

## DISCRETION IN THE NEW ZEALAND CRIMINAL JUSTICE SYSTEM: THE POSITION OF MAORI AND PACIFIC ISLANDERS

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Maori and Pacific peoples are substantially over-represented in the New Zealand criminal justice system, both as victims and offenders.<sup>1</sup> For example, Maori account for roughly half of both the total prison population and community-based offenders,<sup>2</sup> while only comprising about fifteen percent of the total population.<sup>3</sup> Similarly sobering are statistics (adjusted for population) which show that compared to Europeans, Pacific peoples are twice as likely to be apprehended, prosecuted and convicted of an offence, while Maori are between four and five times more likely.<sup>4</sup> Accounting for the overall causes of this over-representation is difficult, and the causes may well differ between these broad groups. One line of analysis, for example, places particular weight on Maoridom's unique experience with colonialism in New Zealand,<sup>5</sup> a factor that is obviously missing in relation to Pacific peoples. Further, differences in the two groups' over-representation<sup>6</sup> caution against simplistically treating them as homogenous. Despite these complicating factors, it appears that low socio-economic status (for whatever reason), and the associated increased likelihood of being exposed to "risk-factors" (such as unemployment, alcohol and/or drug abuse) leading to criminal behaviour is the driving force behind both Maori and Pacific people's over-representation.<sup>7</sup>

Although the presence of various risk factors partially due to low socio-economic status, (SES) is likely to be the predominant cause of over-representation, it is also recognised that low SES is unlikely to convincingly explain *all* the differences. Maori have been found to be at a greater risk of conviction than others of similar socio-economic background,<sup>8</sup> and there is a concern that the same is true of Pacific peoples. Cabinet papers relating to the "Effective Interventions" package, which has been behind recent reforms in the criminal justice sector, consider that some of the explanation for this over-representation is likely to be due to bias or other unintended consequences of discretion within the criminal justice system.<sup>9</sup>

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<sup>1</sup> New Zealand Cabinet Paper, 'Unintended Consequences of Discretion in the Criminal Justice System' (2006) 2 [http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp) (Accessed 28 August 2008).

<sup>2</sup> New Zealand Cabinet Paper, 'Effective Interventions 1: Overview' (2006) 21 [http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp) (Accessed 28 August 2008).

<sup>3</sup> Statistics NZ, <http://www.stats.govt.nz/census/census-outputs/quickstats/snapshotplace2.htm?id=9999999&tab=CulturalDiversity&type=region&ParentID=> (Accessed 28 August 2008).

<sup>4</sup> New Zealand Cabinet Paper, 'Effective Interventions 11: Maori and Pacific Peoples' (2006) 1 [http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp).

<sup>5</sup> K Quince, 'Maori and the Criminal Justice System in New Zealand' in Julia Tolmie & Warren Brookbanks (eds) *Criminal Justice in New Zealand* (2007) 333.

<sup>6</sup> Mel Smith, Ombudsman, *Ombudsman's Report A.3(A) - Investigation into Issues Involving the Administration of Criminal Justice* (2007), 68.

<sup>7</sup> New Zealand Cabinet Paper, 'Effective Interventions 11' above n 4, 6; New Zealand Cabinet Paper, 'Effective Interventions 1', above n 2, 21.

<sup>8</sup> David Fergusson, *et al*, 'Ethnicity and Criminal Convictions, Results of a 21-year Longitudinal Study' (2003) 36(3) *Australian and New Zealand Journal of Criminology*, 365.

<sup>9</sup> *Ibid*, 365; New Zealand Cabinet Paper, 'Effective Interventions 11' above n 4, 6; New Zealand Cabinet Paper, 'Report Back on Unintended Consequences of Discretion in the Criminal Justice System – Recommendations for Further Research' (2007) 1, 3 [http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp)

This is so because of the pervasive role discretion plays in the New Zealand criminal justice system.<sup>10</sup> Opportunities for discretion to operate present themselves from the decision to report an incident as a “crime”, through prosecutorial decisions on how to deal with an issue (should an incident even end up in court), to the impact of jury discretion, right through to sentencing and the decision to grant parole.<sup>11</sup> On a particularly cynical view it can be considered that there is less of a criminal justice “system” and more of a “leaky funnel” which directs people into formal outcomes such as conviction and imprisonment. The opportunities to “leak out” the sides of the funnel are determined by discretion, and are so numerous as to make it worthwhile focusing on them to inquire why Maori and Pacific people seem to be falling right through the funnel into imprisonment, rather than leaking out at an earlier stage.

Two specific examples of discretion, at the broad and narrow end of the leaky criminal justice “funnel” will be examined: the prosecutorial discretion to divert offenders from the formal criminal justice system (Alex Latu), and discretion in the sentencing process (Albany Lucas). These discretions will be considered in order to identify any likely opportunities for, or examples of, biases or unintended consequences of discretion, which may work to the disadvantage of Maori or Pacific peoples. The need for, and the nature of these discretions will be discussed, as will the adequacy of the constraints that attempt to fetter these discretionary powers.

## **PART ONE: THE PROSECUTORIAL DISCRETION TO DIVERT**

In practice, not every offence committed results in a formal charge, nor is every charge laid by the police fully and formally prosecuted, even if it would be likely to succeed. As a result, discretion in prosecutorial decisions represents an important area where bias or other unintended consequences may work to disadvantage minority groups within New Zealand society, particularly Maori and Pacific peoples. To consider this area, this part particularly focuses on prosecutorial decisions regarding the alternative resolution processes of the police adult and youth diversion schemes. As these processes may involve access to restorative justice mechanisms, their importance will also be discussed.

### **Discretion and diversion – an overview**

Diversion is a particular example of prosecutorial discretion. It covers situations where an offender is dealt with in an alternative manner that completely short-cuts appearing in formal institutions like court. At the informal extreme this includes police warnings or cautions, but this paper deals with diversion in a more formal sense involving some sort of diversionary plan.<sup>12</sup> If an offender is charged, then successful completion of the plan (which may include things like apologies, community work or reparations) results in the charge being dropped. These processes are generally reserved for non-serious offences, and offenders with no, or minimal, criminal background. Dishonesty offences like burglary are generally considered too serious to divert, as are violent offences, but the overall assessment is based on the particular

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(Accessed 28 August 2008); New Zealand Cabinet Paper, ‘Unintended Consequences of Discretion’, above n 1, 4-6.

<sup>10</sup> New Zealand Cabinet Paper, ‘Report Back on Unintended Consequences’, above n 9, 1.

<sup>11</sup> New Zealand Cabinet Paper, ‘Unintended Consequences of Discretion’, above n 1, 2-4.

<sup>12</sup> Warren Brookbanks, ‘The Criminal Justice Process: An Overview’ in Julia Tolmie & Warren Brookbanks (eds) *Criminal Justice in New Zealand* (2007) 134.

circumstances.<sup>13</sup> In practice this discretion is a necessity. It avoids clogging the formal system and prevents the negative perception that police focus unduly on trivialities. Even in systems where the initiation of the criminal process is theoretically obligatory, practical constraints inevitably introduce discretion.<sup>14</sup> Discretion to divert involves direct decision-making power, and is relatively informal in that it is a resolution process outside the “truly” formal criminal justice system involving adversarial court proceedings.

There are two major diversion schemes in New Zealand. The police adult diversion scheme, which applies to those 17 and over, is an extension of the discretion not to prosecute, and is now subject to explicit guidelines as of November 2007. It is implemented by police prosecutors or approved diversion officers.<sup>15</sup> Youth diversion is different in that it has a statutory base under the *Children, Young Persons and Their Families Act 1989* (CYPTFA). This makes formal criminal justice proceedings a last resort for youth offenders, and ensures police are unable to circumvent diversionary mechanisms.<sup>16</sup> It is carried out by the specialised Youth Aid section of the police, who have the option of arranging a diversionary plan instead of the more serious outcomes of Family Group Conferences (FGCs), or charges in the Family Court. The main differences between these two broadly similar schemes are therefore the statutory basis of the youth scheme and the fact that charges need not be brought before the youth diversion scheme applies.

It has been suggested that the effectiveness of New Zealand’s youth justice system has as much to do with diversionary mechanisms as the much-lauded FGCs.<sup>17</sup> Any unintended consequences of discretion here could thus have large ramifications on Maori and Pacific over-representation, much of which relates to youth offenders.<sup>18</sup> Another way this could contribute to Maori and Pacific over-representation is because of diversion’s somewhat restorative nature. Restorative justice concerns systems which are more involving, and less alienating, than the formal system, emphasising repair over punishment. For the youth scheme, the CYPTFA enshrines participatory principles that can be considered restorative, and in the adult scheme, restorative justice principles may be incorporated into diversionary plans or an offender may be referred to an approved provider.<sup>19</sup> Importantly, statistics show that Maori and Pacific peoples enjoy less access to restorative justice than Europeans.<sup>20</sup> As there is support for the idea that restorative justice may decrease re-offending rates, any unintended consequences of discretion here could be contributing to these groups’ *proportional* over-representation, rather than just absolute numbers.<sup>21</sup>

### **Likely opportunities for unintended consequences of discretion**

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<sup>13</sup> New Zealand Police, ‘Diversion FAQs – Who is eligible for diversion?’ <http://www.police.govt.nz/service/diversion/faqs.html>; New Zealand Police, ‘Police Adult Diversion Scheme Policy’ (2007) 7 <http://www.police.govt.nz/service/diversion/>.

<sup>14</sup> Auckland District Law Society Public Issues Committee, ‘Discretion to prosecute’ (1989) 8.

<sup>15</sup> New Zealand Police, ‘Police Adult Diversion Scheme Policy’, above n 13, 6.

<sup>16</sup> N Lynch, ‘Youth Justice’ in Julia Tolmie & Warren Brookbanks (eds) *Criminal Justice in New Zealand* (2007) 378.

<sup>17</sup> G Maxwell, ‘Diversionary Policing of Young People in New Zealand: A Restorative Approach’ in G Maxwell and J Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) 123.

<sup>18</sup> New Zealand Cabinet Paper, ‘Effective Interventions 11’ above n 4, 3.

<sup>19</sup> New Zealand Police, ‘Police Adult Diversion Scheme Policy’, above n 13, 18-19.

<sup>20</sup> New Zealand Cabinet Paper, ‘Effective Interventions 5: Restorative Justice’ (2006) 4

[http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp) (Accessed 28 August 2008).

<sup>21</sup> *Ibid.*, 4.

The first cause for concern is the role of police prosecutors, youth aid officers and diversion officers as essentially gatekeepers to diversion, which leaves them open to accusations of partiality.<sup>22</sup> Decisions not to divert obviously increase the probability of formal criminal justice outcomes, and are arguably susceptible to influence by “police culture”. This is particularly worrisome when one considers the Ombudsman’s recent findings that there is a myopic focus on securing a conviction amongst police, and that early interventions with young offenders are not considered “sexy” work.<sup>23</sup> The current system also provides disincentives for police to support less formal, alternative resolution processes. They see them as “soft options”, and are also frustrated by the “revolving door” nature of the system.<sup>24</sup> With Maori and Pacific peoples more likely to be “revolving”, due to low SES, it is plausible that this frustration might be vented unevenly on them, thus augmenting the initial problem. The unevenness in both schemes’ implementation<sup>25</sup> adds to the case that this exercise of discretion may be having unintended consequences.

A related concern is the ability of police to determine punishment by deciding the form a diversionary plan will take. This can be viewed as an arrogation of what is essentially a judicial function, sentencing. On a strict natural justice perspective, this would seem best exercised by an independent body, and there is a worry that the police are not the best organ to fulfil this function.<sup>26</sup> Similar to the discussion above, “police culture” could well influence the exercise of this discretion in unintended ways. Consider the incorporation of restorative justice principles into diversionary plans. While possible, the general police attitude towards “soft options” outlined above would seem to make it unlikely that this option would be enthusiastically embraced.

Such concerns would appear to be made out upon examining the youth scheme. Even though restorative justice ideals, like involving offenders in the decision making process, are statutorily enshrined in CYPTFA, 40% of offenders surveyed reported that this had not occurred with their diversionary plans. Others reported perceived unfair treatment and inappropriate or harsh tasks in their plans, which had tainted their perceptions of the police.<sup>27</sup> One example was being forced to cut a lawn with scissors as part of the diversionary plan, a task completely unrelated to the offence. Such effects are likely to hinder attempts to improve relationships between police and groups such as Maori, who have historically perceived them as a biased, racist institution.<sup>28</sup> The development of such negative relationships could easily spur mutual antagonism resulting in increased police attention and over-representation, similar to the effect described in ‘The Saints and the Roughnecks’.<sup>29</sup>

### **The adequacy of constraints**

The major recent constraint placed on the adult diversion scheme has been its 2007 formalisation via explicit policy guidelines.<sup>30</sup> This seems likely to increase consistent application and use. It reduces a lot of scope for regional variations in the “gate-keeping” of

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<sup>22</sup> G Maxwell above n 17, 111-112.

<sup>23</sup> Mel Smith, above n 6, 41-42, 111.

<sup>24</sup> H Broad, ‘Restorative Policing’ in G Maxwell & J Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) 127.

<sup>25</sup> Warren Brookbanks, above n 12, 135; New Zealand Ombudsman, above n 6, 111.

<sup>26</sup> Auckland District Law Society Public Issues Committee, above n 14, 11-15.

<sup>27</sup> G Maxwell, above n 17, 119-121.

<sup>28</sup> New Zealand Cabinet Paper, ‘Unintended Consequences of Discretion’, above n 1, 5.

<sup>29</sup> W Chambliss, ‘The Saints and the Roughnecks’ (1973) 11 *Society* 24.

<sup>30</sup> New Zealand Police, ‘Police Adult Diversion Scheme Policy’, above n.13.

diversion. This is especially so in laying down national guidelines for previously massively uneven areas such as traffic offences (which were eligible for diversion in the North Island but not the South). Increased use may well change police perceptions of restorative justice resolution processes as “soft options”, as that is certainly not how they are perceived by those who have gone through them.<sup>31</sup> While these outcomes are to be welcomed, the Ombudsman’s report has pointed out the dangers of an overly prescriptive approach in eroding the ability of the discretion to adequately tailor diversion to specific situations.<sup>32</sup> There is danger of an “efficient” model, which has been encountered in the context of FGCs, where the range of options in a plan are few and similar.<sup>33</sup> This may have particular impact on Maori and Pacific peoples. Drawing an analogy with FGC involvement, Maori and Pacific families are shown to respond better when the process goes beyond mere tokenism, truly involves them, and is more adapted to cultural expectations.<sup>34</sup>

In regard to the youth scheme, Maxwell makes a similar point. She sees its informal development as mainly positive, having resulted in a responsive, largely benign system unlikely to have evolved if formal limits had been put in place earlier.<sup>35</sup> While accepting the point that formal limits should be carefully thought through in order to strike an appropriate balance, it seems some degree of formalisation along the lines of the adult scheme might constrain discretion sufficiently to mitigate the “stark” regional disparities in the youth scheme’s operation.<sup>36</sup>

Considering the second group of concerns related to prosecutorial involvement in sentencing, it might be thought that sufficient independence or insulation from the effects of “police culture” is achieved by the constraint of assigning specially trained officers to these tasks. While this may be generally true, the Ombudsman’s report shows that, especially for youth justice, “at the coalface” in some regions there are significant exceptions.<sup>37</sup> The lawn-cutting with scissors episode perhaps serves to illustrate this. A similar point is made in relation to the Police Prosecutorial Service, who are authorised to handle diversion. Given their current degree of administrative separation and the large rise in non-sworn police prosecutors there would seem to be a case for total independence.<sup>38</sup> Anyway, if in fact “police culture” is not influencing this discretion, a move towards more or total independence from the police might enable more accurate diagnosis of where bias exists, and reduce levels of perceived bias among the police. As noted above, perceived bias may well be damaging to relationships between police and certain groups.

Overall, while the relatively formal constraints mentioned above are likely to be useful, it seems that informal constraints based on perceptions of what “real police work” is, and the proper relationship between police and the community may well be the most effective. While there is ground for cautious optimism about improvement in this area,<sup>39</sup> the effects will be difficult to measure. This is especially so given the justified pessimism that may be felt about

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<sup>31</sup> New Zealand Cabinet Paper, ‘Effective Interventions 5’, above n 20, 3.

<sup>32</sup> Mel Smith, above n 6, 47.

<sup>33</sup> H Broad, above n 24, 133.

<sup>34</sup> G Maxwell, ‘The Youth Justice System in New Zealand: Restorative Justice Delivered Through the Family Group Conference’ in G Maxwell and J Liu (eds) *Restorative Justice and Practices in New Zealand: Towards a Restorative Society* (2007) 56.

<sup>35</sup> G Maxwell, above n 17, 120-121.

<sup>36</sup> Mel Smith, above n 6, 111.

<sup>37</sup> Mel Smith, above n 6, 111-112.

<sup>38</sup> Mel Smith, above n 6, 124.

<sup>39</sup> Mel Smith, above n 6, 41.

the possible effects of the government's current '1000 Additional Police'<sup>40</sup> initiative. The sudden influx of a large number of freshly trained recruits is likely to create difficulties in inculcating positive police attitudes via staff supervision and effective management. Indeed, the timing of the new, and first, police code of conduct<sup>41</sup> applying to sworn staff suggests it was introduced to deal with these issues. It is really too early to evaluate how successful this code of conduct will be in dealing with these sorts of problems.

In sum, Maori and Pacific peoples are over-represented in the youth jurisdiction, and under-referred to restorative justice programmes generally. Diversion in the adult and youth jurisdictions deals with both these issues, making it worthwhile to query whether unintended consequences of discretion exist. Points where this seems likely to occur include the decision to grant diversion, deciding what the diversionary plan entails, and perceived bias in both of these decisions. Formal constraints seem likely to ensure a more even-handed exercise of this discretion, and can be seen to be gaining more of an influential role under the recent formalisation of the adult scheme. Informal constraints arguably play a key role also, but they are more difficult to quantify and evaluate.

## **PART 2: DISCRETION IN SENTENCING**

The sentencing process follows a person's conviction for a criminal offence. A New Zealand study conducted over 21 years found that Maori offenders had higher rates of conviction than non-Maori offenders of the same socio-economic background (SEB) and with the same history of self-reported offending (SRO).<sup>42</sup> The results showed that Maori were 2.1 to 2.6 times more likely to be convicted than non-Maori with the same history of SRO. After controlling for SRO history and individual characteristics,<sup>43</sup> Maori were still 1.6 to 1.8 times more likely to be convicted than non-Maori. The increased risks of conviction for Maori suggest an ethnic bias in which Maori were more likely to be convicted than non-Maori of the same SEB and SRO history.

However, the study has its limitations: firstly, its focus is limited to Maori peoples, making it impossible to ascertain whether the bias is unique to Maori offenders or whether it extends to other minority groups in New Zealand. Secondly, it focuses on just one geographical population – namely, Christchurch. If it had analysed other cities in New Zealand (particularly, where Maori are more densely populated) it might have produced different results and perhaps stronger evidence of an ethnic bias. Finally, the study does not identify the source of the apparent bias. It is likely that the bias arises from an accumulation of biases that are present throughout the arrest and conviction processes'.<sup>44</sup>

The higher risks of conviction for Maori may be a result of 'unintended consequences of discretion within the decision-making process'.<sup>45</sup> Inconsistent application of discretion may occur at various points of the criminal justice system: from the public reporting of offences, to police management of the offence, right through to the judicial process.<sup>46</sup> This has been

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<sup>40</sup> New Zealand Cabinet Paper, 'Effective Interventions 3: 1000 Additional Police' (2006)

[http://www.justice.govt.nz/effective\\_interventions/cabinet\\_papers/default.asp](http://www.justice.govt.nz/effective_interventions/cabinet_papers/default.asp) (Accessed 28 August 2008).

<sup>41</sup> New Zealand Police, 'Code of Conduct' <http://www.police.govt.nz/about/code-of-conduct.html> (Accessed 28 August 2008).

<sup>42</sup> D Fergusson *et al.*, above n 8.

<sup>43</sup> Gender, socio-economic status, educational qualifications.

<sup>44</sup> D Fergusson *et al.*, above n 8.

<sup>45</sup> New Zealand Cabinet Paper, 'Unintended Consequences of Discretion', above n 1.

<sup>46</sup> D Fergusson *et al.*, above n 8.

described as the “leaky funnel” system. If Maori are convicted more frequently, it means they will come up more frequently for sentencing before the court.

## Sentencing

Sentencing a person to imprisonment is one of the ‘most powerful steps a judge can take, with the most wide-reaching repercussions’.<sup>47</sup> The judge has wide discretion in sentencing and may take into account many factors when making this decision. These factors can be divided into legal and extra-legal variables. The former category consists of legally relevant factors such as the nature and seriousness of the offence and prior offending history. Extra-legal factors include ethnicity, age, gender, and personal circumstances such as socio-economic status.<sup>48</sup> It is this category of extra-legal factors which are likely to lead to inconsistency and “unwarranted disparity” in sentencing outcomes.<sup>49</sup> Therefore consistent application of discretion is paramount. The exercise of discretion should not be left open without clear parameters.

## Current Position in New Zealand

In New Zealand, sentencing is governed by the *Sentencing Act 2002*. Prior to this legislation, there were ‘few constraints upon, or guidance as to, the exercise of judicial discretion in sentencing’.<sup>50</sup> The *Sentencing Act 2002* articulates the major purposes and principles of sentencing and the relevant aggravating and mitigating factors to be taken into account in each case. Unfortunately, it provides minimal guidance as to the choice of sanction and it provides ‘little or no assistance’<sup>51</sup> in determining the sentence length appropriate for the *average* case of each type coming before the courts.

Currently, the principal mechanism for guiding the exercise of judicial discretion is appellate review. However, because the scope and outcome of each case depend on its facts, sentencing precedents can only provide a rough guide (at best) as to the appropriate sentence.<sup>52</sup> Accordingly, the Court of Appeal has been developing “guideline judgments” for the benefit of lower courts. These judgments offer authoritative guidance that is not fact-specific and thus intended to be of general application.<sup>53</sup> For example, the Court of Appeal in *R v Fatu*<sup>54</sup> developed four sentencing bands to be used in cases involving the sale or supply of methamphetamine:

- (a) Band one: low level supply (less than five grams)  
- two years to four years imprisonment.
- (b) Band two: supplying commercial quantities (five grams to 250 grams)

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<sup>47</sup> G Hammond, ‘Sentencing: Intuitive Synthesis or Structured Discretion?’ (2007) *New Zealand Law Review* 211.

<sup>48</sup> Heather Deane, ‘Race, gender, and the sentencing process in a New Zealand District Court’ in Kayleen Hazlehurst (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment* Aldershot (1995).

<sup>49</sup> S Bushway *et al*, ‘Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing’ (2001) 4 *Law and Society Review* 734.

<sup>50</sup> NZ Law Commission, *Sentencing Guidelines and Parole Reform* (2008) 17

[http://www.lawcom.govt.nz/UploadFiles/Publications/Publication\\_126\\_338\\_R94.pdf](http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_126_338_R94.pdf) (Accessed 28 August 2008).

<sup>51</sup> NZ Law Commission, above n 50, 18.

<sup>52</sup> NZ Law Commission, above n 50, 18.

<sup>53</sup> NZ Law Commission, above n 50, 19.

<sup>54</sup> *R v Fatu* (Unreported, Court of Appeal of New Zealand, CA 415/04, 18 November 2005 Anderson P, William Young and Chambers JJ).

- three years to nine years imprisonment.
- (c) Band three: supplying large commercial quantities (250 grams to 500 grams)
- eight years to 11 years imprisonment.
- (d) Band four: supplying very large commercial quantities (500 grams or more)
- ten years to life imprisonment.

Despite the advantages of these judgments, they also have significant disadvantages. The Court of Appeal lacks the range of perspective, experience and expertise necessary for the development of sentencing policy. Nor does it have the resources to investigate the cost-effectiveness of different sentencing options.<sup>55</sup> Consequently, the New Zealand government has proposed to establish a Sentencing Council similar to those used in England, Wales, Scotland, Victoria, New South Wales, and over 20 American states.<sup>56</sup> The Council will assist in developing sentencing policy and draft sentencing guidelines as to both sentencing principles and sentencing levels. The sentencing guidelines will assist judges in determining the appropriate type and length of sentence for the individual case.<sup>57</sup> This is hoped to improve consistency between different courts and judges across New Zealand. In fact, research conducted on behalf of the Law Commission found that some New Zealand courts are in fact 'systematically more severe than others, at least in relation to the percentage of convicted offenders who are imprisoned'.<sup>58</sup>

### **The Effect of Ethnicity in Sentencing**

Only one New Zealand study has considered the effect of ethnicity and judicial discretion in sentencing. It found no evidence of discrimination between Maori and Pakeha (European).<sup>59</sup> However, it was limited to dishonesty and drug offences in a single Wellington district court presided over mostly by the same judge.<sup>60</sup> Overseas research on judicial discretion in sentencing has produced mixed results. Some studies have found that judicial discretion had led to ethnic discrimination while other studies have found that legal factors can explain the overrepresentation of particular ethnic groups in criminal justice statistics. Results from two studies are analysed below.

#### *America*

In America, ethnicity has a considerable impact on sentencing. Young African-American males are more likely to be imprisoned than any other age or race group. A Maryland state-based study found evidence of substantial ethnic disparity in sentencing outcomes. The study was able to focus on judicial discretion by drawing a clear distinction between the guideline recommendations and the actual practice of judges. Results showed that African-Americans had 20% longer sentences than Europeans based on the recommended sentence length from the guidelines.<sup>61</sup> Maryland judges were more likely to give African-Americans longer sentences relative to the guideline recommendations. This finding has important implications

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<sup>55</sup> Law Commission, above n 50, 19.

<sup>56</sup> NZ Law Commission, *A Sentencing Council and Sentencing Guidelines* (2006) [http://www.lawcom.govt.nz/.../Publications/Publication 126 336 Sentencing%20Council%20Fact%20Sheet%20OSG%20PR.pdf](http://www.lawcom.govt.nz/.../Publications/Publication%20126%20336%20Sentencing%20Council%20Fact%20Sheet%20OSG%20PR.pdf) (Accessed 28 August 2008).

<sup>57</sup> NZ Law Commission, above n 50, 20.

<sup>58</sup> NZ Law Commission, above n 50, 20.

<sup>59</sup> H Deane, above n 48.

<sup>60</sup> The study focused on gender as well as ethnicity and women were more frequently convicted of these offences.

<sup>61</sup> S D Bushway, above n 49, 761.



for New Zealand as it establishes its Sentencing Council. The sentencing guidelines propose to reduce the risk of ethnic bias and current inconsistency in sentencing.

### *Australia*

A comprehensive Australian study (based in New South Wales) looked at whether ethnic bias in sentencing contributes to the overrepresentation of Indigenous peoples in prison.<sup>62</sup> It found that the effect of Indigenous status on the risk of imprisonment - after controlling for relevant legal factors - is only 'slight' (less than one percentage point).<sup>63</sup> This suggests that ethnic bias may influence the sentencing process even if its effects are only small. The results indicate that Indigenous offenders who are legally represented are more likely to go to prison than non-Indigenous offenders who are legally represented. This may be because Indigenous offenders at risk of imprisonment are more likely to be legally represented than non-Indigenous offenders at risk of imprisonment.<sup>64</sup> The results also indicate that Indigenous offenders with a certain number of prior convictions are *less* likely to go to prison than non-Indigenous offenders with the same number of prior convictions. This could mean that judges place less weight on prior convictions when dealing with Indigenous offenders. This may be due to the fact that Indigenous offenders are more likely to have extensive criminal records or because judges are concerned with Indigenous overrepresentation in prison.<sup>65</sup>

A notable difference in results therefore exists between the research conducted in America and in Australia. This divergence is perhaps best explained by the influence of the media and its stereotypes and the consequent effect it has on the courts.<sup>66</sup> In America, African-Americans constitute 14% of the general population with young African-American males making up 13% of all African-Americans.<sup>67</sup> These young "black" males are widely portrayed by the media as a "dangerous class". As a result, the fear and insecurity of the general population towards this group is relatively high. This stereotype may encourage courts to punish young African-American males more severely.<sup>68</sup> In contrast, the Aboriginal population of Australia constitutes only 2.6% of the general population. Young Aboriginal males account for less than 1% of the general population. Furthermore, violent offending of this class is usually directed at other Aboriginal people and most of it occurs outside the major cities.<sup>69</sup> Therefore, the fear and insecurity of the general population towards this class is not as high as in America. Theoretically, there is less pressure on courts to impose more punitive sentences.

### **Implications for New Zealand**

Applying this approach to New Zealand, Maori constitute 15% of the general population, 50% of the prison population, and 43% of all convictions.<sup>70</sup> Maori violence and gang affiliation are underscored extensively by the media. The fear and insecurity of the general population towards Maori is likely to be as high as that of America. This provides a strong

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<sup>62</sup> L Snowball *et al*, 'Does Racial Bias in Sentencing Contribute to Indigenous Overrepresentation in Prison?' (2007) 3 *Australian and New Zealand Journal of Criminology* 272.

<sup>63</sup> *Ibid*, 285.

<sup>64</sup> *Ibid*, 286.

<sup>65</sup> *Ibid*, 286.

<sup>66</sup> *Ibid*, 286.

<sup>67</sup> 'Young African-American Men in the United States: Fact Sheet' <http://www.kff.org/minorityhealth/upload/7541.pdf> (Accessed 28 August 2008).

<sup>68</sup> L Snowball, above n 62, 286.

<sup>69</sup> L Snowball, above n 62, 286.

<sup>70</sup> New Zealand Cabinet Paper, 'Effective Interventions 11' above n 4.

basis for the possibility of judges imposing more severe penalties for Maori offenders. Therefore, there is a substantial risk of ethnic bias in sentencing in New Zealand. However, further research is essential. Future research should focus on judicial discretion in sentencing relative to the sentencing guidelines which are currently being drafted and should be implemented by 2009. Other minority groups and different geographical populations should also be analysed to help determine whether judges are being consistent over all ethnic groups in New Zealand.

## **CONCLUSION**

The exercise of discretion remains largely a “black hole” in the New Zealand criminal justice system. Unintended consequences of discretion could occur at many points in the process. Opportunities for discretion have been illustrated at two stages of the leaky funnel analogy: namely, police diversion and sentencing. The conclusion was reached that Maori and Pacific people are over-represented in the youth jurisdiction and under-referred to restorative justice programmes generally. Diversion deals with both these issues. Likely points at which the uneven exercise of discretion may take place were identified. Despite there being some constraints on the exercise of discretion, it was felt these were inadequate to prevent uneven outcomes entirely. As for sentencing, based on overseas research, a substantial risk of ethnic bias in New Zealand can be inferred, but there has been little to no research definitive conducted to establish this to date. The unintended consequences of discretion may also be present at various stages in the criminal justice process between those discussed. The cumulative effect of these biases for Maori and Pacific peoples may be considerable. Maori and (to a lesser extent) Pacific peoples are disproportionately overrepresented in prison and in the criminal justice system. The question remains: are they being treated equally in the eyes of the law?