willing to contact their clients about the research. Your lawyer will not discuss case details with us without your permission.

Do 1 have to be part of the research?

No. While we would appreciate you being part of the research, the choice is yours. You have the right to say no to being part of the research at all. You can also withdraw from the research if you change your mind.

What will I be asked?

We are interested in finding out how s 16 was used in each case - whose idea it was, how it was arranged, what they expected and how well it worked for everyone involved. We will also need some background information about the offender and the offence. You may have other things you would like to tell us - especially if there are things you think that could be improved on.

Who will see the information I give?

We would like to tape the interviews so that we can concentrate on talking to you instead of on taking notes, and to make sure that we don't make mistakes about what you did say. What is said on the tape will be typed up, and you will get a copy. If you want the tape turned off at any time you just need to ask. The tape will be held for 6 months after the research report is finished and then returned to you or destroyed.

Once we have talked with all the informants we will write up each case as a case study. A copy of this will go to you for your comments before we send a final

report to the Ministry. Your name and the names of people associated with the case will not be used.

What will the research be used for?

The case studies will be put together into a report. This report will be combined with information from the Pacific People case studies and from a survey of judges and other people in the justice system. All this information will go to the policy people who advise on how laws should be changed or used differently. Any information we get will not change the outcome of a case.

Do I get paid for helping with the research?

If attending an interview costs you anything - like travel to the meeting place or loss of work time, then the research team will cover reasonable costs. A small koha will go to kaiwhakauru in recognition of their contribution to the research.

Who do 1 talk to if I have more questions?

Di Pitama is the person co-ordinating the research. If you ring her with your contact number she will ring you back straight away so that you don't have to pay for the call. You can ring her on (00) 000 0000 (telephone number has been deleted for the report).

What happens next?

If you agree to take part in the research then you can:

Tell your lawyer that you agree to take part, and give your lawyer permission to contact us and to give us your contact details. Di will contact you to set up the interview.

Or

Ring Di and tell her that you agree to take part, and she will set up the interview with you.

Appendix six

Written consent form (Di Pitama)

Consent Form for s16 Case Study Research

Before we can go ahead with the case study your written consent is needed. This is to make sure that you understand what is involved, and so we can carry out all the parts of the case study.

I understand

- ❑ What the research is about
- ❑ That I do not have to take part in the research
- ❑ That I can withdraw from the research if I want to
- ❑ That I will get a copy of my interview transcript and my case study
- ❑ That any information I give will only be used for the case study
- ❑ How to contact the researchers if I need to

I give my permission for

- ❑ The researchers to contact me while they are doing the case study
- ❑ The researchers to discuss my case with my lawyer
- ❑ The researchers to talk to the person who made the s16 submission on my behalf
- ❑ For the researchers to access my pre-sentencing report from Community Corrections

Name _____ Signature _____

Phone contact: _____ Alternative Contact: _____

Postal Address: _____

_____

Privacy Act Statement: All information gathered during the course of this research will be collected, used and stored in accordance with the principles of the Privacy Act (1993).

Appendix seven

Consent form (Kiwi Tamasese, Peter King, Charles Waldegrave)

THE FAMILY CENTRE

ANGLICAN SOCIAL SERVICES

Co-ordinators:
Maori: Flora Tuhaka
Pacific Island: Kiwi Tamasese
Pakeha (European): Charles Waldegrave, MA(Hons)(Waik), MA(Hons)(Camb)

CONSENT FORM

Case studies of the use of Section 16 of the Criminal Justice Act (1985) by Pacific Island offenders

The Ministry of Justice has commissioned the Family Centre Social Policy Research Unit to carry out three case studies of the use of Section 16 of the Criminal Justice Act with Pacific Island offenders. As part of this work we will interview offenders, lawyers, members of the judiciary and cultural support people involved with each of these cases, to find out their experience of using Section 16 and how well it worked in the cases being studied. The information obtained for the case studies will be included in written reports, but care will be taken to ensure that no participants will be identified in any reports.

- I have read the above information for people being interviewed for these case studies.
- I have had the opportunity to discuss this research and am satisfied with the answers I have been given.
- I understand that taking part in this interview is voluntary (my choice) and that I may withdraw from it at any time.
- I understand that my participation in this interview is confidential and that no material which could identify me directly will be used in any reports on this research.

I .....*(full name)* hereby consent to be interviewed in this research.

Date ..... Signature.....

Name of Witness .....

Signature of Witness .....

The principal researcher in this project is Kiwi Tamasese. She can be contacted at the numbers below.

If you have any concerns about the study, you may contact: Alison Chetwin, Principal Advisor (Research), Criminal Justice Group, Telephone (04) 494 9700.

Social Policy Research, Family Therapy, Community Development, Education

Postal Address: P.O. Box 31-050, Lower Hutt, Aotearoa/New Zealand. Telephone: 64-4-569-7112, Facsimile: 64-4-569-7323
Street Address: 71 Woburn Road, Lower Hutt, Aotearoa/New Zealand.
Email: fam@netlink.co.nz

Appendix eight

Project information sheet (Ministry of Justice)

MINISTRY OF JUSTICE

Research on Section 16 of the Criminal Justice Act (1985)

Information sheet

Section 16 of the Criminal Justice Act allows an offender who is before the Court for sentencing to request the Court to hear someone speak on their behalf. The person called to speak may talk about the ethnic or cultural background of the offender, how the background relates to the commission of the offence and/or any positive effects the background may have to help avoid further offending.

Although section 16 has been available for almost 15 years there is little information about how the provision is used, and the effects that use has. The information about section 16 collected in this research will contribute to policies aimed at encouraging positive participation by Māori and minority ethnic groups in the Justice system.

There are two components to this research. The first is a written survey focused on the perceptions and experiences of Judges, Lawyers, Community Probation Service staff and Community Organisations of section 16.

The second component of this research is 11 in-depth studies of cases where section 16 was used. Māori and Pacific Peoples were the focus of nine of these cases. For the remaining two cases the researchers hope to explore cases that involved people of ethnic groups other than Māori or Pacific Peoples. We are seeking the assistance of Counsel to help with this process.

The project has an advisory group, which includes policy and research advisers from the Department of Courts and the Ministry of Justice, cultural advisers, community group representatives, a judge and staff of the Community Probation Service. The full research findings will be published this year and a summary will be sent to all participants.

If you have any questions please contact one of the researchers listed below.

Tony Waldegrave
Criminal Justice Group
PO Box 180
WELLINGTON
☎ 04-494 9863

Alison Chetwin
Criminal Justice Group
PO Box 180
WELLINGTON
☎ 04-494 9864

Kiri Simonsen
Criminal Justice Group
PO Box 180
WELLINGTON
☎ 04-494 9769

Appendix nine

Questions about the research (Ministry of Justice)

Questions about the research

Who are the researchers?
The researchers conducting the case studies are Alison Chetwin, Kiri Simonsen and Tony Waldegrave. All are employed by the Ministry of Justice. For contact details please see the information sheet.

How did the researchers find out about this case?
The researchers contacted a number of lawyers to see if they had worked with s16 cases, and to see if they were willing to contact their clients about the research. Your lawyer will not discuss case details with us without your permission.

Do I have to be part of the research?
No. While we would appreciate you being part of the research, the choice is yours. You have the right to say no to being part of the research at all. You can also withdraw from the research if you change your mind.

What will I be asked?
We are interested in finding out how s 16 was used in each case – whose idea it was, how it was arranged, what they expected and how well it worked for everyone involved. We will also need some background information about you and the offence. You may have other things you would like to tell us – especially if there are things you think that could be improved upon.

What will the research be used for?
The case studies will contribute to a published report. This report will be combined with information from the Māori and Pacific People case studies and from a survey of judges and other people in the justice system. The report will go to the policy people who advise on how laws should be changed or used differently. Any information we get will not change the outcome of your case. Although details about your case will be included in the report your name will not be used.

Who do I talk to if I have more questions?
Please contact Tony Waldegrave using his phone number from the information sheet (you may call collect).

What happens next?
Please ask the person who presented this material to you to contact us about whether you agree for the research to be done. They will send the completed consent form back to us. When we receive the consent form we will either contact you (if you have given permission for us to do this) or contact those associated with your case (if you have given permission for us to do this).

Appendix ten

Consent form (Ministry of Justice)

Research on Section 16 of the Criminal Justice Act (1985)

Consent Form

I have read the information about the research on supporters speaking at sentencing and:

I agree that the researchers can contact me about my case Yes / No

Telephone Number _____
Alternative way of contacting me _____

I agree that the researchers can talk to my family about my case Yes / No

Name of person to contact _____
Telephone number _____

I agree that the researchers can talk to my lawyer about my case Yes / No

I agree that the researchers can see the pre-sentence report for my case Yes / No

I agree that the researchers can talk to the person that supported me in court Yes / No

Name of Supporter _____
Telephone Number _____

Name _____

Signature _____