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A critical analysis of the defunding of section 27 cultural reports used in sentencing

I Introduction

Widely known as "section 27 reports" or "cultural reports", s 27 of the Sentencing Act 2002 allows offenders to present information on personal background and cultural factors.[1] In early 2024, the Minister of Justice announced that section 27 reports were being stripped of the funding afforded under the Legal Services Act 2011.[2] Having cost taxpayers $7.2 million in the previous year, section 27 reports are allegedly too costly and allow too many discounts at sentencing.[3] These reports play a critical role in battling the overrepresentation of Māori in the criminal justice system, and by removing their funding, the inequities faced by Māori will likely be further perpetuated.[4] Given the report's role in addressing the disproportionality of Māori in the justice system, the Crown's obligations to Māori under te Tiriti o Waitangi and the Treaty of Waitangi are called into question.

The following essay argues that in removing funding for section 27 reports, the Crown fails to uphold its Treaty obligations to Māori. This essay will comprise four substantive parts. Part II will explain section 27 reports and their role in sentencing, particularly for Māori offenders. Part III will present the impacts of section 27 reports, first examining the positive perception of these reports in the case law and subsequently considering the adverse effects of funding removal. Part IV will detail the Crown's Treaty obligations both generally and under the Sentencing Act. Part V will apply to the Crown's Treaty obligations to the removal

[1] Sentencing Act 2002, s 27.
[2] 1 News Reporters "Govt to axe funding for pre-sentence cultural reports" *1 News* (online ed. New Zealand, 6 February 2024); and Legal Services Act 2011.
[3] Ministry of Justice *Removing taxpayer funding for section 27 reports* (13 December 2023) at 9 and 11.
[4] Ministry of Justice *Regulatory Impact Statement: Removing taxpayer funding for reports under section 27 of the Sentencing Act 2002* (7 December 2023) at 26.

of funding, which will illustrate the lack of Treaty adherence. Lastly, part VI will conclude the argument.

II An Overview of Section 27 Reports

Statutory Authority

Section 27 of the Sentencing Act is the guiding provision that outlines the contents of section 27 reports.[5] Section 27(1) of the Act outlines that an "offender may request the court to *hear* from any person or persons called by the offender", which can be presented orally, as imagined under the Act, or more commonly, in a written report.[6] The subparagraphs under s 27(1) dictate what the offender can present information on.[7] This information is broadly related to the offender's personal, whānau, community, and cultural background and how these factors may be relevant regarding sentencing outcomes.[8] Additionally, subparagraph (b) allows the judge to consider any restorative processes that can or may have been undertaken.

Furthermore, subparagraph (d) focuses on what support the offender's family, whanau, or community may provide to prevent reoffending.[9] Section 27 also states that the court must hear information presented under the provision or have a reason to deny such a request. The court can also suggest that an offender present information under s 27 if this would be of assistance to the court.[10]

Broader Role and Purpose of Section 27 Reports

[5] Section 27.
[6] Section 27(1).
[7] Section 27(1)(a)–(e).
[8] Section 27(1)(a)–(e).
[9] Section 27(1)(c) and (d).
[10] Section 27(2) and (3).

A central purpose of s 27 was to combat the staggering overrepresentation of Māori in the criminal justice system.[11] The provision was envisaged to encourage alternatives to imprisonment for Māori due to decades-long overrepresentation in Aotearoa prisons.[12] Section 27 is, importantly, an avenue for advancing equality and equity. These reports highlight differences, whether cultural or otherwise, and determine where these differences in lived experiences may have a role in one's offending.[13]

Section 27 allows for all offenders to present information that is more likely to result in a more "relevant, meaningful and appropriate sentence" than what would have been imposed without such information.[14] Reports under section 27 delve into an offender's background to a deeper extent than that in a Provision of Advice to Courts report, often touching on issues such as mental health and addiction.[15] A more appropriate account of an offender's culpability is provided when section 27 reports are read along with all the material available to the court.[16] Thus, section 27 reports give sentencing judges a more holistic view of the offending.

IV The Impact of Section 27 Reports for Māori

A Judge's Perspective on the Reports

To consider the impact section 27 reports have on Māori, assessing their perception in the sentencing process is critical. *Solicitor-General v Heta* is perhaps the most prominent case to discuss the role of section 27 reports when sentencing Māori offenders.[17] *Heta* involved an

[11] David John Harvey *Discounting Cultural Issue*s (12 July 2021) Social Science Research Network <https://www.ssrn.com> at 9.
[12] Ministry of Justice, *Regulatory Impact Statement*, above n 4, at 16.
[13] *R v Evans* [2018] DCR 735 at [23].
[14] Judge O'Driscoll "A powerful mitigating tool" (2012) NZLJ 358 at 360.
[15] Harvey, above n 11, at 13.
[16] Judge O'Driscoll, above n 14, at 360.
[17] *Solicitor-General v Heta* [2019] 2 NZLR 241.

appeal against the 30 per cent discount given to Ms Heta because of the personal cultural circumstances as described in a section 27 report.[18] In his judgment, Whata J recognises the effects of colonisation on Māori communities, noting the loss of Māori land and the destruction of integral cultural and social structures.[19] As a result of colonisation, Māori have continuously been disproportionately represented among the most criminal in Aotearoa.[20]

Notably, Whata J creates the term "systemic Māori deprivation" to represent the social disadvantage impacting Māori.[21] It is determined that systemic Māori deprivation is a relevant source of information that offenders may present in section 27 reports.[22] Symptoms of systemic Māori deprivation will usually be self-evident, including factors such as poverty, alcohol and drug abuse within the whānau, domestic violence, and educational underachievement.[23] However, it is not to say that Māori who can provide evidence of such a factor will receive a discount. Whata J states that there must be a "linkage" between the presence of systemic deprivation and the offending.[24]

The judgement in *Heta* highlights the systemic disadvantages Māori face that arise from the longstanding impacts of colonisation. *Heta* provides just one example of how critical section 27 reports are in recognising the unique experiences of Māori and how such experiences may link to offending. For some Māori, like Ms Heta, committing an offence cannot be separated from the enduring effects of colonisation, and this must be acknowledged at sentencing.

Funding Removal and the Perpetuation of Disproportionality

[18] At [1].
[19] At [40].
[20] At [40].
[21] At [40].
[22] At [49].
[23] At [50].
[24] At [50].

There is no dispute that Māori men and women are the subject of disproportionate representation in the criminal justice system.[25] As of December 2023, Māori represented 51.9% of the prison population[26] while representing only 17.3% of the national population in 2023.[27] Though this is just one faction of the criminal justice system, the statistic paints a clear enough picture that Māori face overrepresentation in the system. Thus, removing the funding for section 27 reports will undoubtedly have an adverse impact on Māori based on statistics alone.

In conducting the necessary process to make the change to the Legal Services Act to remove section 27 funding, the impacts that this will have on Māori are recognised.[28] Due to the disproportionate number of Māori in the criminal justice system, a Cabinet paper from the Ministry of Justice states that if the removal of funding results in fewer sentence discounts, there may well be flow-on consequences.[29] These flow-on consequences are likely to harm tamariki and rangatahi in particular, which aids in understanding how the intergenerational impacts of the justice system are kept alive.[30] To further cement the negative impact this will have on Māori, the paper states that a higher proportion of Māori offenders receive a legally aided section 27 report than any other ethnicity.[31] The evidence to suggest that the removal of funding for section 27 reports will disproportionately impact Māori is overwhelming.

The Impacts of Accessing Section 27 Without Funding

[25] Waitangi Tribunal, *Tū Mai Te Rangi! Report on the Crown and Disproportionate Reoffending Rates* (Wai 2540, 2017) at 10.
[26] Department of Corrections "Prison facts and statistics – December 2023" <www.corrections.govt.nz>.
[27] Stats NZ "Māori population estimates: At 30 June 2023" (16 November 2023) <www.stats.govt.nz>.
[28] Ministry of Justice *Legal Services Amendment Bill – Approval for Introduction* (31 January 2024) at 7.2.
[29] Ministry of Justice, *Removing taxpayer funding for section 27 reports*, above n 3, at 38.
[30] At 38.
[31] At 38.

Although section 27 remains fully functional, the issue is that it is no longer accessible—particularly for Māori. Offenders can opt to pay for the reports, though this will disproportionately impact working class and poor Māori.[32] Alternatively, offenders can invite someone to present an oral submission to the contents of section 27.[33] This alternative seems fantastical. It disregards the fact that most people found it far too challenging to go and speak in court when oral submissions were the norm.[34] Dr Juan Tauri claims that the government is fully aware that many people do not have the "social capital to make the impression required" and that it is condescending and dismissive for the government to take the stance that oral submissions are an appropriate substitute.[35] Tauri also points out the historical negative experiences that Māori have with the courts, which only adds a further barrier to oral submissions being a suitable alternative.[36]

III The Crown's Obligations under the Treaty of Waitangi

It is now commonly accepted that the Crown must fulfil its obligations as a partner to the Treaty. In fulfilling its Treaty obligations, the Crown must adhere to the "Treaty principles", which are a set of principles developed under the law to capture the essence of the Treaty and te Tiriti. The application of the Treaty principles manifests in several ways. In general, there is the proposition of the expectation Parliament intends for legislation to be interpreted in a manner consistent with the principles of the Treaty/te Tiriti, given its constitutional status.[37] Parliament may opt to reference the Treaty and its principles in legislation explicitly.[38]

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[32] Amy Williams "Section 27 funding ban unfair, undermines rehabilitation – Bar Association" *Radio New Zealand* (online ed, New Zealand, 9 February 2024).
[33] Soumya Bhamidipati "Axing of cultural report funding will hurt poorer sections of society, experts say" *Radio New Zealand* (online ed, New Zealand, 8 February 2024).
[34] Bhamidipati, above n 34.
[35] Bhamidipati, above n 34.
[36] Bhamidipati, above n 34.
[37] Jack Oliver-Hood "Ko Ngā Take Ture Māori Our Significantly Indigenous Administrative Law: the Treaty of Waitangi and Judicial Review" (2013) 19 Auckland U L Rev 53 at 54.
[38] See Conservation Act 1987, s 4.

However, the Treaty principles are not always included in legislation, as is the case with the Sentencing Act.

Treaty Obligations in the Sentencing Act

No provision in the Sentencing Act speaks to the Crown's obligations to the Treaty and Te Tiriti. A lack of inclusion does not mean the Crown's obligations to the Treaty principles cease to exist. The High Court of Wellington in *Huakina Development Trust v Waikato Valley Authority* found that the Treaty is "part of the fabric of New Zealand society" and may act as an extrinsic aid to interpret legislation where te Tiriti/the Treaty is not mentioned.[39] Further, in *Barton Prescott v Director-General of Social Welfare*, the High Court of Napier reasoned that given that the Treaty was "designed to have general application", such application must "colour all matters to which it has relevance".[40] Thus, although the Sentencing Act does not explicitly have reference to the Treaty principles, there is clear precedent in the case law that they do still apply.

The Waitangi Tribunal's Recognition of Treaty Obligations in the Criminal Justice System

The Waitangi Tribunal report, *Tū Mai Te Rangi*, also provides insight into the Crown's obligations in the broader criminal justice system context.[41] Although the *Tū Mai Te Rangi Report* responds to claims regarding Māori reoffending rates, the Tribunal's analysis considers the criminal justice system more broadly. In the Report, the Crown accepted that the rates of Māori reoffending meant that it had an obligation under the Treaty to take reasonable steps to reduce the rates to a level consistent with non-Māori.[42] This highlights the Crown's recognition of its Treaty obligations to reoffending rates and given that the Treaty is

[39] *Huakina Development Trust v Waikato Valley Authority* [1987] 2 NZLR 188 at 210.
[40] *Barton Prescott v Director-General of Social Welfare* [1997] 3 NZLR 179 at 184.
[41] *Wai 2540*, above n 25, at 1.
[42] At 18.

not referenced anywhere in the criminal law, these obligations can be taken to extend to the Sentencing Act.

V Analysis of the Crown's Failure to Uphold its Treaty Obligations under the Sentencing Act

The preceding parts of the essay have provided the necessary foundation to advance the argument that the Crown is acting inconsistently with their Treaty obligations in removing funding for section 27 reports. Part V will, therefore, examine several Treaty principles and argue that the Crown has failed to uphold each principle.

Kāwanatanga and Rangatiratanga

The underlying purpose of the Treaty and te Tiriti was for Māori to be guaranteed tino rangatiratanga over their land, resources, and people.[43] In exchange, the Crown could exercise kāwanatanga, or governorship, over the country.[44] In practice, these two principles require the Crown to acknowledge the guarantee of rangatiratanga and the control this allows Māori over their tikanga and management of affairs.[45] The balance between the two principles is fragile and will likely differ circumstantially.[46]

By removing funding for section 27 reports, the Crown disregards Māori's rangatiratanga by exercising its kāwanatanga inconsistently with its Treaty obligations. Per the *Tū Mai te Rangi Report*, while the Crown's kāwanatanga enables it to select from several policy options, any

[43] Waitangi Tribunal *Whaia te Mana Motuhake: In Pursuit of Mana Motuhake: Report on the Māori Community Development Act Claim* (Wai 2417, 2015) at 20.
[44] *Wai 2417 Report*, above n 43, at 20.
[45] *Wai 2540 Report*, above n 25, at 26.
[46] *Wai 2540 Report*, above n 25, at 25.

option chosen *must* be consistent with the Treaty principles.[47] The Ministry of Justice's Regulatory Impact Statement provided five policy options, ultimately recommending Option Four, which did not overtly contradict any Treaty obligations.[48] However, the Crown chose to remove the funding despite specific advice that in doing so, the Crown would fail to uphold its "obligations under Article 1 of the te Tiriti to enable Māori led solutions and limits the exercise of rangatiratanga under Article 2 of te Tiriti."[49]

Partnership and Consultation

Partnership is required to ensure that the Crown can exercise their kāwanatanga in harmony with Māori exercising their rangatiratanga, as the Treaty/te Tiriti guarantees.[50] Hand in hand with the principle of partnership is the need for consultation. It is the Crown's duty to consult with Māori in good faith to result in genuine consultation.[51] Though the Crown's duty is not absolute, there will be "some subjects of such importance to Māori that consultation will be required by the good faith element of the Crown-Māori Treaty partnership."[52] Based on the conclusions in the *Tū Mai te Rangi Report*, it is evident that due to the widespread impacts of the criminal justice system, it is a subject of such importance envisioned by the Tribunal in *The Offender Assessment Policies Report*.[53]

In the rush to get the amendment to the Legal Services Act passed through urgency, there was no consultation with Māori.[54] Indeed, the Cabinet Paper recognised that there was a strong Treaty/Tiriti-based argument that this action should require consultation at the least.

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[47] At 80.
[48] At 11.
[49] At 10.
[50] *Wai 2540 Report*, above n 25, at 66.
[51] *Wai 2540 Report*, above n 25, at 28.
[52] Waitangi Tribunal, *The Offender Assessment Policies Repor*t (Wai 1024, 2005) at 11.
[53] *Wai 1024 Report*, above n 52, at 11.
[54] Ministry of Justice, *Legal Services Amendment Bill,* above n 29, at 50.

However, this was merely a recognition that was not acted upon. Thus, the Crown acted in the face of knowledge that their actions would not be Treaty-consistent. Simply, this is a blatant disregard of the obligation of partnership and consultation that the Crown has under the Treaty.

Active Protection and Equity

The principle of active protection instils an obligation on the Crown to protect Māori Treaty rights *actively*.[55] Furthermore, Article Three of the Treaty creates the obligation of equity, which requires the Crown to address disparities between Māori and non-Māori.[56]The Tribunal has found that where there are circumstances of inequity between Māori and non-Māori, the principle of active protection is heightened, which is certainly applicable here.[57] The disproportionality against Māori in the criminal justice system is a representation of what the Tribunal in the *Napier Hospital Report* describes as "persistent disparities between Māori and non-Māori social outcomes".[58] Per that report, where such disparities are present, there is a need for "affirmative action" to reduce "structural or historical disadvantage[s]".[59]

The Crown's decision to remove funding for section 27 reports is an affirmative action to *sustain*—if not exacerbate—the structural disadvantage that Māori face in the justice system. As touched upon in this essay, section 27 of the Act is a means to address the disadvantage faced by Māori.[60] The funding of the reports acted as a further mechanism to reduce barriers for Māori in the criminal justice process, as *all* Māori had equal access to a report—regardless of financial status. Ultimately, the Crown has actively chosen to follow through

[55] *Wai 2540 Report,* above n 25, at 26.
[56] *Wai 2540 Report,* above n 25, at 27.
[57] *Wai 2540 Report,* above n 25, at 34.
[58] Waitangi Tribunal, *Napier Hospital and Health Services Report* (Wai 692, 2001) at 53.
[59] At 53.
[60] Harvey, above n 11, at 9.

with a policy decision that is not Treaty-consistent despite being offered more Treaty-suitable policy options.[61] This decision is undoubtedly a failure from the Crown to actively protect Māori and take affirmative action to address longstanding inequities within the criminal justice system.

VI Conclusion

Māori overrepresentation in the criminal justice system is an urgent issue that needs to be addressed, and it *is* a Treaty issue. As a Treaty partner, the Crown must fulfil its obligations and work with Māori to combat the intergenerational imprint the criminal justice system leaves on Māori communities. This essay has argued that in removing the funding for section 27 reports, the Crown fails to uphold its obligations under te Tiriti/the Treaty. The essay first covered the necessary background of the reports. The impact of this policy decision on Māori was then explored. The Crown's Treaty obligations were outlined both broadly and context-specifically. Finally, the essay analysed the Crown's Treaty principle obligations concerning removing section 27 funding, ultimately finding that the Crown breached all the Treaty principles covered in this essay.

[61] Ministry of Justice, *Removing taxpayer funding for section 27 reports*, above n 3, at 20–42.