

Interweaving cultural perspectives: an evaluation within New Zealand's criminal justice system

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Abstract

A team bringing together a mix of perspectives and methods evaluated section 16 of New Zealand's Criminal Justice Act 1985. This is a provision which allows an offender's supporter to speak about the offender's cultural background at sentencing. At the heart of the evaluation were case studies of the use of this provision among Maori and Pacific People and other cultural groups. Researchers with experience in research among their own communities carried out each set of case studies using methods appropriate to those communities. The depth and richness of the qualitative findings from the case studies were interwoven alongside quantitative information from a survey of those within the system responsible for implementing the provision. The evaluation produced findings that contributed to legislative change, raised awareness of the provision, and became a resource for practitioners working with a range of cultural groups within the criminal justice system.

Key words

Cultural perspectives, justice, Māori, research with Māori, case studies, mixed methods

Section 16 of New Zealand's now amended Criminal Justice Act 1985 allowed an offender who was before court for sentencing to request the court to hear a person speak on their behalf. The person could speak about the ethnic or cultural background of the offender, the way in which that background might relate to the commission of the offence, and the positive effects it might have in helping to avoid further offending. The provision was designed to help promote the use of alternative forms of sentence, for example community based sentences.

The Ministry of Justice's interest in undertaking research on section 16 arose from work on responding to offending by Māori. In preparation for new sentencing legislation, researchers were asked in 1998 to review the use of section 16, its effect on sentence outcomes for offenders, and whether the purpose of section 16 needed clarifying. More generally, the Ministry is concerned with encouraging greater positive participation by Māori and other cultural groups in the justice system.

Section 16 of the Criminal Justice Act 1985 stated:

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.*

The overarching objective for this research was to investigate the use and perceptions of section 16. To assist policy makers in their understanding of the section 16 process, it was clear that a research design that valued culturally appropriate methodologies and a gathering of in-depth cultural perspectives would be required. Additional concerns were to engage a wide range of stakeholders, both users and justice system practitioners, and to ensure that all who participated in the research should do so in safety and with confidence in the process. 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: six case studies focusing on use of section 16 with Māori offenders; three case studies focusing on the use of section 16 with Pacific Peoples; and two further case studies on the use of section 16 by offenders from other ethnic groups (one was New Zealand European and one was Japanese). This distribution of case studies was based on the information obtained during an exploratory study, on the extent to which section 16 was being used by each group.
- National postal survey – Ministry researchers surveyed criminal justice professionals and community organisations about their use and perceptions of section 16. The main objectives were to investigate how frequently section 16 was used, and what factors constrained or promoted section 16 use.

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. The diverse range of informants also enabled researchers to look at how groups differed or agreed on particular issues of concern.

Stakeholder groups

Three stakeholder groups were consulted throughout the research. During development of the research the project team established an advisory group to oversee and advise on key issues. The group comprised representatives of parties to a formal section 16 process including a judge, community probation service workers, lawyers and community group representatives. The group also included policy and operational managers from key agencies, who were the clients for the research. The project team also met regularly with the Ministry of Justice's Maori and Pacific Peoples' focus groups.

The stakeholder groups provided both advice and practical assistance. They advised on cultural issues, such as the need for a design that would differentiate between the experience of Māori and the experience of immigrant groups with section 16. They also advised on practical issues, such as how to engage the various participants in the research. The stakeholder groups were also involved in the design of research, the development of instruments and methodology, the contracting of researchers, the facilitation of data collection, the analysis of findings, and the implementation of results.

Selecting researchers

It was decided to contract the case studies with Māori and Pacific Peoples to researchers who were independent of the Ministry and who would use culturally safe processes. 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 highly sensitive and significant in terms of their cultural values. 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 project team sought expressions of interest for the case study research from suitably-qualified researchers. The contract for case studies with Māori was awarded to Di Pitama of Strategic Training and Development Services.

Kiwi Tamasese, Peter King and Charles Waldegrave of The Family Centre of Lower Hutt were contracted to undertake the Pacific Peoples case studies.

The remainder of the paper will focus on one of the cases studies, the methodologies and methods which underpinned the contribution of this family's story to the research, and the policy and legislative changes that flowed from the research. Finally we will examine some of the lessons learnt for government agencies in conducting this type of evaluation.

Case study on the use of Section 16 by Māori

Di Pitama, the researcher who conducted the case studies with Māori whānau, explored some of the philosophical and ethical issues involved when Māori researchers carry out research with Māori participants within the constraints and conventions of state-commissioned research. She observed:

“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’*, (Morris, J. 1999) such as case studies.”

She drew a distinction between ‘research methodology’ and ‘research methods’. She saw Māori research methodology as underpinned by the values, beliefs and ethics of Māori researchers. That methodology “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”.

These ways of working are described further in this extract from her writing on kaupapa Māori methodology.

“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. (Morris, J. 1999) 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 (Durie, M. 1995), 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 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’*.”

Although there is not time or space to describe the detailed methods used, engaging families in this research involved developing careful processes of communication, contact and consent. Di observed:

“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.... 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.”

Counsel and judges were interviewed after written consent had been obtained from the person sentenced. A semi-structured interview format was followed. Interview transcripts, and the draft case studies were made available to participants and all who took part received a copy of the final report.

An excerpt from one of the key case studies is now presented as an example of the richness and depth of the cultural perspectives that became available to practitioners and policy makers through the processes we have outlined.

Case study

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 the 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. (Pitama, D. in Chetwin et. al., 2000)

The case study went on to describe the views of the offender, the whānau (family), the counsel, and the judge on the effect of the use of section 16 in this case. This case illustrated a number of themes which also came through in other cases and in responses to the survey. The overall findings resulted in suggested system improvements, relating to court processes, professional practice, and the legislation, and these have been summarised below.

Suggested changes arising from the research

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 inquiries as appropriate at sentencing.

Use of findings

As with many evaluation findings, it is difficult to ascertain to what extent the recommended changes have been made following the release and dissemination of this report. One area in which there is concrete feedback is in the way these findings were translated into legislation. It is evident that the evaluation findings were heard by those drafting the new legislation, be it all within the limitations of a legislative approach. The provision has now become section 27 of the Sentencing Act, which was passed into law in May 2002. Section 27 states:

27. Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender—

(1) *If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—*

(a) *the personal, family, whanau, community, and cultural background of the offender:*

(b) *the way in which that background may have related to the commission of the offence:*

(c) *any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:*

(d) *how support from the family, whanau, or community may be available to help prevent further offending by the offender:*

(e) *how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.*

(2) *The court must hear a person or persons called by the offender under this section on any of the matters specified in subsection (1) unless the court is satisfied that there is some special reason that makes this unnecessary or inappropriate.*

(3) *If the court declines to hear a person called by the offender under this section, the court must give reasons for doing so.*

(4) *Without limiting any other powers of a court to adjourn, the court may adjourn the proceedings to enable arrangements to be made to hear a person or persons under this section.*

(5) *If an offender does not make a request under this section, the court may suggest to the offender that it may be of assistance to the court to hear a person or persons called by the offender on any of the matters specified in subsection (1).*

Cf 1985 No 120 s 16

Lessons learnt

This research has implications for government agencies which conduct evaluations of this type. The evaluation was initiated by a government agency to inform policy and legislative development. It was an inquiry into a provision which was designed to involve groups of different cultures within a mainstream justice system. The case study exemplifies the value of engaging researchers who are experienced in working with the communities the evaluation needs to reach. The researchers brought into the evaluation safe research processes and participatory methods based on Maori and Pacific values. They made available to the policy development process a richness of information in which the voices of those most affected by the system could be heard.

There are several principles of good practice that can be followed by government agencies conducting such evaluations. First it is important to involve the contracted researchers as early as possible in the process. This ensures that they are involved in the overall design and have a part in significant decisions about the direction of the project. In managing a team of this size and complexity, good communication and meetings at significant points in the process to co-ordinate the whole team are important.

Because of the complexities of intersecting with the justice system in this type of research, it was important that the Ministry stayed closely involved in the researchers' work and played a large part in facilitating their contacts with the justice system. Time and resources need to be allowed for this. Indeed the project has highlighted that case study research itself is difficult and complex. This needs to be fully taken into account in determining resourcing and time frames.

Finally, a strength of this project was that it drew on a range of very different types of qualitative and quantitative information gathered from contrasting methodologies. This presented a significant challenge in drawing together this richness of findings to produce a report that could be utilised for both policy and operational purposes. Again, it was important to consider this early in the evaluation and to agree and plan in advance a process for drawing together the findings into usable conclusions.

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